

Non-standard employment and its policy implications

Report submitted to the Department of Labour
30 June 2004

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1. Introduction

Globally there has been a growing concern about an increase in 'atypical' forms of employment. Often, these changes in employment practices are related to changing patterns of work organisation. In the context of what has been described as 'informational capitalism', some argue that bureaucratic forms of work organisation have been transcended by network organisations. Flexibility in employment is thus seen as a natural process that is part of a general reliance on less rigid organisational forms.¹

However much of the literature about the growth of 'atypical', or what we prefer to call non-standard employment, is informed by experience in the countries of the developed North. Countries of the South are certainly not insulated from these trends. At the same time the growth of non-standard employment has a particular resonance in the South African context, where the notion of standard employment was never that well-grounded in the first place. It is not well-known that subcontracting, for instance, was already prevalent in the mining industry in the 1920s. The fact that in mining, manufacture, agriculture and other sectors the South African economy was until the 1980s dependent on a form of temporary work, provided by migrant or contract workers, is far better known.²

The challenge is therefore to differentiate what is 'new' in so-called new forms of work organisation from what reinforces, or represent a reversion to 'older' forms. This is necessary to properly assess the impact of this trend in South Africa. It is also necessary to determine what responses are appropriate, especially given the need to redress racial, gender and regional imbalances in South Africa.

This report is one of four research reports commissioned by the Department of Labour, flowing out of a workshop convened in March 2003 on the changing nature of work and 'atypical' forms of employment in South Africa. Each of the reports concerns a theme related to this phenomenon. Thus one of the themes covered by another report concerns an assessment of the prevalence and magnitude of what is described as casualisation and externalisation in South Africa. Another theme concerns labour broking and temporary employment services, and the rise of the triangular employment relationship. The economic determinants of casualisation and externalisation are the subject of a third report.

Casualisation and externalisation, together with the associated process of informalisation, are key terms utilised in this report for understanding how the nature

¹ Piore, M. & Sabel, C. 1984. *The Second Industrial Divide: Possibilities for Prosperity*. New York: Basic Books; Castells, M. 1996. *The Rise of the Network Society*. Massachusetts & Oxford: Blackwell.

² Bezuidenhout, A. & Kenny, B. 1999. 'An Overview of the Changing Nature of Subcontracting in the South African Mining Industry,' *Journal of the South African Institute for Mining and Metallurgy*, July/August.

of work in South Africa is changing. These and other terms are discussed more fully below. In the section that follows we discuss the terms of reference for this report, and the methodology used to prepare it.

Terms of reference

The overall aims of this project, as stated in the terms of reference, were to consider the policy implications of the growth of ‘atypical’, or non-standard, forms of employment. The more specific aims were as follows:

- An evaluation of the impact of non-standard forms of employment on South African labour legislation
- An assessment of the impact of non-standard forms of employment on:
 - social security and social protection;
 - skills development; and
 - collective bargaining
 - minimum conditions of employment
- The making of suggestions related to policy responses and remedies in a way that balances security and flexibility in the labour market
- Reference to case studies from other countries
- The terms of reference also suggest that the study be largely qualitative in nature.

It will be clear from the above that the aims of the project are broad and potentially far-reaching. It will also be apparent that ideally this project should be drawing from, and synthesising, the reports of the other three projects. However although we have had the benefit of an interim report prepared by the Department of Labour, we have only had access to one of the other three final reports. This was the report on labour broking and temporary employment services.³ With the foregoing in mind, it is also appropriate to note the context in which these terms of reference have been framed.

The workshop convened by the Department of Labour in 2003 took place less than a year after the 2002 amendments to labour legislation were adopted, and the agreement arrived at by the Growth and Development Summit (“GDS”). The 2002 amendments represent the most significant (and controversial) amendments to the Labour Relations Act and Basic Conditions of Employment Act since they were adopted.

However even though one of the express objectives of the amendments was to protect workers who currently fell outside the scope of labour legislation, there was clearly a perception that the amendments did not go far enough in this regard. Thus amongst the issues identified as requiring future “engagement” in terms of the agreement

³ J. Theron with S. Godfrey, P. Lewis and M. Pienaar, 2004. ‘Labour broking and temporary employment services: A report on trends and policy implications of the rise in triangular employment relationships’, Department of Labour research report.

adopted at the GDS was “measures to promote decent work and to address the problem of casualization.”

The phrase “decent work” is borrowed from the ILO, which in 1999 articulated its primary goal as being to secure decent work for people everywhere, as distinct from a focus on workers in standard employment.⁴ The term casualization in the sense in which it is used here, we shall argue below, is a misnomer. However what is important to note at this juncture is that there is no consensus about how the shift away from standard employment should be described, or indeed how it should be measured.

Given the number of imponderables with which the researchers are confronted and the magnitude of implications a shift away from standard employment holds, this project should probably be regarded as of a preliminary nature. It is simply not possible to answer all the questions identified above without a much more protracted and fuller investigation. This is a theme which we will take up again, in the discussion on recommendations.

Methodology

Policy is of its nature dynamic, and needs to be adapted to changed circumstances. Legislation can be viewed as the outcome of policy, and underpins it. In other words it sets the parameters within which adaptations of policy are permissible, and gives it institutional form. However it goes without saying that the effects of legislation are never precisely as policy-makers envisage, and that institutions created by legislation tend to have a life of their own.

In order to evaluate the appropriateness of existing policy, a multi-disciplinary approach is advocated. This entails both a legal enquiry, to understand the provisions of the relevant legislation, and a socio-historical analysis, to consider its effects on groups and on society as a whole. It is also necessary to draw on multiple sources of data. Hence a combination of reviewing existing literature and new research was used.

First, an expanded survey of existing South African and international literature was conducted. Specific attention was given to international case studies that contain experiences that are relevant to the South African context.

Second, in order to evaluate the impact of ‘atypical’ forms of employment on South African labour legislation, an overview is given of the legislative framework that governs employment relations. A review of literature (including law journals), relevant court cases, CCMA awards and existing empirical research was conducted.

Third, the project examined ‘atypical’ employment in the context of the existing regulatory framework, with specific focus on its impact on social security and social protection, skills development, and collective bargaining. This is based on a study of four sectors of the economy. It is pertinent to recognise that the dynamics of casualisation, externalisation and informalisation differ from sector to sector. For this

⁴ Report of the Director General, ‘Decent Work’, 87th Session, International Labour Conference, 1999.

purpose, the mining, construction, household appliance manufacturing, and retail industries were selected.

Key terms

It is obvious that the distinction between standard and non-standard employment is integral to this report. However neither the term *standard employment relationship* (*SER*) or any equivalent term, such as permanent or long-term employment, has a precise legal meaning.⁵ That is because the assumption underpinning much of our labour legislation and labour relations policy is that there is, or should be, no distinction drawn between different categories of employment unless it is absolutely necessary to do so. Related to this is an assumption concerning the vulnerability of those working in an employment relationship that also motivates the extension of legal protections to them.

It follows that there is no universally acceptable characterisation of the standard employment relationship. However it seems there would be consensus on at least two key criteria: employment is indefinite (or permanent) and employment is full-time. A third criterion will in most cases also be present, namely that the work is done at the workplace of the employer. Non-standard (or atypical) employment is therefore employment that does not comply with at least the first two criteria.⁶ The existence of a contract of employment, which is a requirement if labour legislation is to apply to the relationship, is irrelevant to the distinction between these two forms of employment.⁷

Following the analysis presented at the Department of Labour's 2003 Workshop, we argue that the increase in non-standard employment is being generated by three inter-related processes: casualisation, externalisation and informalisation.⁸ Casualisation is sometimes used to describe the entire process whereby all forms of non-standard employment are being generated, as in the GDS agreement to which we have referred above. In our view this is inappropriate, for reasons that will become apparent below. Casualisation should rather refer to a particular process.

Thus *casualisation* refers to the process whereby standard employment is being displaced by employment that is temporary or part-time (or both). Temporary work is

⁵ These include concepts such as alternative work arrangements, market-mediated arrangements, nontraditional employment relations, flexible staffing arrangements, flexible working practices, atypical employment, vagrant or peripheral employment, vulnerable work, precarious employment, disposable work, new forms of employment and contingent work, to name but a few. See Kalleberg, AL. 2000. 'Nonstandard Employment Relations: Part-time, Temporary and Contract Work.' *Annual Review of Sociology*, p. 341.

⁶ Kalleberg points out that 'standard' employment usually refers to the expectation that work that is done 'full-time, would continue indefinitely, and was performed at the employer's place of business under the employer's direction.'

⁷ Theron argues that the corollary of an expectation that employment is full-time is a contract of employment (whether written or unwritten). See note 8 below.

⁸ Theron, 2003. 'Employment is not what it used to be.' *Industrial Law Journal*, vol. 24, pp. 1247-1282.

the most difficult to define because it ranges from those working a few days a week or month (commonly referred to as ‘casual’ workers) to those employed for a fixed-term, which may also vary. However it will usually be done at the workplace of the employer. Moreover it is, by definition, employment that is regulated by a contract of employment.

Externalisation, on the other hand, refers to the process by which employment regulated by a contract of employment is being displaced by employment that is regulated by a commercial contract. This can occur in one of two ways. Firstly (and most obviously) it occurs when someone is engaged as a contractor rather than an employee, and labour legislation is by definition excluded, either because the individual is self-employed, or because s/he is regarded as a so-called independent contractor.⁹ Secondly (and more importantly) externalisation occurs where workers are employed by an intermediary to work for someone else, whether that person is termed a client or user, and where the terms of employment are in effect determined by that client or user. The result is a so-called *triangular employment relationship*.

Outsourcing and *sub-contracting* are a means by which externalisation can be achieved, and a triangular employment relationship is created, but they are not the only means. Increasingly externalisation is achieved through *labour broking*, or the utilisation of a *temporary employment service*. Another common form is through *franchising*.

There is some overlap in practice between the above two categories. For example, it might be that externalisation leads to casualisation, where for example a firm that is engaged as a consequence of outsourcing employs workers for limited periods or on fixed-term contracts. Similarly there is an overlap between the foregoing two categories and informalisation.

Informalisation refers to the process by which employment is increasingly unregulated, in part or altogether.¹⁰ This can be as a consequence of casualisation, in that workers (although nominally employed) are in practice not able to enforce their rights in terms of labour regulations. Or it can be as a consequence of externalisation, either because workers are not employees (they are ‘independent contractors’ in law), or because their nominal employer does not in fact control their employment (in the case of the triangular employment relationship).¹¹ It can also be seen as a response to

⁹ Obviously this does not exclude challenges to the validity of such contracts, which are envisaged in labour legislation in terms of the provisions of section 200A of the LRA and section 83A of the BCEA.

¹⁰ It should be noted that this definition of informalisation does not correspond with the definition used by Statistics South Africa in the Labour Force Surveys. Our definition focuses primarily on compliance with the LRA, BCEA, EEA and SDA. None of these feature in the questions asked in the LFS to determine whether an employee is employed formally or informally.

¹¹ Externalisation, for example, might lead to a small sub-contractor both reducing the number of hours employees work and paying the less than the minimum required by a sectoral determination or bargaining council agreement (which would not have been the case if the contracting enterprises had employed those workers directly). New entrants to the labour market who obtain employment in such a situation would also be informally employed and consequently fall into the category of informalisation.

‘pressure from below’, given the mass of unemployed or under-employed persons who are willing to accept employment on any terms.¹²

It follows from the above that there is a distinction that needs to be maintained between workers and employees. *Employees* in this report refers to those who are employed in terms of a contract of employment, to which labour legislation applies. *Workers* refers to a broader category, that includes employees and others who work in a dependent relationship for another, and whose conditions of work are determined by that other.

Our conception of the labour market

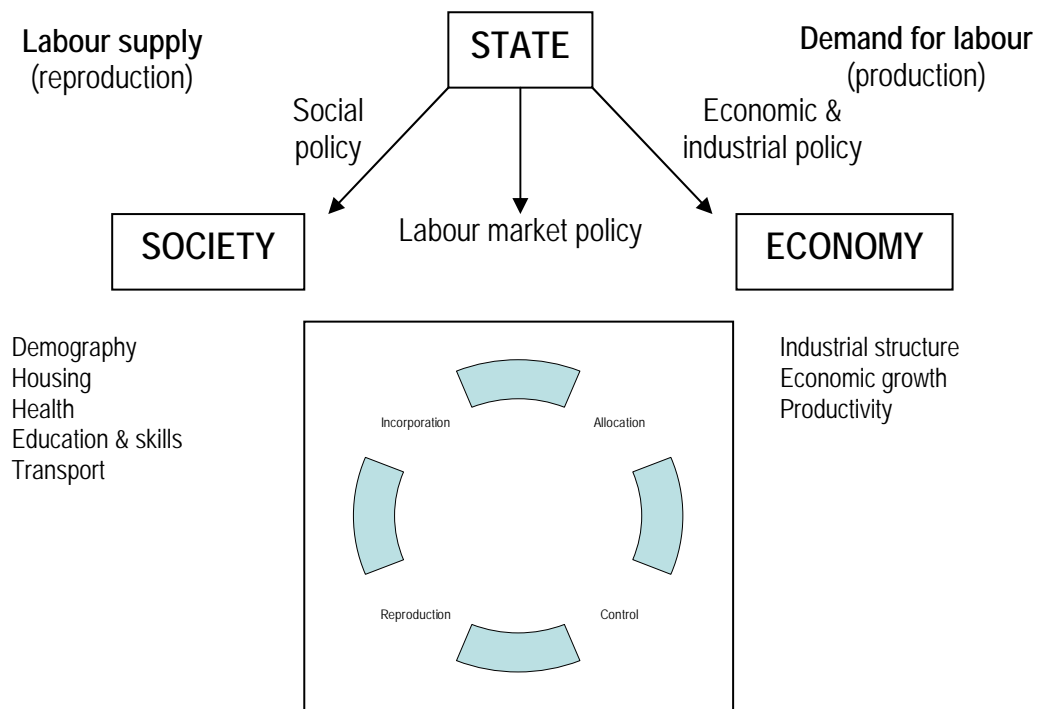
In contemporary societies, the way in which labour is organised is described in market terms. But the labour market, in our conception, does not function in the same way as a commodity market. Peck puts the argument as follows: ‘Because labour is not a true commodity, the self-regulating mechanisms associated with conventional commodity markets cannot be expected to regulate the labour market.’ Furthermore, ‘[t]he idea of a self-regulating labour market is a fiction. In essence, this is because labour itself is a fictitious commodity: it is not produced for sale, it cannot be stored, it cannot be separated from its owner, it is “only another name for human activity which goes with life itself”.’¹³ To labour is a human quality, and therefore we cannot rely on quantitative econometric models alone to explain the functioning of labour markets. Indeed, casualisation, externalisation and informalisation have to be understood as part of the broader processes of continuity and change in the labour market. We have therefore developed the following model in order to understand the functioning of the labour market as a dynamic process (see Figure 1).¹⁴

¹² See also Appendix 1 for a graphic representation of the interrelationship between casualisation, externalisation and informalisation.

¹³ Peck, J. 1996. *Work Place: The Social Regulation of Labor Markets*. New York: Guilford, p. 40.

¹⁴ Our discussion here draws on a wide literature on the functioning of labour markets, but more specifically the work Jamie Peck, who has presented one of the most coherent overviews of the linkages between non-standard employment and labour market dynamics. See Peck, J. 1996. *Work Place: The Social Regulation of Labor Markets*. New York: Guilford. See also: Elson, D. 1999. ‘Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues.’ *World Development*, vol. 27, no. 3, pp. 611-627; Ferber, M. and J. Nelson. 1993. *Beyond Economic Man: Feminist Theory and Economics*. Chicago: University of Chicago Press; Fine, B. 1998. *Labour Market Theory: A constructive reassessment*. London: Routledge; Gordon, D.M., Edwards, R. & Reich, M. 1982. *Segmented work, divided workers: The historical transformation of labor in the United States*. Cambridge: Cambridge University Press; Humphries, J & Rubery, J. 1984. ‘The reconstitution of the supple side of the labour market: The relative autonomy of social reproduction.’ *Cambridge Journal of Economics*, no. 8, pp. 331-346; Mingione, E. 1985. ‘Social reproduction and the surplus labour force: The case of Southern Italy.’ In: Redclift, N. & Mingione, E. (eds.). *Beyond employment: Household, gender, subsistence*. Oxford: Basil Blackwell; Reich, M., Gordon, D.M. & Edwards, R. 1973. ‘A theory of labor market segmentation.’ *American Economic Review*, no. 63, pp. 359-365.

Figure 1: The labour market as a system



On the left hand side of the model we have processes that determine labour supply. It is important to note that labour supply is *relatively autonomous* from the demand for labour, because its nature is not determined solely by market factors. Labour supply implies the supply of people who are willing to work for wages in the economy. The quantity and quality of labour supply is not only determined by demographic factors (i.e. the size, age and distribution of the population), but through policies and legislation. In this paper, we shall argue that social policies play an important role in determining supply.¹⁵

The demand for labour is determined primarily by the industrial structure of the economy. This refers to dominant sectors in the economy, as well as the size and growth rates of the economy. It is also important to consider factors such as trade, productivity levels, levels of investment and savings. As in the realm of labour supply, the state also plays a direct role. This is both because the state itself is a major employer, and through its policies. In this paper, we shall argue that industrial policy play an important role in determining demand.¹⁶

Sellers meet buyers in the context of employment. This is therefore where the realms of labour supply and demand are joined. But whereas the traditional notion of employment implies that the seller is an employee and the seller is an employer, the

¹⁵ Other relevant policies are education and training, policy on migration (both emigration and immigration) and health.

¹⁶ Other relevant policies are macro-economic policy as well as policies linked to government procurement.

growth of externalisation necessitates a broader conception. In this broader conception, employment must be understood to encompass a situation where the seller may be self-employed, or even a firm that is economically subordinate to the buyer. The growth of informalisation can be seen as the necessary consequence of a situation where labour supply outstrips demand for labour, and there is high unemployment.

Incorporation describes the processes by which individuals become wage earners in the labour market or self-employed, and that determines their choices in the labour market, and their potential to do certain jobs.¹⁷ Often individuals may also decide not to seek employment.¹⁸ Labour market policies that impact more directly on the incorporation of labour, are systems that impact on education and training.¹⁹

Allocation describes the matching of workers with jobs. In the real world, workers are often allocated to certain jobs because of ideology and social prejudice, as much as skill and proven qualifications.²⁰ Moreover the casualised segment of a labour market is drawn from vulnerable social categories that frequently are not empowered to make political claims.²¹ Labour market policies that impact on this process concern provisions of the Employment Equity Act, and parts of the Labour Relations Act that regulate the rights of job applicants.

Whereas the processes of incorporation and allocation have to do with entry into the labour market, *control* has to do with how the employment relationship is structured, and the power relations that determine these structures. It also has to do with productivity and the determination of remuneration levels.²² Casualisation and externalisation have to be understood as a form of control, both in that employment is structured differently and in that these new structures bear directly on questions of remuneration, productivity and union density.

¹⁷ Not all individuals choose to work in the formal labour market. Some stay at home to take care of other members of households or communities. Also, especially in developing societies, people often have other means of subsistence, such as small scale agriculture. Thus, the incorporation of people into the formal labour market is often influenced and determined by the possibility for existence outside formal labour markets.

¹⁸ They may have other options, such as subsistence agriculture, or may decide to use the welfare system as a primary source of income instead. Those involved in domestic care may also decide not to seek employment.

¹⁹ Here one can refer to the provision of vocational training regulated by the Skills Development Act and the National Qualifications Framework, but also education policy more general.

²⁰ Also, as argued in the previous section, the way in which people are incorporated into the labour market – i.e. their levels of education, etc. – already implies a level of discrimination.

²¹ Labour markets tend to be segmented, because labour market disadvantage is usually about ‘ascribed status’ based on characteristics such as gender, ethnicity, race, and the like. Ascribed status is contrasted with ‘achieved status’ such as qualifications and skill. Ascribed status is not created by employers, but often exploited by them.

²² The relevant policies here are those put in place by the Labour Relations Act, the Basic Conditions of Employment Act, as well as measures that put in place rules and procedures that impact on occupational health and safety. Often employers follow the route of casualisation, externalisation and informalisation to re-establish their control over labour by evading such procedures.

Reproduction relates to the way in which labour is incorporated, allocated, and the way in which the nature of labour control feeds back to the realm of labour supply. Labour reproduction refers to biological procreation, education and training, clothing and caring, and the like. It is anchored not only in the labour market, but in the household, the community and the state. It is important to note that the cost of labour reproduction is generally not carried in full by wages, since it is subsidised by domestic labour, as Peck argues: “The production of men as wage-labourers depends on the on the unpaid domestic labour of women and the wider systems of social reproduction through family, community and state.”²³

Structure of this report

This report is structured in three parts. In the next section of this report, Part 1, we consider three international case studies on the changing nature of work, two of which we would categorise as countries of the North, and one of which is from the South. The case studies make the point that what is changing is a global phenomenon. At the same time they illustrate the differential impact of the changes, in a national context.

We then consider some responses to the changing nature of work at an international level, starting with the debates at the ILO, and the instruments it has adopted. These, we argue, underscore the difficulty of achieving tripartite consensus at the international level at the present juncture. Undoubtedly this difficulty must be understood politically, in terms of the balance of power between capital, labour and national government. At the same time it is exacerbated by conceptual difficulties in understanding the nature of the changes. In this context we consider an attempt to re-conceptualise the employment relationship.

In Part 2 of the report we present case studies on four sectors in South Africa, to illustrate the operation and impact of casualisation and externalisation. We then provide an overview of how the labour market is currently regulated in South Africa. It follows from the model of the labour market proposed, that this should not be confined to labour market policies and regulations (providing for the regulation of employment standards, skills development and training or labour relations). Thus our conception of labour market regulation also encompasses social or welfare policy and industrial policy, and specifically those policies that concern the development of enterprises, or which are intended to stimulate employment. This broad conception of labour market regulation is in accord with contemporary endeavours to re-conceptualise employment internationally, and to focus less on standard employment and more on work and workers.

In Part 3 of the report we consider the implications of our analysis of casualisation, externalisation and informalisation in more detail. First we consider the broader implication that the re-conceptualisation of employment entails for labour market regulation. Second we consider more specific implications. The report concludes with an examination of the recommendations flowing from this analysis.

²³ Peck, 1996, p. 39.

PART 1

1.1 International case studies

According to Kalleberg, '[s]tandard work arrangements were the norm in many industrial nations for much of the twentieth century and were the basis of the framework within which labour law, collective bargaining, and social security systems developed.'²⁴ The reference to 'industrial nations' here is telling. Much of the research done on non-standard employment operates from a North-centric perspective, where processes of casualisation and externalisation take place in the context of relatively high levels of employment, and informalisation is often not visible.

To introduce a generic set of regulations that facilitate the use of part-time employment in for example the context of the Netherlands (where a strong welfare state exists) and India (where the majority of the population fall outside formal systems of social protection) would imply that local conditions are not taken into account. Indeed, with regards to labour market policy, one size does not fit all. Hence, renewed interest in the rise of non-standard forms of employment globally should be understood against the backdrop of continued global divisions between the North and the South.²⁵

In the North debates often focus on a reduction in employment security and how this relates to the decline of welfare states. This is often blamed on competition for investment and jobs from countries in the South, leading to demands from Northern labour movements for a social clause to trade agreements so as to enforce labour standards in 'low-wage' countries.²⁶

But there are also differences *between* countries in the North, with commentators sometimes contrasting the Scandinavian model of social regulation to the Anglo-Saxon model of labour market flexibility. The latter refers to the approach to the

²⁴ Kalleberg, 2000.

²⁵ We use the concepts 'North' and 'South' as referring to the global political economy, and not as geographic concepts.

²⁶ This has led to a number of high profile debates leading up to meetings of the World Trade Organisation. However, up to now the issue has not featured on the formal agenda for free trade negotiations. Instead, a number of codes of conduct and 'fair trade schemes' have been implemented to bring about pressure on labour repressive regimes to reform. The US's Africa Growth and Opportunities Act also includes a number of requirements for countries to participate, leading to pressure on countries like Swaziland to reform repressive labour laws. However, the shift to non-standard employment in the North cannot simply be attributed to 'globalisation' or 'competition from the South'. One should take into account that the industrial structures of a number of Northern countries have shifted away from manufacturing to the dominance of the service related industries. This shift in itself lends it to the growth of non-standard employment, since the service sector often operates during more irregular hours than manufacturing or mines.

labour market taken in the United States of America and the United Kingdom after the labour market reforms brought about by Thatcherism. In opposition to this are the German and Scandinavian models that still rest on extended statutory regulation of the labour market, coupled with relatively high levels of state-sponsored social protection for the unemployed.²⁷

However, this model has also come under pressure. In Germany the integration of the high unemployment economy of the former East Germany as well as increased competition for jobs from low-wage members of the European Union has led to a process of labour market flexibilisation causing considerable tensions between the government and trade unions.²⁸

On the other hand there are a number of other countries where labour market regulations have been tightened up. In the United Kingdom, the government has been forced to re-regulate segments of the labour market. An example of this is the introduction of hourly minimum wages for casual employees.²⁹ In France, the Social Modernisation Act of 2002 increased the restrictions on the use of fixed-term and temporary labour. An end of contract bonus to be paid at the end of temporary contracts was raised, temporary workers are given protection when they prematurely end their fixed-term contracts of employment in order to move to permanent positions, the minimum period before a fixed term contract can be renewed without being considered a renewal of contract was increased (to avoid successive rolling contracts), and companies are required to advertise permanent openings to those employed by them as temporary workers.³⁰

In Spain an agreement was reached according to which access for part-time workers to the statutory pension system is facilitated. Every hour worked by part-time workers count for one-and-a-half hour when the length of a worker's career is calculated. The Spanish government also agreed to reduce employers' contributions to social security by between 40% and 60% when they convert the temporary contracts of certain targeted groups into permanent contracts.³¹ Indeed, as we shall see in the case study of the Netherlands, measures to bring about 'flexibility' are often balanced by instruments to increase social security for non-standard employees.

Nevertheless, objectively we can identify an increase in the number of non-standard jobs relative to standard employment in a number of countries of the North, as illustrated by the following figure.

²⁷ See Rodgers, G. & Rodgers, J. 1989. *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. Geneva: ILO Publications.

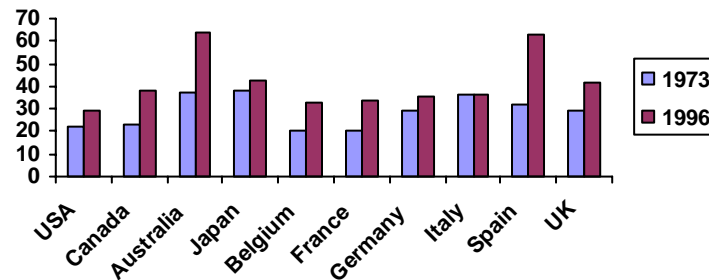
²⁸ See Kellner, B. 2003. 'The Hartz Commission Recommendations and Beyond: An Intermediate Assessment.' *International Journal of Comparative Labour Law and Industrial Relations*, vol. 19, no. 3, pp. 363-386.

²⁹ Hutsebaut, M. 2002. 'Social Security and Atypical Employment: A European Trade Union Perspective.' Paper presented at the International Industrial Relations Association 4th Regional Congress for the Americas, Toronto, Canada, 25-28 June.

³⁰ Hutsebaut, 2002.

³¹ Hutsebaut, 2002.

Figure 2: The growth of non-standard forms of employment in selected countries³²



This increase in non-standard forms of employment means that renewed attention has been paid to the erosion of the *security* brought about by employment in the informal economy. The following model has become a generally accepted framework in much of the international literature that analyses how non-standard employment erodes labour security (see Table 1).

Table 1: Dimensions of labour security³³

Labour market	Adequate employment opportunity; state support for full employment
Employment	Protection against arbitrary dismissal; regulations governing hiring and firing
Job	Designated occupation to career; barriers to skill dilution; craft demarcation
Work	Protection against accident and illness at work; limits to working time and unsocial hours
Skill reproduction	Access to skills; skill retention and upgrading; apprenticeships and on-the-job training
Income	Minimum wages; wage indexation; progressive taxation; comprehensive social security
Representation	Protection of collective voice; independent trade unions; rights to organise and strike

Based on this model, De Ruyter and Burgess have developed a general framework to illustrate how non-standard employment leads to labour *insecurity*. Their argument can be summarised as follows (see Table 2):

³² Source: Adapted from Standing, G. 1999. *Global labour flexibility: Seeking distributive justice*. London: Macmillan, p. 172. Note: Non-standard employment here includes self-employed, temporary employees and part-time employees, expressed here as a proportion (%) of employment.

³³ Source: Standing, G. 1997. 'Globalization, Flexibility and Insecurity.' *European Journal of Industrial Relations*, no. 3, pp. 8-9; see also De Ruyter, A. & Burgess, J. 2003. Growing Labour Insecurity in Australia and the UK in the Midst of Job Growth: Beware the Anglo-Saxon Model.' *European Journal of Industrial Relations*, vol. 9, no. 2, p. 225; Burgess, J. & Campbell, I. 1998. 'The Nature and Dimensions of Precarious Employment in Australia.' *Labour and Industry*, vol. 8, no. 3, pp. 5-17; see also Standing, 1999, p. 52 and chapters 5-7.

Table 2: Dimensions of labour insecurity³⁴

Labour market	Abandonment of the full employment objective
Employment	Weakening of employment protection; outsourcing of skills and jobs
Job	Breakdown of occupational demarcation; broadening of job tasks; contracting out
Work	Avoidance of occupational health and safety regulations; extended working hours or inadequate hours; intensification of work
Skill reproduction	Decline in public sector employment; demise of apprenticeships; compression of internal labour market; contracting out
Income	Growth in part-time and casual employment; rise of 'workfare'
Representation	Ambiguous and new forms of work; decline in union density; anti-union legislation

But the above framework still reflects a North-centric perspective, where non-standard forms of employment are introduced in the context of declining welfare states and relatively high levels of employment in the first place.³⁵ As pointed out by President Thabo Mbeki, in the context of developing countries, the size of the 'second economy' – or the informal economy – implies a somewhat different problematic. This view is echoed by Jeemol Unni and Uma Rani, two India scholars who considered possibilities for social protection for informal workers:

In developing economies with a large informal component in the labour force, the notion of social justice requires social protection measures to cover both basic needs and economic security. That is, poor quality of employment on a large scale would mean that economic growth does not cater to the needs of a large segment of the workforce. The original concept of social security which covered only contingencies is not sufficient.³⁶

We discuss the cases of Australia and the Netherlands first. In both cases, conscious policies were taken to 'flexibilise' the labour market. In both cases, however, the

³⁴ Source: Adapted from De Ruyter & Burgess, 2003, p. 226.

³⁵ The notion of *workfare*, for instance, was developed in the United States where the wages and conditions of casual work declined to such an extent that welfare benefits outstripped those wages. This presented a policy dilemma. The system of *workfare* implied that welfare grants were made dependent on recipients taking on casual jobs when those were available. The state then started to act as a labour market intermediary by placing welfare applicants in casual jobs. These policies are very controversial, and have led to accusations that 'workfare' systems represent a return to forced labour to the US. See Peck, J. & Theodore, N. 2000. 'Work First: Workfare and Regulations of Contingent Labour Markets.' *Cambridge Journal of Economics*, no. 24, pp. 119-138.

³⁶ Unni, J. & Rani, U. 2003. 'Social Protection for Informal Workers in India: Insecurities, Instruments and Institutional Mechanisms.' *Development and Change*, vol. 34, no. 1, p. 128.

social consequences of these policies have led a key actors reconsidering the approach and the introduction of regulations to deal with this.

After that, to illustrate the differences between the North and the South, we discuss India, since it is a developing country where innovative responses to the problem of the informal economy may point to a way forward.

Australia

Compared to other OECD countries Australia had a relatively high unemployment rate of 6.7% in 2001. The country has a population of 19.4m population (in 2001) and ranks fourth on the latest Human Development Index (0.939).³⁷

Structural economic changes and changes to labour legislation have contributed to the rise of non-standard employment in Australia. Due to trade liberalisation and imports from more competitive Asian countries, the Australian manufacturing industry declined as a significant employer. Also, the service sector became more significant in the overall economy, facilitating a move away from standard employment. The privatisation of parts of the public service coupled with the decline of the power of the labour movement are other contributing factors.³⁸

Following an initial national 'social accord' on wages and productivity, subsequent conservative governments have amended labour law so as to individualise contracts of employment and to enhance labour market flexibility. The Howard government introduced the Workplace Relations and Other Legislation Amendment Act of 1996³⁹, which dismantled the traditional collective structure of industrial regulation.

The result has been some of the highest levels of non-standard employment of OECD countries. However, as in the case of many other countries, it is difficult to collect reliable data, often due to the overlapping of categories caused by conceptual confusion. Nevertheless, non-standard employment is increasing in relative and absolute terms. The following table attempts to give some perspective to this.

In addition to this, it is estimated that between 60% and 80% of newly created jobs in Australia can be classified as precarious.⁴⁰

The rapid expansion of non-standard employment in Australia has led to a questioning of the assumptions usually made with regard to social policy. As Burgess and Campbell argue: 'Paid work has long been regarded as a means towards individual betterment, self-respect, economic and social participation and community... These

³⁷ United Nations Development Programme. 2003. *Human Development Report 2003: Millennium Development Goals: A compact among nations to end human poverty*. Geneva: UNDP.

³⁸ Clayton, A. & Mitchell, R. 1999. 'Study on Employment Situations and Worker Protection in Australia.' Report Commissioned by the ILO, Geneva, p. 13.

³⁹ Generally known as the Workplace Relations Act.

⁴⁰ See Burgess & Campbell, 1998; Clayton & Mitchell, 1999.

assumptions about work are being tested as a result of the growth of precarious employment.’

Table 3: Non-standard Employment in Australia⁴¹

Category	Proportion of standard employment
Casual employees	26%
Fixed-term employees	2%
Part-time workers	25%
Self-employed contractors (often ‘dependent’)	3%
Employees in unregulated sectors (outside awards and enterprise agreements)	30%
Homeworkers or ‘outworkers’	3%
Employees on government employment schemes	No reliable estimates
Clandestine work	No reliable estimates

In a report dealing with the social policy and the rise of non-standard employment, the Australian Centre for Industrial Relations Research and Training made the following recommendations with regard to policy:

- Extending employment entitlements to all workers regardless of status;
- Increasing the portability of entitlements across enterprises and industries;
- Extending the availability and length of leave entitlements for career development; and
- Integrating work, social security and education systems to recognise work breaks and part-time work.⁴²

Netherlands

The Netherlands has an unemployment rate of 2% (in 2001) and a population of 16 million (also in 2001). It ranks fifth on the latest Human Development Index (0.938).⁴³ The country has become known as the ‘part-time economy’ for its peculiar approach to the labour market – that of coupling labour market flexibility with a strong social security system.

After the Second World War, the Netherlands created a typical European welfare state in order to bring about social and economic reconstruction. Centralised bargaining became the norm, with a key role for the state in setting minimum wages. However,

⁴¹ Source: Compiled from information contained in Burgess & Campbell, 1998.

⁴² De Ruyter & Burgess, 2003, p. 238.

⁴³ UNDP, 2003.

the state took an approach that contained wage levels, and ten years after the war the economy reached previous levels of growth as well as full employment.

As in many of the Northern welfare states, the oil crisis of the 1970s led to a rise in inflation and an unsustainable budget deficit. By the end of the 1970s, the Netherlands's unemployment rate had increased to 9%. This led to increased tension on the country's traditionally harmonious collective bargaining system. In 1982, a process of social dialogue led to the introduction of a new approach to the labour market. The length of the working week was reduced, while it was made easier for firms to hire part-time employees. The government also amended legislation that required it to set national minimum wages. Instead, collective bargaining was decentralised to the level of the industry and the firm.⁴⁴

Between 1982 and 1999, employment in the Netherlands rose by 50% - a much faster rate than other European countries. Currently, about 30% of all Dutch workers are employed in part-time jobs. (Part-time employment is considered to be less than 30 hours a week.)

During the 1990s further measures were introduced to enhance flexibility, including the New Working Hours Act of 1996 which made it easier to diverge from the 'nine to five' principle of the normal working day. Temporary employment agencies were no longer required to apply for a special permit to operate,⁴⁵ but any person who was employed by temporary employment agencies for more than 26 weeks had the right to a permanent contract of employment.⁴⁶ In 1999 the maximum period for which a person could be employed in a temporary job was extended from 6 months to 3 years. But this was done in the context of improved security to balance flexibility. Certain minimum wages were laid down for temporary workers, and workers were entitled to a permanent contract of employment in cases where temporary contracts were renewed for a third time by the same employer.

India

With its population of 1033.4 million (in 2001) India ranks 127th (0.590) on the Human Development Index. A staggering 79.9% of the country's population have to survive on less than \$2 a day.⁴⁷

In contrast to Australia and the Netherlands, India has a very high unemployment rate. In fact, a minority of the population work in jobs in the formal sector. Estimates differ, but roughly 90% of the labour market is classified as being part of the informal

⁴⁴ This agreement became known as the Agreement of Wassenaar.

⁴⁵ See The Act on Allocation of Workers by Intermediaries, 1998 [Netherlands].

⁴⁶ See The Act on Flexibility and Security, 1999 [Netherlands]. See also Hutsebaut, M. 2002. 'Social Security and Atypical Employment: A European Trade Union Perspective.' Paper presented at the International Industrial Relations Association 4th Regional Congress for the Americas, Toronto, Canada, 25-28 June.

⁴⁷ UNDP, 2003; South Africa, with its population of 44.4 million (in 2001), ranks 111th (0.684) on the Human Development Index. An estimated 14.5% of the population survive on less than \$2 a day.

(or ‘unorganised’) sector. This includes workers in non-standard employment, as well as those who are engaged in informal sector activities – i.e. classified as self-employed.

More than a half of India’s workforce can be classified as ‘self-employed’, most of whom are very poor. In urban areas, 41% of men and 45% of women were self-employed. In rural areas this proportion increases to 55% and 57% from men and women respectively. A national survey found that 36% of informal enterprises operated from home.⁴⁸

A further 30% are classified as ‘casual workers’ – which means that they work from time to time. In urban areas, 17% of men and 21% of women worked in casual jobs. In rural areas, 36% of men and 40% of women can be classified as casual employees. A survey found that only 15% of casual employees received any medical benefits from their employers, and only 19% were entitled to medical leave.⁴⁹

A further 10% are regular employees, of which two-fifths are employed by the public sector. However, in urban areas, 42% of men and 33% of women worked in ‘regular salaried jobs’.⁵⁰

Hence, more than 80% of the labour force is employed in the ‘unorganised sector’. This implies that this sector does not provide workers with the social security and other benefits of employment as in the ‘organised sector.’ In the rural areas, agricultural workers form the bulk of the informal sector. In urban areas, contract and sub-contract as well as migratory agricultural labourers make up most of the unorganised labour force. The unorganised sector is made up of jobs in which the Minimum Wage Act is either not, or only marginally, implemented. Furthermore, the absence of unions in the unorganised sector does not provide any opportunity for collective bargaining. Over 70 per cent of the labour force in all sectors combined (organised and unorganised) is either illiterate or educated below the primary level.

In this context, Unni and Rani argue the following:

In developing countries large proportions of the population are engaged in self-employment and in informal activities; it is difficult to cover these individuals under formal schemes of employment benefits, insurance and other benefits. The approach followed in the developed world, therefore, may not be suitable for, or effective in, the developing countries. Rampant poverty among spatially dispersed rural populations also makes such schemes difficult to administer. Given the size of the informal economy, and massive and persistent poverty in developing countries, the concept of social protection has to include the idea of productive employment and poverty reduction

⁴⁸ Unni & Rani, 2003, pp. 137, 144.

⁴⁹ Unni & Rani, 2003, pp. 143-144.

⁵⁰ Unni & Rani, 2003, p. 144.

Thus, '[t]he goal of assuring sustainable livelihoods for the population should be part of the social protection policy of the state,' argue Unni and Rani, '[a] comprehensive social protection policy should include three broad categories':

- Promotional measures that aim at improving endowments, exchange entitlements, real incomes and social consumption;
- Preventive measures that seek to avert deprivation;
- Protective measures to provide relief from deprivation.⁵¹

Indian society has developed a number of strategies to deal with the insecurity brought about by the structure of the labour market. These include public works programmes in certain provinces that are often drought stricken. Minimum wages also apply in vulnerable sectors. However, because of informalisation these are often not enforced effectively. Vulnerable segments of the labour market are targeted for special skills upgrading programmes. Welfare funds to weather the shock of rapid economic change are also used. In addition to these programmes targeted at those in non-standard employment, a number of programmes have been set up to assist the informal sector more broadly – i.e. the self-employed. These include programmes to enhance capital security, demand security and attempts to bring about the legal recognition of small businesses.⁵²

An important point we can make from the above case studies is the centrality of the differences between (i) countries who introduce individualised contracts of employment, as in the case of Australia, or part-time work, as in the case of the Netherlands, and (ii) a country such as India where the formal sector of the labour market makes up a relatively small proportion of employment in the first place. In the context of (i), existing welfare states are 'hollowed out', but in the case of (ii), such a welfare state did not exist in the first place. Temporary workers in the Netherlands can still draw on the support of relatively decent welfare benefits to support their 'flexible' approach to work. But in India, or South Africa for that matter, 'flexibility' in employment status often has dire social consequences. This means that one has to take a developmental approach to labour market regulations in developing societies such as South Africa or India. In the next section we develop a framework for a developmental approach to labour market policy.

1.2 International responses: The ILO's attempts to regulate new forms of work

The notion that the world of work was changing in response to the changes associated with globalisation has increasingly engaged the ILO's attention. In 1990 there was a general discussion at the annual conference of the ILO on the promotion of self-employment. This marked a shift from the assumption that the self-employed were independent, and not in need of the protection of labour standards. A resolution regarding "apparently self-employed" recommended that "protection of workers including the nominal self-employed against subcontracting arrangements and labour

⁵¹ Unni & Rani, 2003, pp. 128-129.

⁵² See Unni & Rani, 2003, pp. 148-158.

contracts leading to their exploitation should be instituted and enforced where not already the case.”

In 1994 the *Part-time Work Convention* was adopted.⁵³ On the one hand the Convention seeks to promote part-time employment, and advocates a review of laws and regulations that prevent or discourage recourse to part-time work. This is because of “the role of part-time work in facilitating additional employment opportunities...”⁵⁴ On the other hand it seeks to protect part-time workers. It provides that part-time workers should not be less favourably remunerated than full-time workers in comparable employment, whether on an “hourly, performance-related, or piece-rate basis.”⁵⁵ Other conditions relate to the conditions of employment and social security.⁵⁶

Two years later, the *Homework Convention* was adopted.⁵⁷ The Homework Convention broke new ground. It recognised that there were workers who did not work at the workplace of the employer, who nonetheless were in need of protection. It also recognised the need to protect workers that were ostensibly self-employed. To do so it sought to identify and hold accountable an employer on the basis of an identifiable economic relationship, rather than on the basis of a contract of employment.⁵⁸ However only four countries have ratified the Homework Convention. None are known to be countries where homework is a particularly significant phenomenon.

The Convention appeared to augur well for the adoption of an even more far-reaching new convention on contract labour, in 1997. However there was no agreement on the concept of “contract labour”, and further discussion on the text of a new convention was deferred until 1998. In the 1998 text, contract labour was defined as work performed personally for a user enterprise by a contract worker “under conditions of dependency on or subordination to the user enterprise similar to those that characterize an employment relationship...”⁵⁹ The proposed convention envisaged two situations in which contract labour occurs. The first is where “work is performed pursuant to a direct contractual arrangement other than a contract of employment...” The other is where “the contract worker is provided for the user enterprise by a

⁵³ Convention 175 of 1994.

⁵⁴ Article 9, Convention 175 of 1994. It also enables specific groups such as workers with family responsibilities to be employed.

⁵⁵ Article 5, Convention 175 of 1994.

⁵⁶ Only 8 countries have ratified the convention, including Netherlands, which is known for its “part-time economy”, Italy and Mauritius.

⁵⁷ Convention 177 of 1996. Homework was defined as work carried out by a person in his or her home, or in other premises of his or her choice (other than the workplace of the employer), for remuneration, and which work results in a product or service “as specified by the employer.” The employer in turn is defined as any person who “directly or through an intermediary...gives out work in pursuance of his business activity.” A recommendation on homework was also adopted.

⁵⁸ It is evident that home workers do not have an employment contract with the employer putting out work.

⁵⁹ See proposed Convention concerning contract labour, Report V(2B), 1998.

subcontractor or an intermediary.”⁶⁰ In essence this refers to externalisation as defined above.

In the interim the conference adopted the *Private Employment Agencies Convention* of 1997. The ease with which this convention was adopted contrasts starkly with ILOs’ difficulty, and ultimately failure, to agree on even the necessity to regulate externalisation. This Convention not only gave international legitimacy for the first time to the operation of on private employment agencies (PEAs), which some would argue fulfil a function that is properly assigned to the state. It also included in its definition of a PEA agencies that employ workers “with a view to making them available to a third party...(referred to below as a ‘user enterprise’) which assigns their tasks and supervises the execution of these tasks.”⁶¹

The South African equivalent of this kind of PEA is the temporary employment service (TES), also known as the labour broker. South African legislation had recognised the broker or TES as the employer since 1983. However the research report on labour broking and temporary employment agencies argues that the designation of the TES (or broker) as employer is contrived, and raises more questions than it answers. The report also argues that this designation has been an incentive for the exponential growth of TESs in South Africa.⁶²

Undoubtedly the fact that this kind of development had already taken place at a national level, as in the case of South Africa, is one reason why the convention on PEAs was so easily adopted. Another reason is that it plainly advanced capital’s agenda, by encouraging workplace flexibility.⁶³ Whereas the contract labour convention was not adopted due to what the employer vice-chairperson frankly described as the employers’ “implacable opposition to the adoption of any instruments on the subject of contract labour.”⁶⁴ In part this opposition can be attributed to the breadth of the conception of contract labour.⁶⁵ In part it can be attributed to the prospect that the proposed convention would transgress the divide between commercial and labour law.

Thus whereas organised labour argued that there was a grey area between commercial and labour law (a proposition tacitly accepted in the Homework Convention), employers denied this was so. Employers also refused to accept that a contractual obligation with an intermediary, for example, could give rise to an employment

⁶⁰ See article 1 (a)(I) and (ii)

⁶¹ Convention 181 of 1997.

⁶² See note 61 above

⁶³ The “importance of flexibility in the functioning of labour markets” is acknowledged in the preamble to the convention.

⁶⁴ Report of the committee on contract labour, 86th Session, 1998, para 10.

⁶⁵ Thus whereas homework represented a fairly specific phenomenon, according to the worker vice-chairperson at the 1998 conference contract labour could include any and all of the following: subcontracting or outsourcing; the contracting out of public services or privatisation in the context of the public sector; job contracting or labour-only contracting; “contracting in” by utilising temporary work agencies and the like; informal agreements brokered by intermediaries in the informal sector; migrant workers, systems of piece-work manufacturing, certain kinds of homework and more.

relationship with the person putting out or providing work (also a proposition accepted in the Homework Convention). In the words of the employer vice-chairperson “A worker is either an employee or is not an employee, to be determined on the basis of the tests that normally apply in determining if a contract of employment exists... if a worker is an employee of one enterprise, it would only lead to confusion to treat that person as an employee of another enterprise.” The only situation in which employers were prepared to accept an international instrument might be appropriate was to address the issue of disguised employment.

The Conference on the Scope of the Employment Relationship

The failure to adopt the contract labour convention was the first time in its long history that the ILO’s standard generating machinery had failed. Instead a resolution was adopted recognising the need to identify situations in which workers require protection, and calling for a future conference to discuss this. This was the conference that took place in 2003 concerning the scope of the employment relationship. The outcome of the discussion was to adopt a resolution calling for the adoption of a new recommendation.

The focus of the recommendation was to be on “disguised employment”. Disguised employment occurs “when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status.”⁶⁶ It is distinguished from what are referred to as ambiguous employment relationships, on the one hand, and triangular employment relationships on the other.

Given the outcome of contract labour discussions, it is perhaps not surprising that the focus of regulation should be disguised employment. It is also not surprising, if disappointing, that the resolution adopted should skirt around the terrain of the commercial contract. The point of departure adopted is that “self employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.”

Yet in the same breath the resolution concedes that disguised employment can occur through “inappropriate use of civil or commercial arrangements.” Shorn of value laden terms, it appears that what constitutes disguised employment depends entirely on what the intentions of the employer are perceived to be. Since intentions are notoriously difficult to determine, it is difficult to see how this category represents any advance in our understanding of the changing nature of work.

The same criticism can be levelled at the category of ambiguous employment. An ambiguous employment relationship exists, states the resolution, whenever work is performed or services provided that give rise to “an actual and genuine doubt about the existence of an employment relationship.” This is, to say the least, stating the obvious.

The ILO’s characterisation of the triangular employment relationship is open to criticism on different grounds. The user, or client, is characterised as the third party in

⁶⁶ Resolution concerning the employment relationship, 2003, paragraph 7.

the relationship between the provider of work or services and its workers. This is of course consistent with the Private Employment Agencies Convention in which the provider, an agency, is regarded as the employer. However this characterisation ignores the economic reality that the user is the dominant party in the relationship, and commonly determines the relationship between the provider and its workers.⁶⁷

In short, the approach adopted by the ILO appears to be timid if not regressive. The terms in which it characterises the problems resulting from the changing nature of work are at best imprecise, and it is difficult to attach any concrete legal meaning to them. In terms of the traditional enquiry one is either in an employment relationship or one is not. Either the traditional enquiry still holds, or it is no longer possible to regard employment in a dichotomous way. If the latter is the case, the existence of an intermediate status must be acknowledged. As regards the triangular employment relationship, its characterisation is misleading.

The foregoing conclusion does not imply that attempts to regulate non-standard employment are futile, or that the ILO should not be supported as an institution. The lessons to be drawn from the ILO's experience are rather the necessity of articulating a clear theoretical understanding of the changing nature of work, and the necessity to begin to implement appropriate changes at a national level to, before attempting to do so at an international level.

1.3 Re-conceptualising the employment relationship

The report of the European Union's group of experts

Perhaps the most sustained and comprehensive attempt to think through the implications of the changing nature of work has been by a group of experts appointed by the European Union to survey the future of work and labour law in Europe⁶⁸. The report of this group is a substantial document covering a range of themes, and it is not possible to summarise its content within the scope of this paper. The language of the report is also sometimes abstruse. Being concerned with Europe as a whole, it has to take account of different national trends, and different legal traditions. Nevertheless the approach it has adopted in analysing the problems European countries face is useful in guiding our analysis of the South African situation. This approach, using our own terminology, can be summarised as follows.

Labour relations and labour law as currently conceived are premised on two assumptions. The first is a model of the business as employer, which presupposes a community of workers with different trades formed around a single economic activity under the supervision of a single employer. The second assumption relates to employment in a SER. A core feature of the SER model of employment was a trade off between high levels of subordination and disciplinary control on the part of the employer and high levels of employment security and welfare benefits. The decline of

⁶⁷ There are of course service providers that are large corporations. Some indeed are multi-nationals. However the relationship of a service provider to user is necessarily an economically vulnerable one.

⁶⁸ The Transformation of labour and future of labour law in Europe, Final Report, European Commission, June 1999 ("EU Report").

the SER reflected a shift in power relations between capital and labour, and necessitated a new trade off.⁶⁹

The group suggests two possible interpretations of the shift in power relations between capital and labour. One is to ascribe the shift to the reorganisation of capital, as a consequence of the increased autonomy of financial capital when compared with industrial capital, and the fact that capital is increasingly less fixed and more flexible. This has resulted in a management offensive with the object of compelling workers and unions to adapt to this new reality. A second interpretation is that it is not only capital that has changed, but labour that has changed in a partially autonomous way. Thus the prototype of a job was previously in manufacturing (working on something material). Now it is in services, which the group depicts as relating “more to interaction and manipulation of symbols.” At the same time the rules of organisation and co-ordination of work have also changed.

Depending on how the shift in power relations is conceived, the group suggests that the proponents of labour regulation and trade unions are confronted with a strategic choice. One strategy would be to defend the SER whatever the cost, and resist its dissolution. The other strategy would be mere adaptation. The latter strategy might involve preserving the SER so far as possible, and adopting measures to improve the status of those who are not employed in the SER. In the European context, this entails uncoupling the system of labour regulation from social welfare protection.⁷⁰

Neither of these strategies is satisfactory, the group suggests, because both have the effect of dividing society in two. Moreover the first, in particular, “could have the perverse effect of turning labour law into an elitist and corporatist form of protection for the happy few who enjoy the status of wage earner.” The alternative proposed is a strategy of active adaptation. This necessitates re-institutionalising the employment relationship. “Re-institutionalising is used here to mean setting *rules*, allocating *negotiating forums* for these rules and enabling the *collectives* involved to intervene effectively.....Employee status, which makes security contingent on subordination, should be succeeded by a new employment status based on a comprehensive approach to work, capable of reconciling the need for freedom and the need for security.”(Authors’ emphasis)⁷¹

The starting point for this process of re-institutionalising is to change a conception of work as meaning paid work only. Rather work should be seen as including non-marketable forms of work, such as training on one’s own initiative, and unpaid work such as is entailed in domestic reproduction. What characterises work as such, as opposed to mere activity, is that it results from an obligation, whether it is an obligation undertaken voluntarily or by way of contract or by virtue of a legal status. The object should be to arrive at a conception of occupational status that is not dependent on employment, and which covers the various forms of work a person may perform during her/his life, including periods of inactivity, training, self-employment

⁶⁹ EU Report, p. 2.

⁷⁰ EU Report, pp. 21-22.

⁷¹ EU Report, p. 22.

and the like. It must also be possible within this conception to switch from one work situation to another.

In contrast with a view that holds that social rights either depend on an employment relationship or on citizenship, the group argues that there is evidence of a new form of rights emerging, which it terms *social drawing rights*. One example given of such rights that have emerged is the granting of time-off for various purposes: for union representatives, for example, or for training. Another is the various forms of assistance given to the unemployed to establish their own enterprises or to acquire training (the South African equivalent might be the social plan).

These drawing rights can be brought into effect on two conditions. Firstly, the drawer must have accumulated a sufficient reserve (hence the use of terms such as accounts, credits, savings etc. in respect of these rights). Secondly, s/he only has a right to draw for a recognised, socially useful purpose.⁷²

The rules that need to be negotiated, in the course of the process of re-institutionalising the employment relationship, relate to how one qualifies for these drawing rights, and how they should be exercised. It is clear, for example, that it must be possible to accumulate credits or to build up reserves other than through a formal employment relationship.

Re-institutionalising the employment relationship also necessitates interrogating other assumptions associated with the SER, which have largely been informed by its origins in manufacturing, but which may not be appropriate in economies that are increasingly dominated by services. Thus the notion of working time, and a strict division between working time and time-off, is a product of a Fordist era which placed a premium on the subordination of the worker to management. In services, the client in effect becomes party to the determination of working time.

The recommendations of the group of experts are premised on two principles. The first is that the parties to an employment relationship should not be vested with the power to determine the legal status of that relationship. The second is that the scope of labour law should be expanded to cover all kinds of contracts, not merely employment contracts, and to apply to workers who are not necessarily employees. It also advocates creating a special status for temporary employment agencies, as well as introducing specific categories to cater for situations where employers undertake joint activities, and where they should be jointly accountable.

⁷² EU Report, p. 23.

PART 2

2.1 Labour market developments in South Africa

There are similarities as well as sharp differences between the international experience and that of South Africa since 1994, particularly when compared with the countries of the North. On the one hand, South Africa has an unemployment rate that is much higher than the rates in advanced industrialised countries and also has a much more limited social welfare system. On the other hand, whereas many of the advanced industrialised countries have followed policies of labour market de-regulation (or flexibility), following the political transition in 1994 South Africa introduced a progressive labour market regulatory framework (this is outlined in more detail in section 2.3.3 below). However, the economic restructuring undergone in South Africa over the last decade bears similarities with the restructuring taking place internationally and has had much the same impact on the South African labour market. Significant downsizing, demands for more flexible employment and working arrangements, and pressure on established labour market institutions have been key developments in the last decade or so. In this period the drive for employment flexibility assumed paramount importance.

In the late-1990s, the report of COSATU's September Commission pointed out that this trend posed serious challenges for the labour movement:

Workers have won victories that they could not even imagine in the beginning of the 1970s. They made enormous progress in establishing workers rights in South Africa. Yet, despite this progress, something strange is happening in the new South Africa: the unions are being forced back onto the defensive by company 'restructuring' under the increasing competitive pressure from global markets. In company after company, unions are faced with employer initiatives to cut jobs, subcontract or outsource a range of functions and employ casual rather than permanent workers. Partly because of employer initiatives, partly because of their own weaknesses, unions are being forced into a reactive and defensive mode, rather than a proactive and offensive mode of operating.⁷³

The authors of the September Commission Report were acutely aware of the similarities between developments in South African and international trends:

Increasing labour market flexibility is one of the key characteristics of globalisation world wide. This generates increasing differentiation and fragmentation within the organised working class as different workers perceive themselves as having different interests. Some workers gain access

⁷³ COSATU, 1997, September Commission Report, p. 96

to new skills and careers paths with good pay, conditions and benefits; others become ‘outsiders’ with various kinds of non-standard contracts which undermine job security, conditions and benefits....⁷⁴

The Commission argued that the dangers that these initiatives posed for organised labour include the ‘division of workers into “insiders” and “outsiders”’, and the possibility that ‘union responses to restructuring may create ideological confusion among members and activists’.⁷⁵

While there is consensus amongst many on the prevalence of non-standard employment arrangements and the dangers that such arrangements pose for regulation and workers, it is very difficult to measure these trends with any accuracy. Non-standard employment arrangements are notoriously difficult to categorise. They also pose numerous problems for quantitative measurement, whether investigated by firm-based surveys or household surveys. Below we briefly refer to some survey findings to give an indication of the trends and the impact on compliance with labour regulations.

Webster notes that ‘[a]ttempts at productivity increases have invariably been accompanied by job losses.’⁷⁶ He quoted a survey of 165 companies employing 315 000 employees which found that ‘company restructuring’, rather than ‘economic downturn’, was the prime contributor to retrenchments. In 1989/90, 53% of retrenchment exercises were accounted for by ‘economic downturn’. Ten years later, this accounted for 20% of retrenchments. In 1989/90, ‘corporate restructuring’ accounted for only 18% of retrenchments, but ten years later this figure had increased to 35%. The outsourcing of services, which was rapidly increasing, accounted for 6% of retrenchments in 1989/90, but had increased to 16% ten years down the line. Commenting on the findings of survey on flexibility patterns in the South African manufacturing industry, Standing argued that there was a trend towards different forms of casualised work in South Africa:

[E]vidence... suggest[s] that South African firms have been moving in the same direction as their counterparts in most other parts of the world, turning towards greater use of *flexiworkers*, through casual labour, contract labour, sub-contracting to smaller firms, homeworkers and other ‘outworkers’, and agency workers.⁷⁷

A survey conducted by Apploh-Mfodwa *et al* of 626 firms in South Africa (of which 91 were selected for more qualitative research) found that 98% practiced at least one form of workplace flexibility. Numerical flexibility was the most common (81% of firms), while 46% practiced some form of temporal flexibility (overtime or shift

⁷⁴ Ibid, p. 117.

⁷⁵ Ibid, p. 96-97.

⁷⁶ Webster, 1999, p. 10.

⁷⁷ Standing, 1997, p. 7.

work). About 35% of firms used wage flexibility, generally in the form of incentive bonuses. The least commonly observed form of flexibility was functional flexibility.⁷⁸ Andrew Levy and Associates conducted a survey of about 1 000 firms in 1999. It found then that 68.3% of the firms had outsourced over the past five years, with 65% of those firms outsourcing one or two departments, and 35% outsourcing three or more departments. So-called non-core functions constituted the major functions outsourced. At 40.5% of the firms, the employees retrenched by the outsourcing had been absorbed by the contracting firm.⁷⁹

A key question is the link between the introduction of flexible employment arrangements and compliance with labour regulations. In other words, do such arrangements lead to informalisation. Survey data does not provide a complete answer to this question because surveys generally do not classify informality in terms of non-compliance with labour regulations, but surveys do indicate a relationship. The Labour Force Survey breaks down non-standard employment arrangements into: Fixed-term contract; Temporary; Casual; and, Seasonal.⁸⁰ In table 4 below we provide a breakdown of formal and informal employment by type of employment contract.⁸¹

Table 4: Formal and Informal Employment by Type of Contract

Contract	Formal	Informal	Unknown	Total
Permanent	5662 (81%)	879 (46%)	126 (60%)	6667 (74%)
Fixed-term	257 (4%)	54 (3%)	10 (5%)	321 (4%)
Temporary	578 (8%)	500 (27%)	34 (16%)	1112 (12%)
Casual	379 (5%)	364 (19%)	21 (10%)	765 (8%)
Seasonal	53 (1%)	31 (2%)	3 (1%)	87 (1%)
Unknown	53 (1%)	47 (3%)	14 (7%)	115 (1%)
Total	6982 (100%)	1876 (100%)	209 (100%)	9067 (100%)

The table indicates that non-standard employment arrangements are far more prevalent in informal businesses: 18% of workers in formal employment have non-standard contracts whereas 51% of workers in informal employment have such contracts. Non-standard employment arrangements therefore appear to have a strong association with informal employment.

It is therefore not surprising that the rise in non-standard employment arrangements has gone along with rapid growth in informal employment. The latter, along with rising unemployment, has become a key feature of the South African labour market

⁷⁸ Cited in J Theron and S Godfrey, 2000, Protecting workers on the periphery, Development and Labour Monographs 1/2000, p. 81-82.

⁷⁹ Cited in Theron and Godfrey, 2000, p. 56-57.

⁸⁰ Unfortunately the LFS does not define these categories. It is therefore left to the respondent's understanding of the categories in making his/her choice.

⁸¹ Budlender, 2001, p. 24-25.

over the last decade. The UNDP report for 2004 provides the following statistics for the South African labour market.⁸²

Table 5: Formal and informal employment, and unemployment: 1990-2002

Year	Formal employment	Informal employment	Total employment	Total unemployment	Unemployment rate
1990	8 362 677	1 742 754	10 105 431	1 912 471	15.91
1991	8 268 706	1 796 290	10 064 996	2 207 523	17.99
1992	8 143 003	1 895 990	10 038 993	2 576 027	20.42
1993	8 043 241	2 093 317	10 136 558	2 856 619	21.99
1994	8 010 634	2 330 791	10 341 425	3 052 164	22.79
1995	7 911 406	2 579 809	10 491 214	3 320 594	24.04
1996	7 945 181	2 807 452	10 752 633	3 530 232	24.72
1997	7 852 275	2 992 547	10 844 822	3 888 875	26.39
1998	7 716 484	3 187 838	10 904 322	4 208 299	27.85
1999	7 539 859	3 357 241	10 897 100	4 523 704	29.34
2000	7 410 982	3 465 367	10 876 350	4 805 744	30.64
2001	7 346 610	3 539 634	10 886 245	4 517 261	29.33
2002	7 351 135	3 545 284	10 896 420	4 783 502	30.51

(UNDP, 2004: Table 3, 238-239)

The case studies that follow are qualitative rather than quantitative, and focus on the processes underlying the growth in non-standard employment arrangements. However, quantitative data has also been collected wherever possible. Both qualitative and quantitative findings point to a strong relationship between externalisation, casualisation and informalisation.

2.2 Case studies on sectors of the South African economy

In this section, we report on four sectoral case studies to illustrate the extent and nature of non-standard employment in different sectors as well as the dilemma that non-standard employment raises for policy. In each case, we seek to identify the processes of casualisation, externalisation and informalisation taking place in the sectors and show that they are concurrent and often overlapping processes.

The sectors are mining, construction, manufacturing (specifically household appliances) and retail. A number of criteria were used to select the sectors. First, the sectors range across the primary, secondary and tertiary divisions of the economy. Second, different regulatory regimes are evident in the sectors. Mining has a non-statutory centralised bargaining forum, construction has historically been covered by a number of regional bargaining councils, the household appliance sector is covered by a national bargaining council but there is also company-level bargaining taking place, and the retail sector is governed by a sectoral determination with company-level bargaining at the large firms. Third, the sectors provide a examples of export-orientation (mining), domestic-orientation (construction and retail), and domestic orientation but with significant pressure from imports (household appliances). Fourth,

⁸² UNDP Report, 2004, Table 3, p. 238-239.

prior research indicated that various forms of externalisation, casualisation and informalisation were prevalent in these sectors. We therefore believed that the sectors would provide good examples of the interaction between industry characteristics, non-standard employment forms and different regulatory regimes.

2.2.1 Mining

Overview of the mining sector

The South African mining sector has undergone significant structural changes. A number of important trends can be identified, such as the depatriation of major mining firms (with primary listings moved to the London and New York stock exchanges), continued pressure on marginal mines because of relatively low gold prices and currency fluctuations, and pressures on the industry to promote black ownership. The mining industry has traditionally been an export-oriented industry, but the share of mining exports as a %age of South Africa's total exports has shrunk from over 70% in 1983 to 35% in 1999. In 1983, gold accounted for over 50% of all mining exports, but this declined to 15% in 1998. Mining's contribution to the country's GDP has declined from 15.6% in 1986 to 6.5% in 1999. This is partly due to growth in the manufacturing and service sectors, but also because of contraction in the gold mining industry.⁸³ In recent years, the mining of platinum has increased, leading to an increase in employment in that sector of the mining industry.

The mining labour market has undergone a number of significant changes – the most important being a substantial decline in employment levels. In the period from 1980 to 1989 employment in the mining sector as a whole declined from 792 742 to 777 455, a fall of 1.9%. In the period from 1990 to 1995 the decline accelerated from 777 455 to 596 531, a drop of 23.3 %. In the period from 1995 to 1998 the decline continued at much the same rate: employment fell from 596 531 to 465 036, a drop of 21.9 %. The number dropped even further, reaching a level of 411 653 in December 2001.⁸⁴ The latest employment figure for the mining and quarrying sector is a total of 438 000 formal sector employees in December 2003, slightly up from a number of 418 000 in December the previous year.⁸⁵ The overall drop in employment since 1980 amounts to 345 742 or 55.2%.

The Labour Force Survey findings present a somewhat different picture. In February 2002, there were 477 000 employees employed in the formal sector of the mining industry, and only 3 000 in the informal sector.⁸⁶

⁸³ Minnett, R.C.A. 2002. 'An Overview of the Minerals Sector of the South African Economy.' Mimeo, School of Mining Engineering, University of the Witwatersrand.

⁸⁴ Statistics South Africa. Discussion Paper 2: Comparative Labour Statistics, Survey of Employment and Earnings in Selected Industries, March 2001.

⁸⁵ Statistics South Africa, Survey of Employment and Earnings, September 2003 and December 2003, Statistical Release P0275.

⁸⁶ Department of Labour. 2003. Recent Employment Data from the Labour Force Survey. Mimeo.

The structural changes in the mining sector have placed considerable pressure on mines to reduce costs. The pressure heightened at a time when there were also pressures from the labour movement and the government to improve the industry's dismal health and safety record. In many instances, mines moved towards the utilisation of smaller teams of mineworkers linked to production bonuses to reward increases in productivity.⁸⁷ However, at the same time, labour subcontracting as a way of sourcing and organising labour also increased – to a level of about 10% of all underground mining employment in the gold mining industry. This method of sourcing labour led to the prevalence of processes of casualisation, externalisation, as well as informalisation.

Unfortunately it is extremely hard to capture a number of the subcontracting trends in the mining industry quantitatively. This is mainly because of the informal nature of a number of the arrangements. We explore these in the following section.

The nature of non-standard employment in the sector

In the South African mining industry, the subcontracting of a number of mining activities, including so-called core and non-core functions, has become more prevalent since the 1990s. Subcontracting here refers to a number of arrangements where a third party enters the employment relationship as intermediary between the mine and the workers who actually perform the work. Often such intermediaries perform specialised functions, but in other cases they merely perform the function of recruiting and supplying labour – i.e. the function of a typical 'labour broker'. This arrangement is often used to evade employing workers directly and having to take on the responsibilities associated with a contract of employment – the contract between a mine and a contractor is usually a commercial contract.

Traditionally mines contracted out specialised functions, like construction, shaft sinking, and access development. In fact, the largest firm involved in the sinking of shafts was founded in 1964. By the 1980s and the early 1990s mines began subcontracting 'non-core' functions, like cleaning, catering and security.⁸⁸ Subcontracting has taken place both on the surface and underground. On the surface, as mentioned, typical 'non-core' functions such as catering, cleaning, security, and maintenance of hostels have been subcontracted. Construction work on the surface has also been subcontracted.⁸⁹

⁸⁷ Bezuidenhout, A. 1999. 'Between a Rock and a Hard Place: Productivity Agreements in Gold Mining.' *South African Labour Bulletin*, vol. 24, no. 4, pp. 69-74.

⁸⁸ Bezuidenhout, A. & Kenny, B. 1999. 'An Overview of the Changing Nature of Subcontracting in the South African Mining Industry,' *Journal of the South African Institute for Mining and Metallurgy*, July/August; see also Sikakane, E.L. 2003. 'Subcontracting in Gold Mining: Western Deep Level Mine, Carletonville.' A Dissertation submitted to the Faculty of Arts, Rand Afrikaans University, in partial fulfilment of the degree Master of Arts in Industrial Sociology.

⁸⁹ Evidence suggests that surface construction was already subcontracted at the turn of the 19th century. Moroney mentions that in 1902, 'workers on the Consolidated Main Reef Mine went on strike because they discovered that their wages were well below those being earned by a contractor's work force engaged in surface construction on the mine'. A mine manager complained about the destabilising effect this had: '[T]he contractors, if allowed to go on, will obtain all the best boys, any of which are as good at certain work as white men, and at the same time unsettle the Company's boys.' See: Moroney, S. 1978. Mine worker protest on the Witwatersrand: 1901-1912. In: Webster, E. (ed.). *Essays in Southern African labour history*. Johannesburg: Ravan, p. 43.

Since the 1990s, what has traditionally been considered to be ‘core’ mining work, has also been subcontracted. However, this phenomenon is not completely new. Before the mid-1920s, the subcontracting of ‘core’ mining work occurred on a relatively widespread basis. It seemed to take on a form of ‘gang’ subcontracting, with a specific racial character built into the arrangement. Underground mining work was organised in teams (or gangs) of African workers who were supervised by white miners.⁹⁰ However, after the Miner Strike of 1922, this system became so unstable that mining companies engaged white miners directly, while African mineworkers were appointed on fixed-term contracts.

The subcontracting of ‘core’ mining activities seems to resurface only in the 1990s. This happened in a number of ways. One strategy would be for mines to contract out the mining of certain shafts, or sections of certain shafts, to subcontractors to mine on their behalf. Another strategy is for mines to engage a proportion of their workforce through labour brokers (see the ERPM case study in Box 1). Often these strategies are used in combination, creating a complex set of contractual arrangements.

As a result of this growing trend, as well as the subcontracting arrangements that have historically existed in the mining industry, different categories of subcontractors that are operational in the mining industry can be identified:

- Group A. These are the larger, more established contractors (some are subsidiaries of larger companies) employing over 1 000 workers on a variety of mines. RUC Mining (owned by Murray and Roberts) is a typical example of this group. It works on most kinds of mine, including gold, coal, nickel and platinum. Core activities include shaft-sinking, blasting tunnels, stoping, underground excavation and ground stabilisation. Others include Shaft Sinkers, Samat Mining, Cementation Africa and Grinacker.
- Group B. These are mid-range contractors (with a workforce of 500 to 1 000) offering more specialised services. Many are expanding in size. Welkom Mining Supplies is typical of this group. It comprises three separate companies, employing a total of 700 people, and specialises in underground construction, haulage and maintenance.
- Group C. These are smaller firms (with 100 to 500 employees) either attached to a single mine or offering mobile services across the industry.
- Group D. These are micro-enterprises and ‘fly-by-nights’ (with less than 100 workers). In 1996 there were close to 200 such operations (nearly 50 % had 10 or less employees) but the number fluctuates constantly. Most are single-service

⁹⁰ Bezuidenhout & Kenny, 1999. The white ganger took responsibility for supervising work, paying wages to the gang members and even providing explosives needed to perform the work. Remuneration was linked only to performance, without a basic salary. In an attempt to reduce the number of white miners during the profitability crisis in the gold mining industry in 1922, mine managers started to end contracts with these white gangers. Yudelman argues: ‘The issue of contract work subsequently became a very important cause of the 1922 strike, when the mining employers sought to abolish the... system...’ See: Johnstone, F.A. 1976. *Class, race and gold: A study of class relations and racial discrimination in South Africa*. London: Routledge & Kegan Paul, pp. 123 & 159; Yudelman, D. 1984. *The emergence of modern South Africa: State, capital, and the incorporation of organised labour on the South African gold fields, 1902-1939*. Cape Town: David Philip, p. 105.

operators. The group can be divided into legitimate start-up firms and fly-by-night opportunists. These companies are often formed by white ex-miners. A much smaller number of contractors are black.⁹¹

In the box below we focus on a case study of ERPM which illustrates some of the problems that have surfaced around non-standard employment in the mining industry.

BOX 1: SUBCONTRACTING AND INSTABILITY AT ERPM

In 1999, Khumo Bathong Holdings was formed as a 'black empowerment' company by Paseka Ncholo, a former director of public services in the South African government. Khumo Bathong Holdings took over the loss-making East Rand Proprietary Mines (ERPM) after it had filed for bankruptcy. Towards the end of 2001, the mine employed about 4 500 people and produced 150 000 ounces of gold per year. By then, mine management intended to increase output by a half. In December 2001, the mine made its first profit after the acquisition.⁹² In February the next year, Khumo Bathong was in the news again, when the company bought a 3 % stake in Durban Roodepoort Deep (DRD) for R68 million. The deal was financed by the Industrial Development Corporation. In March, Ncholo was appointed as a non-executive director on the board of DRD.⁹³ In March 2002, the company announced that it was negotiating a profit sharing scheme with employees: 'We are asking our employees to take joint ownership of the mine by growing the mine's production through productivity levels at the stope face,' said Ncholo in the media. All profits made above a certain target would be split between the mine's shareholders, management and the mineworkers. By then, German venture capitalist Claus Daun owned 70% of the shares, with Khumo Bathong owning the rest.⁹⁴

However, while on the surface it looked as though the ERPM story was a successful story of black economic empowerment in the making, the NUM was protesting in April already against the hiring of employees at the mine by a labour broker. Protesters gathered to hand over a memorandum to Khumo Bathong. The union felt that these workers were paid much less than the industry average – indeed, some workers allegedly received a salary of R700 a month. The union also alleged that the labour brokers sometimes took a cut of half the daily wages of some workers. 'In our view, if Khumo Bathong is concerned and interested in the welfare and prosperity of ordinary black mineworkers, it would desist from using this contractor who continues to brutalise workers... It is a known fact that contractors take short cuts in the rush for profit... The union will continue engaging the company on this matter and will not

⁹¹ Crush J, T Ulicki, T Tseane and E Jansen van Vuuren. 1999. Undermining Labour: Migrancy and Sub-contracting in the South African Gold Mining Industry. The Southern African Migration Project, Migration Policy Series, No.15. Idasa: Cape Town, pp. 13-14.

⁹² *Business Report*, 16 October 2001; *Business Report*, 4 March 2002.

⁹³ *Business Report*, 14 February 2002.

⁹⁴ *Business Report*, 4 March 2002

stop until the brutalising contractor is out, who in our view is given licence by management to perpetuate atrocities,' a spokesman from the union said at the time.⁹⁵

In August 2002 contracts at the mine were in the news again when it was reported that Ncholo had stepped down as chairman and director of ERPM after Daun initiated a forensic audit into the mine's 'relationship with contractors and suppliers'. The audit focussed on reported 'irregular payment practices and monthly payments to a senior manager by a supplier.' Three senior managers were suspended pending the outcome of further investigations. During this time, Ncholo entered into negotiations with Daun to buy out the 70 % he owned of ERPM.⁹⁶ Subsequently, in September, DRD acquired ERPM with Khumo Bathong as a joint venture.⁹⁷

However, days before the takeover deal was sealed, Ncholo threatened to dismiss 'every one of' the mine's workforce of 4 000 employees for taking part in a two-day anti-privatisation strike. According to the National Union of Mineworkers, the strike was extended to ERPM because employees 'were being underpaid by the labour broker contracted to the mine.' The labour contractor involved, Circle Labour and Accommodation, was warned by mine management that the workers would be fired if they didn't return to work. Technically, this could be done by cancelling the contract between the mine and the labour broker. A statement released by management read: 'A consequence of the termination of the contract would be that Circle must immediately remove its workers from ERPM's property.'⁹⁸ After losing five days of production, management acted on this ultimatum and terminated its contract with Circle. Two former employees were killed and fourteen were injured when striking workers were reportedly prevented from 'vandalising the 109-year old Boksburg mine' by security personnel when management enforced a lock-out. The NUM threatened to 'finger other mines using labour brokers if the situation at ERPM was not resolved.' After the mass-dismissal, the company immediately started to hire directly employees formerly engaged indirectly as contract workers. According to reports, '2 800 employees would get their jobs back.'⁹⁹ Ncholo said: 'We intend to double the pay of our lowest paid worker from R700, bringing our salaries in line with that of the industry.'¹⁰⁰

Following the incident, the government got involved by appointing the Commission for Conciliation, Mediation and Arbitration (CCMA) to ensure that the employment contracts and conditions of those workers appointed by the company complied with national legislation and minimum standards. Membathisi Mdladlana, Minister of Labour, reportedly 'expressed concern that some mine officials were using labour brokers to avoid paying the minimum wage agreed to by the Chamber of Mines.' A spokesperson for the Department of Labour said that the ministry had found that

⁹⁵ *Business Day*, 11 April 2002; *Business Day*, 10 October 2003.

⁹⁶ *Business Report*, 21 August 2002.

⁹⁷ *Business Report*, 10 September 2002.

⁹⁸ *Business Report*, 6 October 2002.

⁹⁹ *Business Report*, 8 October 2002; *Sunday Times*, 13 October 2002.

¹⁰⁰ *Business Report*, 10 October 2002.

¹⁰¹ *Business Report*, 18 October 2002.

wages paid to workers by the labour broker involved were ‘well below the market norm and workers had accepted these out of desperation.’ The human resources manager of Circle Labour responded: ‘We supply the labour and the mine manages it. We therefore do not decide on wages...’¹⁰¹

The above case study is possibly an extreme example in that the mine employed nearly all its labour through a labour broker. In many other mines, only a proportion of workers are employed by labour brokers. The case study nevertheless shows how sub-contracting in the mining industry includes processes of externalisation as well as an element of informalisation. Evidence suggests that subcontracted mine employees receive wages considerably lower than permanent employees, that they are often housed in separate hostels (often under appalling conditions), that they are sometimes used to enter areas that are considered to be too dangerous for permanent employees to mine, and that health and safety regulations are sometimes not adhered to because of the informal nature of some of the employment arrangements.¹⁰²

Reasons for the rise of non-standard employment

The reasons for subcontracting in gold mining are rooted in the decline of the gold price, which makes the mining of lower grade ore unviable, coupled with the exhaustion of high-grade ore reserves. In coal mining the reasons relate to the decline in the export price due to increasing international competition, improved technology, and cost increases due in part to the exhaustion of high-grade ore reserves.

The above factors have led to massive retrenchments and the closure of certain mines. They have also led to increased subcontracting in order to increase cost efficiencies. Part of this strategy, or a consequence of this strategy, has been the reduction of the costs associated with employing workers and complying with relevant labour regulations (particularly health and safety legislation and the LRA). This also has also resulted in the weakening of trade union organisation.

The strategies adopted by mines are not uniform. Some mines have historically had a policy of sub-contracting far more than others. Mines operating on a full calendar basis (FULCO) tend to sub-contract more than others.¹⁰³ These strategies are also interrelated with other strategies, such as multi-tasking and the introduction of productivity bonuses. Outsourcing and casualisation has been assisted by the fact that

¹⁰² See Bezuidenhout, A. & Kenny, B. 2001. ‘The Social Cost of Subcontracting in the South African Gold Mining Industry.’ In: *Mining, Development and Social Conflicts in Africa*, Third World Network, Acca; Crush, J., Ulicki, T., Tseane, T. & Jansen van Vuuren, E. 2001. ‘Undermining Labour: The Rise of Sub-contracting in South African Gold Mines.’ *Journal of Southern African Studies*, vol. 27, no. 1.

¹⁰³ In 1995, for instance, 17.5% of the workers of FULCO mines were appointed by subcontractors, while 7.4% of those at non-FULCO mines were appointed by subcontractors. See Crush J, T Ulicki, T Tseane and E Jansen van Vuuren. 2001. ‘Undermining Labour: The Rise of Sub-contracting in South African Gold Mines.’ *Journal of Southern African Studies*, vol. 27, no. 1, p. 8; see also Lewis, P. 2001. ‘Doing Time on the South African Gold Mines: The Move Towards Full-calendar Operations.’ In: Adler, G. (ed.). *Working Time: Towards a 40 hour Work Week in South Africa*. Johannesburg: Naledi & Friedrich Ebert Stiftung.

the level of unemployment has made retrenchees accept far less secure forms of employment.

The consequences of non-standard employment

Levels of subcontracting in the mining industry seem to have stabilised at about 10% of the workforce, although this differs from mine to mine. The impact on conditions of employment also varies from contractor to contractor. Generally, however, evidence suggests that employees of contractors are paid lower wages than regular employees.¹⁰⁴ They also tend not to have access to similar benefits. As Ulicki found in research conducted by the Southern African Migration Project: 'The vast majority of subcontracted workers do not receive membership in a medical aid scheme, sick leave or injury compensation, a pension, severance pay, free safety equipment, or death benefits.'¹⁰⁵

BOX 2: SUBCONTRACTING AND VAAL REEFS

'In the Vaal Reefs disaster of 1995, the mineworkers employed by subcontractors were not covered by death benefits and their families received very little compensation. A special disaster fund was established and through this each family was given R5 000. The families of regular mineworkers received R60 000 each.'

Source: Ulicki, T. 1999. Basotho Miners Speak: Subcontracting on South African Gold Mines.' *South African Labour Bulletin*, vol. 23, no. 4, p 63.

As with all subcontracting arrangements, a segmented mining labour market is created. Often the employees of subcontractors are housed in separate hostels, and are discouraged from joining trade unions. As one subcontract worker said in an interview: 'Subcontractors don't allow workers to join unions. That's how they can make employees work no matter what. If you want to be fired, be big-headed and complain. They will kick you the hell out of work and you're going to starve.'¹⁰⁶ Apart from causing tension, and potentially violence, the system obviously impacts negatively on the union's bargaining strength. The issue has therefore become a contentious point in the negotiations between the NUM and the Chamber of Mines.

According to the Mine Health and Safety Act of 1996, the mine, and not the subcontractor, is primarily responsible for enforcing health and safety regulations.

¹⁰⁴ Crush *et al*, 2001 found that 64% of subcontracted mineworkers in their database earned less than R800 a month, compared to 48% of regular mines who fell in the same category. However, in the higher income brackets, some subcontract workers outstripped regular mines. This means that some subcontractors, most probably those who specialise in shaft sinking, tend to pay their employees decent wages.

¹⁰⁵ Ulicki, T. 1999. Basotho Miners Speak: Subcontracting on South African Gold Mines.' *South African Labour Bulletin*, vol. 23, no. 4, p. 62.

¹⁰⁶ Ulicki, 1999, pp. 64-65.

This is partially due to the experience at Vaal Reefs and the recommendations from the Leon Commission of Enquiry. However, this is sometimes difficult to enforce, especially when mining is done by ‘fly-by-night’ contractors. Mineworkers have told researchers about instances where subcontract workers are fired when they get injured. Some went so far as to say that some cases where underground fatalities are not reported, but bodies are thrown down shafts instead.¹⁰⁷ These allegations are extremely serious, and should be treated as such. However, researchers have not been able to independently verify the allegations.

BOX 3: SUBCONTRACTING AND HEALTH & SAFETY

‘Some subcontractors ignore aspects of the Mine Health and Safety Act. According to the Act, an employee must report any situation which may present a risk to the health and safety of employees to the supervisor. Furthermore, an employee has the right to leave a dangerous work place. However, many mineworkers report being forced to work overtime, thereby creating a dangerous work environment. If they express concern over the risk of working under such conditions, they are fired. The Act stipulates the employees must be trained and competent to safely perform any task given to them; with contractors this is always the case.’

Source: Ulicki, T. 1999. Basotho Miners Speak: Subcontracting on South African Gold Mines.’ *South African Labour Bulletin*, vol. 23, no. 4, p. 64.

The link between employment equity and subcontracting is extremely sensitive and complex, as illustrated by the ERPM case in Box 1 above. Often subcontracting arrangements are justified as black empowerment. But it raises the now familiar issue of who exactly is empowered. When such actions lead to the reduction of wages and conditions, as well as relaxed health and safety standards, the union argues that black empowerment is simply used as a smokescreen to hide the evasion of labour standards.

Workers employed by the smaller contracting companies are often mineworkers who were retrenched from their jobs in the past. Given the large-scale retrenchments in the industry, a pool of experienced mineworkers can be hired. However, these workers do not become part of training programmes, and over a longer period their skills base becomes depleted.

Regulatory and other options

The mining sector is covered by the LRA, the BCEA, and the Mines Health and Safety Act, as well as the Compensation for Occupational Injuries and Diseases Act and the Occupational Diseases in Mines and Works Act.

¹⁰⁷ Bezuidenhout & Kenny, 1999.

In addition to the above legislation, the mining sector has for many years had a non-statutory centralised bargaining arrangement. This is made up of the Chamber of Mines, representing the major gold and coal mining companies, and a number of well organised trade unions (the most important of which is NUM). However, these centralised agreements are not extended to non-parties (as is usual with bargaining council agreements). Mine level negotiations therefore take place with a number of companies that are not members of the Chamber. In addition, NUM has agreed to exclude several members of the Chamber from the central agreements. The result is that the collective agreements with the Chamber cover just over half of all employees in the industry. It is unclear how many of the remaining employees are covered by company-level agreements. The inability to extend agreements reached with the Chamber is compensated to some extent by certain non-members following fairly closely the conditions set by the central agreements.¹⁰⁸

The negotiations between unions and the Chamber allow for considerable decentralisation with regard to setting specific conditions for individual mines (this has been exacerbated by the upsurge in productivity agreements in the industry). Bargaining in the sector is therefore far more fragmented than would appear at first sight. However, NUM is currently pursuing the establishment of a bargaining council for the gold and coal mining industry. Following an agreement between the NUM and the Chamber of Mines, a joint investigation into ‘bargaining options’ was launched. This investigation is about to be completed, and then has to be considered by other unions in the sector, as well as members of the Chamber of Mines. They will have a month to give comments. Following that, a further process will be followed to determine future bargaining options, which may include setting up a bargaining council (see Box 4).¹⁰⁹

BOX 4: AGREEMENT BETWEEN CHAMBER OF MINES AND THE NUM ON BARGAINING OPTIONS

9. BARGAINING COUNCIL

- 9.1 In terms of an agreed terms of reference, the Chamber and the NUM will appoint a task team of experts to do an investigation into an appropriate bargaining dispensation/bargaining council for the gold and coal mining industry.
- 9.2 The experts will be tasked to submit the results of their investigation by December 2003.¹¹⁰

¹⁰⁸ Some years ago the five major contractors in the gold mining industry formed an association. The contractors do not negotiate with NUM but all set wages and other conditions that almost match those set in the collective agreements negotiated between NUM and the Chamber. It appears, however, that there is a big gap between these wage levels and those set by other contractors.

¹⁰⁹ Interview with Dr Elize Strydom, Deputy Industrial Relations Adviser and Mr Mike Spowart, Industrial Relations Manager, Chamber of Mines of South Africa, June 2004.

¹¹⁰ Agreement Between the National Union of Mineworkers and the Chamber of Mines of South Africa Regarding the 2003/2004 and 2004/5 Review of Wages and Other Conditions of Employment on Gold Mines.

These Developments are key in future options for regulating the use of non-standard employment in the sector, since agreements between the Chamber of Mines and the NUM could potentially in future be extended to non-parties. Indeed, the NUM has over the last few years made attempts to introduce regulations for sub-contractors and labour brokers. The aim of the union is to establish a body to accredit all contractors and labour brokers, but the Chamber of Mines has consistently rejected this proposal. Indications are that employers are against this because they think the union will use the accreditation process to try to prohibit all sub-contracting and broking.

In the absence of an accreditation body NUM has secured agreements with the Chamber to regulate the use of sub-contractors (see Box 5).

BOX 5: AGREEMENTS BETWEEN THE CHAMBER OF MINES AND NUM

1995:

4. SUB-CONTRACTING

- 4.1 The parties acknowledge that it is custom and practice in the mining industry throughout the world that aspects of the mining process and other matters associated with the operating of mines are sourced out or contracted out by mining companies to other persons. Whilst this practice of outsourcing or subcontracting offers various advantages to mining companies and supports the development of small business enterprise, it might contain threats for employees and members of trade unions operating in the mining industry.
- 4.2 Therefore, the parties agree that when considering subcontracting, the company shall adhere to the following principles and procedures and have due regard to the factors contained in this agreement. The provisions of this agreement shall not apply to tasks which require special skills, equipment and/or resources and for which tasks mines do not ordinarily employ category 1-8 employees, provided that from time to time, the NUM will be informed of the type of tasks which are outsourced on this basis.
 - 4.2.1 Within thirty days of signing this agreement, the NUM shall be advised of existing subcontracting agreements.
 - 4.2.2 Mines undertake:
 - 4.2.2.1 to advise the NUM's mine levels structures of new sub-contracting plans;
 - 4.2.2.2 to disclose to the NUM on a regular basis information relevant to subcontracting, subject to the law and applicable agreements; and
 - 4.2.2.3 where the employment of subcontractors might lead to the retrenchment or downgrading of an existing employee, the NUM's representatives will be involved in discussions in respect of such retrenchment or downgrading.
- 4.3 To facilitate the implementation of this agreement the question of contracting out will be a subject for discussion in management/NUM meetings.
- 4.4 The parties agree that the purpose of this agreement is to promote harmonious relationships and in this regard commit themselves that where incidents of conflict arise between mine employees and employees of contractors, all parties will become involved to defuse the situation.
- 4.5 A subcontractor is required to comply with applicable legislation, including

the Aliens Act, Labour Relations Act, Basic Conditions of Employment Act, Minerals Act, Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act.

4.6 It is acknowledged that mine management cannot interfere with the contractual relationship between the contractor and his employees, but good practice dictates that there should be sound employment practices.¹¹¹

1996:

9. SUBCONTRACTING

9.1 The parties agree upon the need for effective implementation of the 1995 agreement on sub-contracting regarding, amongst other matters, advice to the NUM's mine level structures of new sub-contracting plans and disclosure to the NUM on a regular basis of information relevant to sub-contracting.

9.2 The Chamber undertakes to bring to the attention of its gold and coal members which recognise the NUM the need to fulfil their obligations under the terms of the 1995 sub-contracting agreement¹¹²

1999:

5.1 Subcontracting

The parties to this agreement are opposed to employees of sub-contractors being exploited for economic gain. It is therefore the intention of the parties to this agreement to regulate the use of contractors in the core business of gold mines. Core business includes all tasks save for tasks which require special skills, equipment and/or resources and for which tasks the Mines do not ordinarily employ category 3 to 8 employees.

In this regard the objective would be to ensure that contractors are monitored against minimum conditions of employment legislation and that their employees are adequately covered against unemployment and work-related injury and illness.

Therefore the parties agree that:

5.1.1 Sub-contracting shall be a standard item on regular management/union meetings, or shall be dealt with in subcontracting committees involving the Union.

5.1.2 All information relevant to sub-contracting shall be disclosed to the Union, subject to the law and applicable agreements.

5.1.3 Sub-contractors shall be monitored against the following:

5.1.3.1 Compliance with all health, safety and labour legislation or such exemptions that may have been granted.

5.1.3.2 Their registration in terms of the Unemployment Insurance Act 30 of

¹¹¹ Agreement between National Union of Mineworkers and Chamber Of Mines of South Africa on the 1995 Review of Wages and other Conditions of Employment and Restructuring the Mining Industry Towards Productivity Improvements.

¹¹² Agreement Between National Union of Mineworkers and Chamber of Mines of South Africa on the 1996 Review of Wages and other Conditions of Employment.

- 1966 (the UIA Act).
- 5.1.3.3 Their registration in terms of the COIDA and/or the ODMWA.
- 5.1.3.4 Provision of proof that they are paying the required assessments and levies in terms of the COIDA and/or the ODMWA.
- 5.1.3.5 Compliance with the Mine Health and Safety Act No. 29 of 1996.
- 5.1.4 The Mines undertake to include in tender documents for contracting work the relevant provisions of this agreement.¹¹³

2003:

8. OUTSOURCING

The parties agree that:

- 8.1 The main employer will take responsibility for the actions of their contractors in the area of Health and Safety standards, training and enforcement.
- 8.2 Sub-contractors would be expected to register in terms of COIDA and for the ODMWA, and must provide proof that they are paying the required assessments and levies in terms of these Acts.
- 8.3 Tenders will require that contractors give undertakings that they will provide health care, death and retirement benefits, which are similar to those provided by the gold mining industry.¹¹⁴

There is disagreement as to whether these agreements adequately address the negative consequences of subcontracting. Indeed, the fact that since 1995 four different agreements have been signed signals that the issue remains a serious problem. Some argue that the agreements do not define ‘core mining’ sufficiently clearly so they are being circumvented on a wide scale. While mines are required to consult with NUM before introducing subcontracting in order to establish whether the arrangement complies with the agreement (i.e. the subcontractor will provide specialised skills that do not fit the definition of core mining), mines often implement subcontracting arrangements without consultations and, furthermore, many mines don’t supply the information as required by the agreement. Attempts by NUM to get more powers with regard to the issue of sub-contracting have not been successful.¹¹⁵

Initially the NUM did not organise the employees of subcontractors. Members saw them as competitors that were undermining their conditions of employment and job security and were opposed to organising them. However, recently there has been a change in policy and a realisation by the union that they have to organise these

¹¹³ Agreement Between the National Union of Mineworkers and the Chamber of Mines of South Africa Regarding the 1999/2000 and 2000/2001 Review of Wages and Other Conditions of Employment.

¹¹⁴ Agreement Between the National Union of Mineworkers and the Chamber of Mines of South Africa Regarding the 2003/2004 and 2004/5 Review of Wages and Other Conditions of Employment on Gold Mines.

¹¹⁵ Crush *et al* refer to a 1995 agreement between NUM and the Chamber on information sharing on sub-contracting, which they state has “never been implemented”.(1999: 1)

workers. The problem is that they are difficult to organise because of their insecure position.

It is debatable whether existing regulations provide adequate protection for non-standard employees. One could argue that the issue is not so much the rules and standards set by the regulations; it is rather the level of non-compliance with the regulations that is the major problem. In other words, enforcement of regulations is not adequate. The problem is sometimes compounded by NUM's lack of capacity at branch level. The consequences of the lack of enforcement manifest in particular amongst subcontractors.

One approach would be to ban the use of labour brokers outright. Alternatively, only labour brokers that are registered for tax purposes and in terms of labour legislation should be allowed to operate. Any company that employs a labour broker that does not comply with this regulation could be heavily fined. In addition, unions could through collective agreements establish rights to jointly decide with management about whether to sub-contract and to whom to sub-contract.

BOX 6: SUBCONTRACTING IN MINING – POLICY OPTIONS

In a report on subcontracting in the mining industry published by the Southern African Migration Project (SAMP) the following policies to address the problem of sub-contracting in the mining industry are proposed:

1. The development of a sophisticated information base on sub-contracting and that legislative intervention is probably necessary to ensure that this takes place. The information base should be supplemented by further independent research.
2. A detailed independent inquiry needs to be made into all facets of sub-contracting.
3. Contractors should be required to adhere to the same regulations and conditions of employment as those set out for mines, better wages and benefits should be provided, and unions should be permitted to organise.
4. Minimum safety and wage standards need to be established and enforced.
5. An investigation into the scope and impact of sub-contracting needs to be undertaken urgently by the Departments of Home Affairs, Labour, and Minerals and Energy. Furthermore, the Department of Labour needs to move expeditiously to bring sub-contracting into line with the Basic Conditions of Employment Act.(1999: 5-6)

Source: Crush J, T Ulicki, T Tseane and E Jansen van Vuuren. 1999. 'Undermining Labour: Migrancy and Sub-contracting in the South African Gold Mining Industry.' The Southern African Migration Project, Migration Policy Series, No.15. Idasa: Cape Town, pp. 5-6

2.2.2 Construction¹¹⁶

Overview of employment in the construction sector

The construction sector is extremely cyclical. Employment therefore fluctuates considerably, declining sharply during the slumps and then picking up again when investment in property and infrastructure is on the increase. In December 1999 employment in construction (including the civil engineering sector) was 225 339 according to the Survey of Total Employment and Earnings.¹¹⁷ By September 2002 employment had increased to 350 000 (the survey had been renamed the Survey of Employment and Earnings). Between September 2002 and June 2003 54 000 jobs were lost and total employment dropped to 296 000. Employment declined still further in September 2003 to 288 000, before picking up slightly to 289 000 by December 2003.¹¹⁸

However, the cyclical nature of employment in the industry tells only half the story about changing employment patterns. The Survey of Employment and Earnings (SEE) covers a sample of 10 183 private enterprises and public institutions in the formal non-agricultural business sector. The employment data therefore reflects formal employment trends.¹¹⁹ The Labour Force Survey (LFS), which covers a sample of 30 000 households, provides data on both formal and informal employment. In September 2002 the LFS estimated total employment in the construction sector at 570 000, with 328 000 in formal employment and 227 000 in informal employment. The formal employment figure is fairly close to that of the SEE, but the LFS shows that the sector has a very large informal employment component (40% of total employment is informal).¹²⁰

The LRS estimates for September 2003 were 626 000 employed in the construction sector, of whom 360 000 were in formal employment and 259 000 in informal employment. The LFS data now marks a significant deviation from the SEE data. While the SEE data indicates declining employment, the LFS data shows increasing formal and informal employment. Furthermore, the LFS formal employment estimate

¹¹⁶ Much of this section is based on interviews conducted in June 2004 with Wynand Stapelberg, the last secretary of the Gauteng Building Bargaining Council; Mapule Ikaneng, a researcher at the National Union of Mineworkers; Colin de Kock, executive director of the Gauteng Master Builders Association; Theo Ntsomi, general secretary of the Building Wood and Allied Workers' Union of South Africa; Mr Verschuur, secretary of the Southern and Eastern Cape Building Bargaining Council; Lindsay Madden, Arnold Williams and Darryl Whittaker, respectively the chief executive officer and agents of the Cape Building Bargaining Council; and with the human resources officer at a large construction firm and the owner of a large specialist sub-contractor.

¹¹⁷ J Theron and S Godfrey, *op cit*, p. 92.

¹¹⁸ Statistics South Africa, Survey of Employment and Earnings: March 2003. Statistical Release PO275, 23 September 2003; Statistics South Africa, Survey of Employment and Earnings: June 2003. Statistical Release PO275, 27 November 2003; Statistics South Africa, Survey of Employment and Earnings: September 2003 and December 2003. Statistical Release PO275, 25 March 2004.

¹¹⁹ Statistics South Africa, Survey of Employment and Earnings: September 2003 and December 2003. Statistical Release PO275, 25 March 2004.

¹²⁰ Statistics South Africa, Labour Force Survey: September 2002. Statistical Release PO210, 25 March 2003.

is significantly higher than the SEE figure (360 000 as opposed to 288 000).¹²¹ There could be numerous explanations for the differences between the two surveys. One possible explanation is that the LFS is capturing a considerable proportion of informal employment as formal employment. The implication of this is that the formal/informal split in the construction sector might be closer to 50/50 than the 60/40 split that the LFS data reflects.

Importantly, the LFS indicates that the informal component of the construction industry is increasing in size. In October 1997 informal employment was measured at 158 000 (31%) (by the predecessor of the LFS, the October Household Survey); in February 2001 informal employment had risen to 223 000 (38%); by September 2002 it was 227 000 (40%); and, in September 2003 it stood at 259 000 (41%). While the increase relative to formal employment appears to be flattening out in 2002-2003, it is clear that much of the new employment being created in the industry is informal.¹²²

Interviews with key people involved in the construction sector, which we discuss in more detail below, point to an undercount of informal employment on the part of the LFS. The estimates (albeit rough) of bargaining council and employers' organisation officials and trade unionists put the formal/informal split at close to 40/60. Furthermore, the interviewees confirm that there has been rapid growth in the number of informal employers and employees, and that much 'new' employment growth has been informal. Probably the main reason for the discrepancy between the LFS data and the estimates of interviewees is the criteria used for assessing formality and informality. The LFS defines informal employment as employment with an employer not registered for VAT with SARS. For the interviewees in the construction sector registration with a bargaining council is the key requirement to establish formality. Non-registration with the relevant bargaining council therefore equals informality. The discrepancy therefore suggests that a considerably number of small firms are registered for VAT but are not registered with a bargaining council. We would argue that for the purposes of this report, which is concerned primarily with labour regulation, it is the estimates based on registration or non-registration with a bargaining council that have greater relevance.

Another factor that could explain some of the discrepancy between the LFS figures and the interviewees' estimates is that the interviews focussed primarily on the building sector, whereas the survey figures are for the construction sector as a whole, i.e. including building, civil engineering and certain building materials suppliers.¹²³ It is unclear how much informal employment there is in the civil engineering sector. If informal employment is not as prevalent in the latter sector, this would explain some of the difference between data for the construction sector as a whole and the estimates for the building sector.

¹²¹ Statistics South Africa, Labour Force Survey: September 2003. Statistical Release PO210, 25 March 2004.

¹²² Statistics South Africa, October Household Survey: 1997. Statistical Release PO317, 4 November 1997; Statistics South Africa, Labour Force Survey: February 2001. Statistical Release PO210, 25 September 2001; Statistics South Africa, Labour Force Survey: September 2002. Statistical Release PO210, 25 March 2003; Statistics South Africa, Labour Force Survey: September 2002. Statistical Release PO210, 25 March 2004.

¹²³ See the Standard Industrial Classification of all Economic Activities (5th edition). 1993. Central Statistical Service: Pretoria.

The Cape Building Bargaining Council, for example, estimates that 60% of employees falling within the jurisdiction of the council are employed by non-compliant employers (i.e. employers that are not registered with the Council and do not comply with its agreements – which for the purposes of this study we consider to be informal employers). This gives a figure of about 34 200 informal employees in the sector as opposed to 22 800 formal employees. The Council estimates that non-compliance has grown over the last decade. The building industry in the Western Cape is much bigger than it was in 1996 but formal employment has declined from 29 330 in that year to 22 800 in 2003. So there has been a shift of employees from formal employment to informal employment. Furthermore, the growth in employment that must have taken place in the industry is by implication entirely informal employment. A number of other interviewees confirm (although without providing estimates) that the formal component of the industry is shrinking and the informal component growing.

The Southern and Eastern Cape Bargaining Council estimates that between 1996 and 2001 the number of registered employers declined from 1 000 to 600 and the number of registered employees from 12 000 to 6 000. However, the council estimates that the number of employees working in the industry remained the same, i.e. 12 000. So the decline in registered employees has been matched by an increase of 6 000 informal employees. So in 2001 the industry had a formal/informal split of about 50/50.

NUM confirms the estimate of the Cape Bargaining Council but extends this to the industry nationally, i.e. the national formal/informal employment split is about 40/60. The Gauteng Master Builders Association believes that employment in the construction sector in Gauteng has remained static, but there has been a 30% decrease in ‘measured’ employment (for which one can read formal employment). By implication, over the last few years there has been a 30% increase in informal employment.

Non-standard employment in the building sector

This study sought to examine the full range of externalisation and casualisation arrangements. In the construction sector three such arrangements are found (other forms of externalisation or casualisation are non-existent or very limited).¹²⁴ First, there is what can be termed traditional sub-contracting. Such sub-contracting has always been an important part of the industry, particularly in the electrical, plumbing and roofing operations. Traditional sub-contracting is characterised by specialist skills and the supply of the materials by the sub-contractor. By all accounts there has been no growth in traditional sub-contracting. It was suggested by one interviewee that the main barrier to growth of traditional sub-contracting was the reluctance to take on the

¹²⁴ There are very few part-time employees in the industry, but ‘casuals’ are present (although not in the same numbers as a decade ago). Interviewees were not able to estimate the number of ‘casuals’ but indicated that the employment of casuals’ is primarily by LOSCs and the so-called bakkie builders (usually these two categories are one and the same thing). So LOSCs appear to have overtaken and swallowed up the ‘casual’ category. After 1995 there was a growth in independent contractors (i.e. the sorts of schemes associated with COFESA). However, the introduction of section 200A in the LRA appears to have stopped this practice. Labour broking does not appear to be prevalent in the industry, but it seems that labour brokers are more evident than they were a few years ago.

risk of purchasing materials. In addition, few sub-contractors have the capacity to borrow money to buy materials.

Second, there is labour only sub-contracting (LOSC). This form of sub-contracting differs from traditional sub-contracting in that it is a much newer phenomenon and involves neither specialist skills nor the supply of materials by the sub-contractor. Instead, as its name suggests, LOSC comprises the supply of labour to perform certain tasks for a contractor (primarily in the ‘wet trades’ such as brick-laying and plastering but also in other areas). LOSC appears to have started emerging about 15 years ago and since then has grown very rapidly. It is now by far the most dominant form of non-standard employment in the construction sector: interviewees described the growth as “huge” and “massive”. Importantly, very few LOSCs register with bargaining councils or comply with bargaining councils’ agreements or with other labour legislation. A number of interviewees saw LOSCs and non-compliant employers in the industry as one and the same thing (and used the terms interchangeably). The growth in informal employment in the construction sector is therefore primarily the result of LOSCs.

LOSCs vary from an employer (usually an artisan) with three or four employees to operations with 20-30 employees. However, the fluid nature of working arrangements within LOSCs often makes it difficult to determine whether there is in fact an employer and employees. Some LOSCs operate more as teams, without a particular person clearly identifiable as the employer. Other LOSCs have formalised this arrangement somewhat by establishing themselves as CCs, with all the workers in the LOSC being members of the CC.

New LOSCs are being established all the time, either by being outsourced from existing contractors or by being set up by emergent contractors (see further below). However, some LOSCs have been around for some time and are now established and profitable. Importantly, becoming more profitable generally does not result in the LOSC complying with labour legislation or registering with the relevant bargaining council.

There are two sources for the LOSC phenomenon (although there is also considerable overlap between the two). First, larger firms are encouraging artisans or team leaders to take a small team and set up as a LOSC, thereafter contracting back with the firm (as well as others). Of course, if encouragement does not work the same result can be achieved by retrenching workers, who then set themselves up as LOSCs.¹²⁵ The prevalence of this source for the growth of LOSCs is confirmed by the extent to which large firms in the industry have downsized. One interviewee alleged that three very large contractors had downsized to such an extent over the last decade that they were now at most medium-sized firms: the one has gone from employing about 2 000 workers to employing just on 100 workers; another went from 800 employees to just over 100; and the third now employs about 250 employees (it is not clear what the employment figure was in 1996). But, the firms to all intents and purposes remain

¹²⁵ ‘Encouragement’ rather than retrenchment is clearly the preferable option because it has the potential of avoiding severance pay.

very large contractors because they continue to ‘employ’ large number of workers via LOSC arrangements.¹²⁶

Second, there appears to be a lot of overlap between LOSCs and so-called emergent contractors, i.e. small black-owned building firms. The growth in the number of emergent contractors has been encouraged by preferential tendering arrangements in terms of the policies of black economic empowerment and small business development. However, the tender requirements generally do not stipulate registration with a bargaining council (or compliance with labour legislation). Hence emergent contractors as a rule do not register with bargaining councils or comply with labour legislation. The growth in the number of these firms therefore feeds directly into the growth of informal employment in the construction sector. To a large extent this is the fault of government. It needs to ensure that the Department of Public Works and other government departments include registration with a bargaining council in their tendering requirements. Failing to do this is leading directly to increasing informal employment.

The notion of empowerment is not limited only to government. One interviewee argued that black economic empowerment was an important consideration motivating its policy of encouraging its artisans to set up as LOSCs. NUM and the Building Wood and Allied Workers’ Union of South Africa (BWAWUSA) rejected this argument. They believe employers are cynically using the black economic empowerment argument as a way of shirking their responsibilities (see further below).

The third major type of non-standard employment in the construction sector is the introduction of fixed-term contracts. The research indicates that it is mainly being done by larger contractors. The duration of the fixed-term contracts is either a set time or is project-related. Contractors are therefore able to match their staffing with their workload by employing a portion of their workers only for periods during which they are sure there is work.

It is not clear how widespread this practice is. The Cape Building Bargaining Council was aware of the practice of using fixed-term contracts to expand staffing requirements for large projects in the Western Cape, but did not see this as an extensive practice. A similar perspective was given by the BWAWUSA. The Council believe that it is unlikely to grow because its main agreement allows considerable flexibility to employers at the end of contracts (i.e. an employer can lay off an employee on very short notice for up to 20 days without pay). Another interviewee argued that the ‘reasonable expectation’ of continued employment created by the roll-over of fixed-term contracts is what limits this practice (i.e. employers prefer to avoid this risk by using LOSCs).¹²⁷ What is important, however, is that even with the flexibility provided by the main agreement and the danger of ‘reasonable expectation’ there is still a resort by contractors to fixed-term contracts. Further research needs to be done on this issue to establish how prevalent such contracts are in the industry.

¹²⁶ Another factor in the downsizing of large contractors in the Western Cape is the centralisation of head office functions in Johannesburg. It appears that a number of firms have shifted certain operations to the head office in Johannesburg, with a resulting decrease in staff employed in the Western Cape.

¹²⁷ Section 186(b) of the LRA.

It is not clear whether the practice of fixed-term contracts is a transition to LOSC arrangements. At a large sub-contractor the ultimate aim of management is to have a total workforce of 80. This suggests that the fixed-term contracts are all destined to be phased out over time as more and more employees are encouraged to become LOSCs. This did not appear to be the plan at a large contractor. It seemed to have achieved the balance that it was seeking between fixed-term employees and LOSCs. At this firm fixed-term contracts therefore appeared to be a permanent fixture of its employment arrangements.

In practice the three forms of externalisation/casualisation can be found in one firm or on one building site. For example, a large, established specialist sub-contractor had at the time of the interview about 550 people working for it. Two hundred of these were not employees but were performing work as LOSCs. Of the remaining 350 employees, about 250 were on fixed-term contracts. This left a core permanent workforce of only 100. Another large contractor has to a significant extent transformed itself from a construction company to what it terms a 'project manager'. In doing so it has reduced its hourly-paid staff from 1 000 workers in about 1996 to its current level of 370. Most of the work it does is now done by sub-contractors and LOSCs, while its own hourly-paid workforce is on fixed-term contracts. The permanent staff of the firm comprises mainly professionals and supervisors, together with a few artisans and labourers.

One sees a similar breakdown on a regional level. The Southern and Eastern Cape Bargaining Council estimates that 6 000 of the 12 000 employees working in the industry are not registered with the bargaining council, mainly because they are employed in LOSC arrangements. Of the 6 000 registered employees, it estimates that about 60% are employed on fixed-term contracts (mainly the unskilled workers).

Of course, almost all employees of LOSCs are temporary. They are employed only when there is a project or some sort of work. However, the arrangements are so fluid in the LOSC sector that one cannot describe such workers as being on fixed-term contracts. They are at best temporary employees and at worst casuals employed on a daily basis. Finally, almost all LOSC are not registered with the bargaining council and do not comply with the councils' agreements or with labour legislation.

LOSC therefore provides a very clear example of externalisation, casualisation and informalisation working in tandem, with externalisation being the main driving force and informalisation being the outcome. Employees are being externalised via contractors encouraging LOSC arrangements. Once externalised the workers are 'employed' in loose arrangements that are casual or temporary in nature, i.e. externalisation leads to casualisation. At the same time, the externalisation results in non-compliance by the LOSC, which means that the workers become part of the growing informal component of the construction sector.

What are the reasons for the LOSC phenomenon and other non-standard employment arrangements?

The following are the major forces driving the LOSC phenomenon as well as other non-standard employment arrangements. It should be emphasised that most of the forces are inter-related:

- The cyclical, project-based nature of the building industry. This makes it difficult for employers to retain all their employees on a continuous basis.
- A long slump in the industry starting in about the mid-1990s, resulting from both weak private sector investment and lower than expected public investment in infrastructure development (although the industry has become much more buoyant in the last six months). The depth of the slump varies somewhat from region to region. The result has been intense competition for a limited number of jobs and a contraction of demand for labour.¹²⁸
- Labour legislation is generally seen as too onerous, but the retrenchment provisions are seen by building employers as particularly problematic, with severance pay a major bone of contention. This clearly relates to the cyclical, project-based nature of the industry. The retrenchment provisions and severance pay were directly linked to the growth in LOSC by a number of interviewees. LOSC is therefore seen as the way around these provisions.
- Bargaining council agreements are seen as problematic because of the minimum wage rates as well as the added cost of benefit fund contributions. Allied with resistance to compliance with bargaining council agreements is the difficulty of policing the building industry. The short-term itinerant nature of work in the industry makes it very difficult for bargaining councils to effectively police their agreements.
- The state procurement system has facilitated LOSC arrangements. According to one interviewee the tender requirements stipulate that work to the value of 30% of the contract price must be given out to small black sub-contractors. However there is no requirement that such sub-contractors must comply with the relevant labour legislation or bargaining council agreements. So the procurement system encourages the use of sub-contractors without encouraging compliance. Furthermore, the fact that the tendering system favours the lowest bidder places downward pressure on wage rates, etc. This is further encouragement to avoid compliance with bargaining council agreements.

There is not much that policy can do about the cyclical and project-based nature of the industry (although the timing of public investment could help to smooth out the fluctuations in demand). Furthermore, policing of legislative compliance will always be a problem in the building industry given its nature. Clearly the state procurement policy can be changed to require compliance and registration on the part of sub-contractors that are awarded tenders. This should have an impact on informalisation. However, the question remains whether legislative amendments and the watering down of bargaining council agreements will have the effect of stopping the LOSC trend. The example of the Gauteng Building Bargaining Council does not suggest that this will be the case. Following the collapse of the council the LOSC trend has continued apace. In fact, an interviewee indicated that LOSC had probably increased

¹²⁸ F Horwitz, 2000, Report of the commission investigating the effects of sub-contracting on collective bargaining in the building industry in the Western Cape, p. 1.

since the collapse of the council. This suggests that the council could not have been a particularly important factor motivating for LOSC arrangements.

The consequences of non-standard employment for regulation

In the section that follows we look at the impact of non-standard employment arrangements, primarily LOSC, on minimum conditions of employment, collective bargaining, health and safety, employment equity, skills development, and social security and social protection.

Minimum conditions of employment

LOSC has had a huge impact on minimum conditions of employment. In general LOSC do not comply with labour legislation or bargaining council agreements. Wage rates are therefore set unilaterally and there is no limit to hours of work. There is, furthermore, no holiday pay, sick pay, notice pay, etc. Generally interviewees could give no details regarding the above. However, the Southern and Eastern Cape Bargaining Council indicated that the standard wage rate in the LOSC sector was R50 per day. This compares to a bargaining council wage rate of about R80 per day plus about R40 benefit fund contributions.

Besides the direct impact of LOSC on the conditions of employment of workers engaged in such arrangements, the growth of LOSC has placed increased pressure on the formal part of the industry to lower standards. Given that such firms can only lower conditions to the minima prescribed in bargaining council agreements, the alternative is to retrench and then contract back workers through LOSC arrangements. This fuels the LOSC trend and places increasing numbers of workers in an unregulated environment.

The solution to this trend offered by the Cape Building Bargaining Council is to hold the main contractor liable for any non-compliance on the part of sub-contractors. This has the potential to at least make contractors pressure sub-contractors to register with the bargaining council and comply with its agreements. It also makes policing the agreements somewhat easier. It is important to note that both the large sub-contractor and large contractor that were interviewed stated that the policy of their firms is to only use registered sub-contractors.¹²⁹ However, this mechanism is not foolproof. First, it does not appear to have halted the (non-compliant) LOSC trend. Second, it does not guarantee full compliance. For example, a LOSC can register with the council but only declares three employees whereas there are nine employees. Six employees are therefore effectively unregulated.

Collective bargaining

Besides placing pressure on wages and other conditions of employment, non-standard employment has had a major impact on collective bargaining institutions in the

¹²⁹ The large contractor has even employed two sub-contractor co-ordinators, who must check that all registrations are in place for every contract with every sub-contractor, i.e. that the LOSC or sub-contractor is registered with Federated Employers Mutual (for workmen's compensation), with the bargaining council and with SARS.

construction sector. In recent years the Pietermaritzburg, Durban, Kroonstad and Gauteng bargaining councils have collapsed, while the Bloemfontein, East London, and Southern and Eastern Cape councils are on very shaky ground.¹³⁰ The Cape council has gone through a period of instability but appears to be on the road to recovery. The Kimberly council also appears to be doing relatively well.

Underlying the reasons for the collapse of the councils is the level of non-compliance by small building firms, particularly LOSCs, as well as the fact that this level has been rising. This has undermined employer and trade union representivity, and it has placed pressure on registered employers to leave the council system. Employers also argue that trade union intransigence with regard to attempts to develop more flexible agreements contributed to the collapse of some councils.

The situation on the Cape Building Bargaining Council appears to have stabilised after going through a rocky few years. While non-compliance is still a major threat, the council has embarked on a major drive to turn around the situation (see further below). Both parties on the council have a strong commitment to this initiative. The reasons for the trade unions' support are self-evident. Employers, however, are also strongly committed because a better regulated industry will limit the degree to which they are being undercut by non-compliant building firms. But employers' support is contingent on the council significantly improving enforcement of the agreement. So there is a bottom line: if the council cannot turn around the situation then there is no future for it.

Interestingly, the collapse of bargaining councils appears to have implications for compliance in regions with councils. A large sub-contractor in the Western Cape alleges that recently a number of Johannesburg-based competitors have got jobs in the Cape Town area. The firms have apparently tendered for jobs on the basis of Johannesburg rates (i.e. non-bargaining council rates) and have then sought not to comply with the local bargaining council agreement, with the result that they have undercut Cape Town-based firms.

¹³⁰ The Southern and Eastern Cape Building Bargaining Council provides an interesting case study of the difficulties facing bargaining councils in the construction sector. The main agreement of the council lapsed in 2001 because the trade unions were not ready to re-negotiate it. Employers then did their best to avoid negotiations., before applying to have the council wound up, arguing inter alia that the registered contractors were being eroded by LOSCs and emerging contractors, so it was no longer viable for them to participate in the council. Employers also argued that the council's agreement was not being enforced properly (this is denied by the secretary of the council who argues that 80% of employers were registered and complying at the time the agreement lapsed). However, the Labour Court could not find sufficient reason to wind up the council (partly because an informal bargaining forum had been established thereby continuing the bargaining relationship). The bargaining council therefore still exists but does not have a main agreement and has no powers of enforcement. It continues to update the wage schedules (but compliance with the revised wage rates is voluntary) as well as administer the social security funds and perform dispute resolution functions (it is accredited for conciliations and arbitrations). The Labour Court, however, did not order the employers to enter negotiations with the unions on the council. So it is unclear whether the council will ever get a new main agreement.

Health and safety

The building industry does not have a good health and safety record. One interviewee alleged that it is second only to the mining industry in terms of accidents and injuries. LOSC has not improved the situation. Few LOSC are familiar with their health and safety obligations and most have little interest in complying with legislative requirements. However, health and safety is one area in which there appears to be a concerted attempt by employers to improve matters. The fact that the Construction Regulations promulgated in terms of OHS Act holds the client responsible for compliance with the Act probably plays a large part in the motivation for improving the health and safety situation.¹³¹

Interviewees stated that the Master Builders Associations in Gauteng, the Western Cape and the Eastern Cape had done a lot to try to improve health and safety standards. For example, the Gauteng MBA had assisted with health and safety training. In the Western Cape the MBA has launched a health and safety induction programme. Many firms have sent all their employees on the course (every person who completes the course is issued with an ID card that is valid for one year). Firms also appear to be putting a lot of pressure on sub-contractors to meet the health and safety requirements. According to interviewees the initiatives are paying off: there has been a sharp fall-off in accidents and injuries.

Employment equity

Although unions in the building industry argue that there are still too few previously disadvantaged people in management positions, the fault for this does not appear to lie with non-standard employment. Probably the main problem is that many building firms are family-owned, which has placed limits on employment equity. The relationship between equity and non-standard employment lies instead with empowerment trends in the industry, particularly the emergent contractor phenomenon.

As noted above, the LOSC phenomenon overlaps with the encouragement of emergent contractors. Both draw on the black economic empowerment concept as justification. BAWUSA strongly disagree with the argument put forward by contractors that LOSC arrangements are part of an empowerment agenda. The union argues that LOSC is being driven primarily by the desire of contractors to avoid their responsibilities as employers. If it was a genuine empowerment initiative, the union argues, contractors should also be providing support to the newly-established firms. This is generally not the case.¹³²

Besides LOSC, there appear to be a variety of types of black economic empowerment in the building industry. Many firms appear to favour doing projects on a joint venture basis with black-owned firms. Interviewees in Gauteng stated that fronting by black

¹³¹ Clause 4(1)(a) of the Construction Regulations, Occupational Health and Safety Act 85 of 1993.

¹³² However, one interviewee stated that his firm was thinking of setting up a small administrative unit to assist the LOSCs with which it works with wages, deductions, etc. In addition, the firm also sold off bakkies to LOSCs on relatively easy repayment terms.

firms for white-owned firms was a major issue in the industry. This is clearly an area that requires further research.

Skills development

Most interviewees allege a big fall-off in skills in the industry, particularly artisanal skills (i.e. bricklaying and carpentry). Firms are not employing people and training them in a trade. So there are no new artisans coming in to replace those that are retiring or leaving the industry. Instead, artisans are being replaced by semi-skilled workers, whose training comprises one or two short courses. This is partly the fault of the big contractors, but sub-contractors and LOSC are also to blame because they are not interested in training employees. This has resulted in a very big drop in quality and productivity.¹³³ Whereas skilled bricklayers were able to lay 900 bricks per day, in many cases bricklayers now will lay only 300 bricks a day.

The Construction SETA (CETA) appears to have done little to improve the situation. A number of interviewees were extremely critical of the CETA.¹³⁴ However other interviewees were more optimistic, arguing that after a slow start the CETA was now starting to make progress. Another interviewee argued that the CETA was very active, but it was employers that were not utilising the training opportunities. Importantly, the current upturn in the industry is increasing the demand for skilled workers and making employers more aware of the need to do training. However, it is generally agreed that no training takes place in the LOSC sector and that the CETA has no impact on LOSCs.

One interviewee stated that there were five or six learnerships in place in the industry, but did not know how many learners were currently in training. We were unable to obtain clarity from the CETA. We could not secure an interview with anybody at the CETA after numerous attempts, and the CETA's website was also not accessible.

Social security and social protection

The LOSC phenomenon has had a huge impact on social security and social protection. Traditionally bargaining councils have provided the social security funds in the building industry. Non-compliance with bargaining council agreements means that workers do not contribute or benefit from such funds (indeed it is such contributions that are often cited as a motivation for not registering with bargaining councils). Huge numbers of workers in the industry are therefore not covered by any bargaining council social security scheme or by COIDA or UIF.

The collapse of councils has also had a big impact on social security coverage. It was alleged by one interviewee that the Gauteng bargaining council had 100 000 members

¹³³ Not all interviewees agreed that LOSCs had resulted in a decline in productivity and quality. One interviewee argued that LOSC had seen productivity improve sharply in the short-term, whereas another stated that quality was being maintained because the firm forced sub-contractors to comply with its quality standards.

¹³⁴ One factor behind the criticism is that employers probably compare the CETA unfavourably with the BIFSA colleges that used to deliver training in the industry. The BIFSA colleges were reportedly very good, although it was acknowledged by one interviewee that they had been under-utilised.

in its pension fund at the time of its collapse. The pension fund survived the collapse and continues to exist in the industry, but membership has now dropped to 7 000. Importantly, no LOSCs are joining the fund. The instability in the Southern and Eastern Cape bargaining council has had a similar effect: there has been a drop off of about 40% in membership of the pension fund.

Regulatory responses to non-standard employment in the construction sector

Interviewees had a number of ideas as to how the building industry can be better regulated, particularly with regard to the LOSC phenomenon:

- The problem of severance pay can be ameliorated by a ‘pay as you go’ system, i.e. monthly contributions to a fund administered by the relevant bargaining council. This will lessen the impact of severance pay at the time of the retrenchments (which is when most firms can least afford such pay).¹³⁵
- LOSC should be prohibited, i.e. only specialist sub-contracting should be permitted.
- Government needs to be financially supportive of bargaining councils in order to give them more muscle. In return bargaining councils can police health and safety, which will take some of the pressure off the Department of Labour. Alternatively, the National Association of Bargaining Councils needs state funding in order to make it a more effective body.
- Bargaining council agreements need to become more flexible and cover basic minima and benefits.
- Bargaining councils need to improve representation of small firms. Section 30(1)(b) of the LRA is ineffectual and often stands in stark contrast to the stringent admission criteria of councils. It was suggested that all small firms that are registered should be able to nominate a representative to the council (without having to join an employers association). This would bring their interests directly to the negotiating table.
- Bargaining councils must offer services and benefits to small builders. In order to do so it is necessary to define small businesses in bargaining council agreements.
- ‘Casual’ labour should be defined in bargaining council agreements and regulated.
- NUM has plans to form a national bargaining council for the construction sector as a whole, i.e. building and civil engineering. They are seeking to establish the national council first in the civil engineering sector and then extend it across to the building sector. We believe that this is an extremely

¹³⁵ The Gauteng bargaining council had something similar, the Stabilisation Fund. It was funded by contributions by employers and employees. Employees that had been laid off could draw on the fund for a period of up to six weeks.

ambitious project, particularly given the low levels of union representation in the sector and the existing instability in bargaining councils in construction. It does not, furthermore, in itself offer any solution to the level of non-compliance in the sector.

- A sectoral determination could be promulgated for the industry. However, it was acknowledged that this would not solve the problem of enforcement.
- The CETA needs to play a role: training must be delivered to the informal part of the industry but there must be compliance in order to access training. So the CETA should work in a partnership with the bargaining councils.

However, the most concerted and considered attempt at turning the LOSC tide is being undertaken by the Cape Building Bargaining Council. The strategies being adopted aim at a 30% increase in compliance by the end of 2004. In the section that follows we shall outline the council's strategies.

First, the council's agreement makes the main contractor jointly and severally liable for non-compliance on the part of its sub-contractors. This puts pressure on contractors (which are too big to avoid compliance themselves) to become part of the enforcement mechanism. Interestingly, this logic has been followed more recently by SARS. SARS has been concerned about revenue that it was not collecting from sub-contractors and LOSCs in the building industry. Recently it has issued a directive that if the sub-contractor or LOSC is not registered with SARS it is the responsibility of the main contractor to deduct 10% of the contract price and pay this over to SARS in respect of PAYE. Again, in the face of trying to get hundreds of small sub-contractors and LOSCs to register and deduct PAYE, SARS has chosen to rather target contractors and place the obligation with them.

Second, the council has instilled new urgency into its policing functions. Inspections are now proactive (previously the council was inspecting in response to complaints only) and plans-driven. The latter means that the council gets all the building plans each month from the various municipalities falling within its jurisdiction. A sample of the plans is selected and inspectors go out and do inspections at those building sites. They also have media-generated inspections. In this case the council scans the media for announcements of new projects and buildings. They go out and conduct inspections at these sites. A third strategy, termed 'finders and minders inspections', is to give any council staff member a R50 reward for reporting a building site that is subsequently found to have unregistered contractors or sub-contractors on it.

The third, and probably the most innovative strategy, is being promoted under the slogan, 'Breaking the Chain of Poverty'. This strategy involves the council going to the source of building work, both on the tender side and the financing side, in order to get compliance built into the system at that point. On the one hand, the council has targeted the Public Works Department, the Provincial Administration of the Western Cape, the City of Cape Town, the Construction Industry Development Council, and the National Home Builders Regulatory Council. These are the institutions that generate most building work. The aim of the strategy is to get these institutions to work only with firms that are registered with the bargaining council. On the other

hand, the council are also going through the same process with the major banks (via the Council of SA Bankers) and other loan institutions.

Key to the strategy is a letter from the Western Cape Regional Secretary of COSATU that asks for greater compliance in the industry and better policing on the part of the council. The letter is used by the council to effectively endorse the 'Breaking the Chain of Poverty' campaign. The letter is used when institutions express reluctance or opposition to enforcing compliance as requested by the council. An example was the Sakhasonke Emerging Contractor Development Programme (SECDP), which is a joint programme of the Public Works Department and the Ministry of Finance. The council had established that about 60% of the builders involved in the programme were unregistered. However, when it was approached, the SECDP was reluctant to agree to the request of the council. It cited the need to create jobs and assist emerging contractors as the reason. But when the letter from COSATU was produced there was a sea change and it signed up.

All the strategies fall under a new approach being adopted by the council to compliance. This is the 'positive marketing and educational approach'. This simply aims to prioritise voluntary compliance. The council is therefore making every effort to become user-friendly as well as to offer benefits to registered firms. Firms are welcomed into the council and the council goes out of its way to deal positively with them. The council also goes out and engages with firms. The council is, furthermore, obliged in terms of its agreement to offer labour relations courses to employers (the aim being to prevent disputes through education). It also does entrepreneurial training and holds monthly seminars on topical issues.

The underlying logic for the strategies is the realisation that the council cannot enforce compliance on a 'police all the building sites' basis. There are 15 inspectors to police about 57 000 employees at numerous building sites across a wide area. It was realised that this was an impossible task. The strategies were generated by creative thinking to come up with alternatives to policing.

It is not yet clear what the effect of the strategies has been. It has only been about six months since the council embarked on these initiatives and some of them are still in the process of being implemented. The LOSC phenomenon continues to grow and poses a massive challenge to the council (as well as a threat). However, the monthly inspection reports of the council show that it is starting to make inroads into the non-compliant sector.

2.2.3 Manufacturing (focussing on household appliances)

Basic information about the manufacturing and household appliance sectors

Like the retail sector (see discussion below), South Africa's manufacturing industry includes a diverse range of activities. In 2003, manufacturing accounted for 62% of South Africa's exports, mining for 33% and agriculture for just under 5%.¹³⁶

¹³⁶ Source: Department of Trade and Industry trade data, <http://www.thedti.gov.za/econdb/raportt/rapstruc.html>

However, when one disaggregates manufacturing, what is termed ‘raw products’ and ‘semi-manufactured goods’ still account for two thirds of exports. Beneficiated metal products, such as steel, account for a major part of this.¹³⁷ The country also has a negative manufacturing trade balance of 49%, which is offset by a positive mining trade balance of 57%.¹³⁸ The high profile case against Iscor’s policy of import parity pricing has highlighted the fact South Africa has not succeeded in bolstering downstream industries that could potentially benefit from the country’s competitive steel and petro-chemical industries. Upstream industries (beneficiation) tend to be capital intensive, while downstream industries (manufacturing) are often more labour intensive.

Following the programme of import tariff liberalisation since 1994, most sectors but especially labour intensive sectors have shed a significant number of jobs. Employment in the manufacturing industry as a whole has therefore declined since the late 1990s. In December 1998, the manufacturing industry as a whole employed 1 327 823 employees. Of these, 58 238 were classified as ‘part-time’.¹³⁹ In December 2003, overall employment in the manufacturing industry had declined to 1 253 000 employees.¹⁴⁰ Again the findings of the Labour Force Survey present a different picture. In February 2002, the manufacturing industry employed 1 409 000 in the formal sector, and a further 189 000 in the informal sector.¹⁴¹

While referring to manufacturing in general, the specific focus in this section is on the household appliance manufacturing sector. An important reason for this is the fact this sector has seen an increase in fixed-term contract employment. However, we shall also refer to general patterns of non-standard employment in the broader steel and engineering industry – particularly the phenomenon of labour broking.

The household appliances manufacturing sector forms part of the engineering industry. South Africa manufactures all the major kinds of kitchen durable appliances locally. Following the liquidation of two regional players (Kelvinator in Alrode, Johannesburg, and Masterfridge in Manzini, Swaziland), only two major manufacturers located in South Africa are left in the game. Company A manufactures refrigerators, freezers, stoves, washing machines and tumble dryers locally. The company also imports some of its branded products – its gas cookers are imported from Brazil, and some of its washing machines are imported from Korea. Company B manufactures only refrigerators and freezers locally. The rest of its products are imported.

¹³⁷ Source: Department of Trade and Industry trade data, <http://www.thedti.gov.za/econdb/raportt/rapstrucben.html>

¹³⁸ Source: Department of Trade and Industry trade data, <http://www.thedti.gov.za/econdb/raportt/rapstruc.html>

¹³⁹ Statistics South Africa. Discussion Paper 2: Comparative Labour Statistics, Survey of Employment and Earnings in Selected Industries, March 2001.

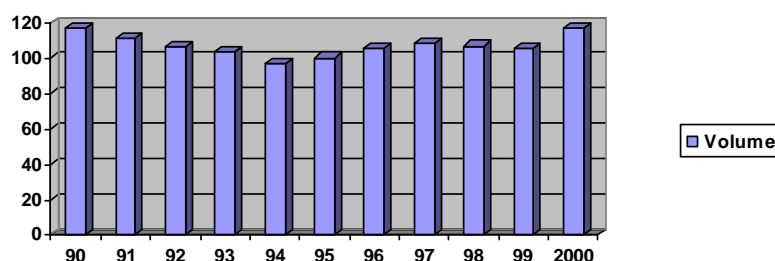
¹⁴⁰ Statistics South Africa, Survey of Employment and Earnings, September 2003 and December 2003, Statistical Release P0275.

¹⁴¹ Department of Labour. 2003. Recent Employment Data from the Labour Force Survey. Mimeo.

In Swaziland, a new company has started manufacturing refrigerators at the premises of the liquidated Masterfridge, and in Zimbabwe, three factories manufacture kitchen durable appliances – two refrigerator manufacturers operate from Harare, and a company in Bulawayo manufactures stoves. It is important to include these companies in an analysis of non-standard employment in this industry, since this trend is not peculiar to South Africa.

Figure 3 expresses output in the industry in South Africa as an index of 100, taking the average production levels of 1995 as baseline. This implies that manufacturing activities have been concentrated in fewer factories with higher output.

Figure 3: Index for Physical Volume of Household Appliances Manufactured, expressed as value in relation to 1995=100



This process of rationalisation in South Africa follows a broader trend in the industry globally. Increasingly firms move to rationalise production facilities and to increase volume at their remaining facilities. Multinational manufacturers were able to do this because of a general reduction in import tariffs globally. Between 1990 and 1997, world trade in kitchen durable appliances accelerated by 13% per annum, amounting to US\$23 136 million in 1997.¹⁴² Roughly half of the global market share (measured in volume of sales) is now held by eleven firms. Most of the manufacturers in Southern Africa – with the exception of one firm – are not major global players. Only one South African firm features when one breaks down sales by regions of the world.

An important characteristic of the global process of industrial restructuring in the kitchen durable appliance industry is the extent to which production is concentrated in mega-factories – with an emphasis on volume. In some countries, such as the UK, Australia and Taiwan¹⁴³, the industry is waning, but often the very same companies that are withdrawing from these countries, are boosting capacity elsewhere –

¹⁴² Industrial Development Corporation (IDC), 2000. *The South African Downstream Carbon Steel Industry*. Sandton: IDC, p. 35.

¹⁴³ Beynon, H., Cam, S., Fairbrother, P. & Nichols, T. 2003. 'The Rise and Transformation of the UK Domestic Appliances Industry.' Paper presented at the Conference on *New Management Strategies and Employment Relations* hosted by the School of Social Sciences, Cardiff University, 15-16 September 2003; Chou, W.G. 2003. 'The Disappearance of the "Golden Tale": Employment Relations in a Japanese Joint Venture Producing White Goods in the Global Economy of Taiwan.' Paper presented at the Conference on *New Management Strategies and Employment Relations* hosted by the School of Social Sciences, Cardiff University, 15-16 September 2003; Lambert, R., Gillan, M. & Fitzgerald, S. 2004 [forthcoming]. 'Electrolux in Australia: Deregulation, Industry Restructuring and the Dynamics of Bargaining.' *Australian Journal of Industrial Relations*.

especially in places like Turkey, China and Korea.¹⁴⁴ Often the function of quality control is integrated into the process by techniques such as Six Sigma, and the burden of quality management is partially passed on to subcontractors. When one considers that the output of one factory in Korea is 2.5 million fridges a year, the cumulative output of three factories in South Africa – 350 000 a year – seems negligible.

Like all other manufacturing sectors of the South African economy, import tariffs in the kitchen durable appliance industry have been lowered. According to the Industrial Development Corporation (IDC), the weighted import tariff for kitchen durable appliances was at 7% in 1994. They projected this to decrease to 6% in 2004.¹⁴⁵ Import duties varied from 0% to 25%, with refrigerators and freezers being most protected; in the year 2000 the average import duty on refrigerators and freezers was 19.82%. According to the IDC, the import penetration rate in the same year for the kitchen durable appliance industry was 27%. While the price of imported products increased at an annual rate of 9.7%, mainly due to the depreciation of the Rand, imports have increased at a rate of 20% per annum since the early 1990s.¹⁴⁶ This year's reduction of the 25% import tariff on refrigerators and freezers to a zero rate for products imported from the European Union will lead to additional competitive pressure for the local industry.¹⁴⁷

Further strain is put on the industry by the way in which manufacturing links upstream into the South African economy. The kitchen durable appliance manufacturing industry, for instance, links upstream to the steel, plastics, and electronic industries. One has to consider why, in the context of a mineral rich economy, downstream manufacturers were unable to build more viable industries on inputs from mining and beneficiated metal products. As pointed out earlier, the policy of import parity pricing by Iscor has a major impact on the competitiveness of the industry. In the beginning of 2003, in order to keep up with the cost of imported steel, Iscor increased the cost of steel provided to the industry by 30%.¹⁴⁸ This increase in input cost is especially harsh when one considers that steel products account for 32% of inputs for household refrigerators and freezers, 29% of inputs for household laundry equipment, and 19% of the inputs for household cooking equipment. Between 1991 and 1998, the kitchen durable appliance industry consumed 105 267 tonnes of steel on average per annum. Its share of total domestic primary steel sales is 3%.¹⁴⁹

¹⁴⁴ Feng, T. & Zhao, W. 2003. 'Research on Transforming of Labour Relations of White Goods Industry in China.' Paper presented at the Conference on *New Management Strategies and Employment Relations* hosted by the School of Social Sciences, Cardiff University, 15-16 September 2003; Sugur, N. 2003. 'White Goods Industry in Turkey.' Paper presented at the Conference on *New Management Strategies and Employment Relations* hosted by the School of Social Sciences, Cardiff University, 15-16 September 2003.

¹⁴⁵ Industrial Development Corporation (IDC), 2000. *The South African Downstream Carbon Steel Industry*. Sandton: IDC, p. 35.

¹⁴⁶ *Ibid.*

¹⁴⁷ This results from the free trade agreement between South Africa and the European Union.

¹⁴⁸ Interviews with Managing Directors of two South African firms.

¹⁴⁹ IDC, 2000, pp. 34-35

With the lowering of import tariffs, the kitchen durable appliance industry was unable to re-orientate itself to become a significant export industry. Instead, imports increased at a rapid pace. Traditionally, South Africa imported kitchen durable appliances mainly from Germany, Italy and the USA.¹⁵⁰ However, recent evidence shows that imports from countries such as Korea and China have also increased dramatically. The importing of refrigerators and freezers from Korea increased from a value of R29 433 000 in 1998 to R90 172 000 in 2000. The value of washing machines imported from Korea increased from R49 278 000 in 1998 to R96 877 000 in 2000. Imports from China have also grown, although not as rapidly as those from Korea. In 1998, China exported washing machines to the value of R10 796 000. In 2000, this increased to R19 123 000.¹⁵¹

Whilst export volumes of kitchen durable appliances increased by 30% per annum during the 1990s, only 6.4% of kitchen durable appliances manufactured in South Africa were exported in 1998. These exports were mainly destined for Zimbabwe and Mozambique.¹⁵²

Hence, during the 1990s, the importation of kitchen durable appliances exceeded the exports by far (see Figures 4, 5 and 6).

Figure 4: Imports and Exports in R000 for Washing Machines

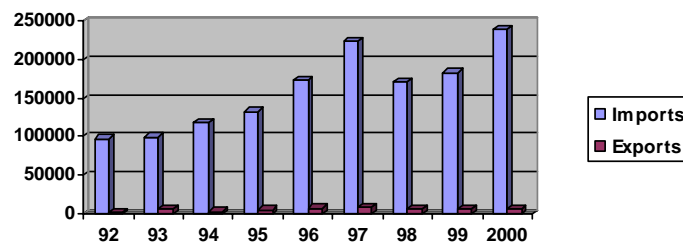
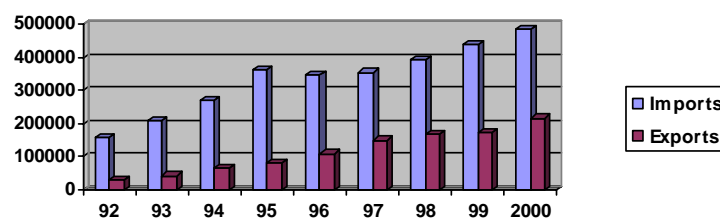


Figure 5: Imports and Exports in R000 for Refrigerators, Freezers, etc.

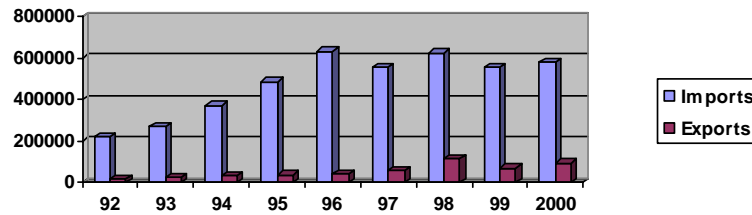


¹⁵⁰ *Ibid.*

¹⁵¹ Department of Trade and Industry online database of imports and exports.

¹⁵² *Ibid.*

Figure 6: Imports and Exports in R000 for Dish Washers, etc.



Hence, the household appliance manufacturing industry has been subject to significant increase in imported goods. Also, firms have not been able to penetrate export markets significantly. It is a good example of a segment of the manufacturing industry that is under pressure following the opening up of South African markets.

The nature of non-standard employment in the sector

In the steel and engineering sectors there has been extensive externalisation since 1995. Most companies have outsourced operations that are not regarded as core. Apart from operations that lend themselves to outsourcing, such as security, these have included machining and tooling operations. In one instance the finishing and paint shop was transferred to employees, on the understanding that the union play a role in ensuring the success of the business. There has also been an increase in subcontracting. The term 'subcontracting', it seems, tends to be applied to specialist services such as construction and electrical services. There has also been increased use of labour brokers and temporary employment agencies.¹⁵³

Labour brokers have traditionally supplied skilled workers, whose rate per hour is significantly higher than the Bargaining Council agreement provides (R40 as compared with R23 in terms of the agreement) but with none of the social benefits. A recent trend is for an employer to agree with employees to form close corporations with which the employer contracts. The benefit for the worker is to pay less tax, while the employer avoids paying the additional costs of employment such as benefits etc.¹⁵⁴

Operations have been outsourced both to existing and so-called empowerment enterprises. The union perception is that employers generally prefer to outsource to established enterprises, because they do not believe their own employees have the capacity or skills to do the work. At one engineering firm (John Thompson) 200 workers were retrenched consequent to outsourcing. The union wanted the contract to be offered to the employees to be retrenched, but the company was not amenable to this. On the other hand, the union has no policy to guide its members or leadership where businesses are amenable to such proposals, or initiate such proposals

¹⁵³ Theron, J. & Godfrey, S. 2000. *Protecting Workers on the Periphery*. Report submitted to the Department of Labour.

¹⁵⁴ *Ibid.*

themselves as an alternative to retrenchment. Where the contract is awarded to 'employees', it is typically to a manager who is prepared to take over an operation.¹⁵⁵

Generally small enterprises, such as those that belong to a single entrepreneur, operated in disregard of the Bargaining Council agreement. Some nevertheless supplied services to established businesses. In the Atlantis hive established by the SBDC, for instance, a number of machining and tooling shops supplied companies in the area. However the larger companies generally had strict quality requirements, making reliance on emerging or informal enterprises, other considerations aside, impractical.¹⁵⁶

Casualisation has also occurred in the same period, although there are no industry figures reflecting this. The leading union in the industry reported a major increase in the use of temporary contracts by employers. Temporary contracts are used where there is an increased demand for labour, but employers wish to avoid permanently employing workers. Ship repair is an example of an operation where extensive use is made of temporary labour. The bargaining council agreement permits an employer to employ a temporary worker for up to three months, but this period can be extended.

In kitchen durable appliance industry a different non-standard employment trend has emerged. Since the mid-1990s firms have started to introduce fixed-term contracts. Indeed, a third of the employees in this sector are now appointed on short-term contracts. At one factory, these workers are known as 'STC's' – short for 'short term contractors'. It is especially during times when production has to increase that these STC's are employed by the companies. When workers are recruited for permanent positions, they are usually recruited from the ranks of the STC's. But often, workers work 'permanently' on a 'temporary' basis.

At another factory some employees were employed on a month-to-month basis. They were called 'contract workers'. According to an interviewee 'some of these contract workers are working here up to three years', without being made permanent. Some said that the company would appoint workers on fixed-term contracts, allow those contracts to expire for a number of weeks, and then renew them again. In this way creating the 'expectation' of a permanent position is avoided.

Apart from this segment of temporary workers, some 'casuals' are also employed from time to time. At one factory, there was apparently an attempt to employ the segment of seasonal temporary workers through labour brokers. However, the union successfully opposed this.

Importantly, this segmentation of internal labour markets is not peculiar to the factories in South Africa. At the two factories in Zimbabwe and the factory in Swaziland a similar system is used.

At the factory in Swaziland, when the interviews were conducted, there were 436 employees. Of these, 193 were appointed on monthly contracts. One interviewee referred to these workers as 'seasonals'. At one company in Zimbabwe, of a factory

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

staff component of 170, 60% were appointed on a permanent basis, and the rest were appointed on contracts that were renewed every six weeks. These contracts meant that the company could give workers 24 hours notice. At the other factory, of a total workforce of 250 employees, only about 100 were on permanent contracts. The rest were all contract workers, whose contracts were renewed on a monthly basis. According to the production manager, the company had a policy to appoint new staff 'every year'.

Table 6 provides a summary of how 'fixed term' contracts operate at the different factories. Proportions of contract workers range from 25% of all employees at one plant to a staggering 60% at a factory in Harare.

Table 6
Permanent Employees and Fixed Term Contact Workers¹⁵⁷

	Number of employees	Permanent employees	'Contract' employees	Comments
Factory A (SA)	1 300	800	500 (38%)	Short term contracts for duration of 3 months; Some 'toolmakers' and 'electricians' sourced by labour contractors
Factory B (SA)	470	350	120 (26%)	Monthly contracts introduced in 1996, when output increased; Some casuals used to fill in for absent workers; Contractors sometimes used for special projects
Factory C (SA)	600	450	150 (25%)	Monthly contracts renewed for up to 6 months; System introduced in 2000; At components factory, 80 permanent employees and 160 (66%) contract employees
Factory D (SA)	900	480	420 (47%)	Monthly contracts; New employees hired on contract basis, and subsequently laid off
Factory E (Zimbabwe)	170	100	70 (40%)	Six-week contracts, can be given 24 hour notice; Employment agencies used for skilled staff
Factory F (Zimbabwe)	250	100	150 (60%)	Monthly contracts
Factory G (Swaziland)	436	243	193 (44%)	'Seasonal' workers employed on a monthly basis

¹⁵⁷ Source: Interviews with managers, shop stewards, and meetings with shop steward committees. Since employment levels tend to vary, these figures reflect staffing levels for when the interviews were conducted at the factories.

Reasons for the rise of non-standard employment

The manufacturing of household appliances is a cyclical endeavour. Demand for such goods increases over the festive season. In the run-up to this season, manufacturers often employ more fixed-term contract workers. But after December, the industry usually enters a period of low demand. In 2003, one of the factories actually did not renew any of the contacts with fixed-term employees. In order to avoid retrenching permanent staff, workers were employed on short-time – i.e. a four day working week.

Before the liberalisation of trade, the industry was relatively protected. The sheer size of the products (i.e. the implications this has for transport costs) and South Africa's geographical position in relation to major exporters also built in some additional protection. However, with increased competition for local markets, South African manufacturers were squeezed to reduce costs. Most of the factories started to implement the system from the mid-1990s onwards.

The consequences of non-standard employment

Compared to other sectors of the South African economy, permanent employees in the engineering industry have made progress with regard to minimum conditions of employment. In the household appliance manufacturing industry, the goal of a 40 hour working week has almost been achieved. In certain departments, workers work on shifts to boost output. The industry is covered by a bargaining council, and minimum wages are laid down by the agreement reached here.

However, the increased competition and a number of liquidations have led to a general sense of insecurity. This is compounded for workers on fixed-term contracts. Apart from their basic wages, they are not included in any of the benefits (such as membership of a provident fund and medical aid scheme) that permanent employees receive.

New debates are emerging at some factories as the workplace is transformed by the Employment Equity Act with regard to the gender composition of factory workers. Factories in the metal and engineering sectors are traditionally considered to be 'male' factories. At one of the factories, where the list of fixed-term contract workers traditionally forms a labour pool from which workers are recruited from for permanent positions, there was a feeling from male employees that women were 'jumping the queue'. One worker expressed it as follows: 'Actually preferential treatment is given to women, even though the men are holding the bulk of the labour pool, the casuals and the short-term contract workers. When it comes to [employing] permanent [workers], it's always the women who jump the queue, because there are no women on the outside that are on the short-term list or on the casual list.' This especially created tension between older men and younger women.

With regards to skills development, there were differences between factories. At one of the factories, the company was already claiming back skills levies. At the other there was a dispute between the company and the trade union about the implementation of a training strategy. At none of the factories were fixed-term contract workers sent for training.

At none of the factories did trade unions actively recruit contract workers as members. At one of the factories, an interviewee even went so far as to suggest that '[t]he only difference [between] contract and permanent [workers] I think is being a member of the union - having a card and everything; that's the only difference.' According to her '[e]verything [else] is just the same'.

Hence, we see the segmentation of the labour market into those who have permanent jobs and access to a provident fund, the option to belong to a medical aid scheme, and some job security, and those who are appointed on fixed-term contracts, who have very little job security and no benefits on top of their hourly wages. This form of non-standard employment implies a process of casualisation, but not externalisation and informalisation as in the case of the mining industry. Fixed-term contracts of employment are not mediated by labour brokers, and the contracts are formal employment contracts between the companies and the 'contract workers'. The legitimacy of the system is validated by the seasonal nature of the industry – during certain periods, consumer spending on kitchen durable appliances increases, and contract workers are hired before these periods to increase production and laid off again when demand slumps.

Regulatory and other options

Compared to the other case studies in our report, the use of fixed-term contract workers in this sector poses fewer problems of regulation. First, such workers have employment contracts and therefore there is no question of labour regulations applying to them. Second, their location in large factories makes enforcement by the bargaining council (the sector is covered by the Metal and Engineering Bargaining Council) relatively easy. The main problem arises with regard to the rolling over of fixed-term contracts. This can probably be best addressed as a collective bargaining issue at the bargaining council. The practice in the Netherlands to prescribe a certain period between fixed-term contracts that could be considered as continued employment is one option.

Regarding the use of labour brokers, the engineering sector main agreement specifies that only brokers that are registered with the bargaining council and with the Department of Labour in terms of the UIA and COIDA will be allowed to contract labour.¹⁵⁸ Further, an employer who utilises the services of a broker is required to notify the bargaining council and also maintain certain particulars concerning employees procured through the broker. This provision stands in contrast with other sectors, such as mining, where employers are resisting measures to require labour brokers to register with bodies such as a Bargaining Council.

Improved general social protection would also strengthen the position of fixed-term contract workers in the labour market.

¹⁵⁸ See Kenny, B. & Bezuidenhout, A. 1999. Fighting Subcontracting: Legal Protections and Negotiating Strategies.' *South African Labour Bulletin*, vol. 23, no. 3, p. 45.

2.2.4 Retail

Basic information about the sector

The retail trade sector is large and extremely diverse, comprising of a wide range of retail outlets, from very small corner stores to large supermarkets. The sector has an estimated 80 000 employers employing approximately 1.5 million workers. Similar to experiences elsewhere in the world, historically, the sector has been difficult to regulate or organise. Since the late 1980s, the growth of informal sector trading, SMMEs, franchise stores with small workforces, and the rise of temporary and ad hoc employment relationships have made regulation and the enforcement of legislation increasingly difficult. The sector is also characterised by the absence of a bargaining council. The major union in the sector, the South African Commercial Catering and Allied Workers' Union (SACCAWU), has recognition agreements with a number of the major companies, but has been derecognised in Shoprite and Woolworths. Before December 2002, when a sectoral determination for the industry was published by the Minister of Labour¹⁵⁹, the sector was covered by a wage determination.¹⁶⁰

The main sub-sectors in the retail industry are food, clothing, and furniture/household items. Historically the sector has been fairly labour intensive, and in contrast to other sectors a high %age of women are employed. Employment statistics in this sector are limited. National data sources on the labour market and employment (i.e. the Census, sectoral surveys, the now discontinued October Household Surveys, or the Labour Force Surveys) provide statistics on overall employment in the retail industry. However, these surveys record total employment numbers, but are not disaggregated to show employment in sub-sectors (such as food, furniture, household, and clothing retail) Thus, identifying employment changes in particular sub-sectors is difficult. Further, different employment categories (full-time, part-time, casual) are not captured by these surveys, therefore making it almost impossible to accurately trace changing patterns of employment in retail overall and in the different sub-sectors. Further, some official statistics cluster the retail trade with motor and wholesale trade, and with the accommodation services industry, making historical analysis difficult.

More recently, statistics have broken down employment into full-time and part-time categories. This is useful in understanding the significance of part-time employment in the sector. However comparative analysis remains difficult, because the definitions of the categories have changed.¹⁶¹

¹⁵⁹ Department of Labour, Sectoral Determination 9: Wholesale And Retail Sector,

South Africa in terms of the Basic Conditions of Employment Act, No 75 of 1997, Government Gazette no. 24207, 19 December 2002.

¹⁶⁰ Wage Determination 478 for the Commercial Distributive Trade.

¹⁶¹ For example the December 1997 questionnaire defined full-time employees (permanent and temporary) as those employees who normally work 30 hours or more per week. Part-time employees were those that normally work more than 20 hours but less than 30 hours per week. The definition of full-time shifted the following year. In both 1998 and 1999 employees were classified as full-time if they usually worked 35 hours or more a week. Part-time employees were defined as 'those (permanent temporary or casual) who are not full-time as defined above'. In 1999 full-time continued to be defined as those (including permanent, temporary, and casual) who normally work 35 hours or more per week. The definition of part-time was 'those who are not full-time or work less than 35 hours per week'. The apparently arbitrary shifts in the definitions of full-time and part-time employment do not correspond

Nevertheless, we can use official figures generated by Statistics South Africa to identify general employment changes in the sector. Data shows that employment in the retail trade sector grew from 352 800 in 1975 to 401 600 in 1993. Employment then decreased again in 1994, but continued to grow after then. Between June 1998 and March 2001, employment in the wholesale and retail industry increased from 800 433 to 878 139. This was mainly due to an increase in what is classified as ‘part-time’ employment – an increase from 121 490 in June 1998 to 181 829 in March 2001. The statistics also show that the employment of part-time workers in this sector tends to increase over December.¹⁶² Subsequent statistical releases of the Survey of Employment and Earnings unfortunately do not distinguish between permanent and part-time employees. By December 2003, the retail and wholesale industry employed 1 285 000 employees in the formal sector.¹⁶³

The Labour Force Survey statistics present a different picture. By February 2002, the retail and wholesale industries employed 1 411 000 individuals in the formal sector, and a further 876 000 in the informal sector¹⁶⁴ The LFS therefore highlights a key feature of the retail trade sector, namely its huge informal component (i.e. 38.3% of employment is informal).

Part of the overall service economy, this sector is expected to benefit from increased tourism. In addition, trade continues to be fairly labour-intensive, and is thus expected to create rather than shed jobs. Moreover, in contrast to other sectors, although some labour has been displaced over the past decade due to technological innovations, low skill levels and more limited use of computerised technology in the sector has meant that fewer jobs have been lost to the introduction of new technology than in many other sectors. However, as argued above, total employment figures fail to capture how the composition of the workforce is changing, and the proportion of part-time, full-time, casual, and temporary workers. Hence, due to a lack of consistency in definitions used for surveys, we have to supplement quantitative analyses with the qualitative impressions we get from case studies of individual firms.

Up until the 1960, the retail industry was largely made up of independent retail stores and wholesalers, many of them small. As large retail stores emerged and began to grow, small and medium sized stores struggled to protect their market shares. Many of the smaller stores were bought up by Pick n’ Pay and other larger retail stores grew and expanded. After the first hypermarket was opened in the mid 1970s, large superstores were established in other parts of the country.

either to the BCEA or the wage determination that was in force at the time. Further, statistics do not capture the rise of employees hired as temporary or casual workers, in contrast to permanent part-time employees. See Theron, J. & Godfrey, S. 2000. *Protecting Workers on the Periphery*. Cape Town: Institute of Development and Labour Law.

¹⁶² Statistics South Africa. Discussion Paper 2: Comparative Labour Statistics, Survey of Employment and Earnings in Selected Industries, March 2001.

¹⁶³ Statistics South Africa, Survey of Employment and Earnings, September 2003 and December 2003, Statistical Release P0275. This includes those formally employed in retail and wholesale, the repair of motor vehicles, motor cycles and personal household goods, as well as hotels and restaurants.

¹⁶⁴ Department of Labour. 2003. Recent Employment Data from the Labour Force Survey. Mimeo.

One of the most significant structural changes in the retail sector over the past decade was the 1997 take-over by the Shoprite group of 157 loss-making OK Bazaars outlets (food and furniture). Shoprite Holdings Limited is an investment holding company founded in 1936. After the take-over it became the single largest retail group in the country, with over 400 outlets and an annual turnover of about R16 billion.¹⁶⁵ Its subsidiaries include Shoprite Checkers and Shoprite Guernsey Ltd. It operates in Zambia, Zimbabwe, Lesotho, Namibia, Swaziland, Mozambique, Botswana, Uganda and Egypt under a number of brands, including Shoprite, Checkers, OK, Hungry Lion, 8 'Till Late, Sentra, Megastore, Value and Buying Partners. The company's website describes it's workforce as follows:

As a result of its growth and development, the Group employs nearly 23 000 permanent and more than 36 500 part time employees in South Africa, and more than 3 800 permanent and 3 500 casual staff members outside of South Africa, providing Shoprite with a total workforce of more than 66 700 people who reflect the diversity of the communities in which it operates.¹⁶⁶

This take-over and the growth of large retail chains have resulted in the domination of the market by three major chains: Shoprite-Checkers, Pick n' Pay, Woolworths. Including the informal sector, it is estimated that at least 50% of gross re-sale now comes from these three stores, plus the Spar. Thus, one of the only ways for new businesses to compete is to go the franchise route, or to find a niche in the sector by providing 'convenience shopping'. The last decade or so has seen the proliferation of smaller stores operating under franchise agreements, (such as Pick 'n Pay Family stores, 7/Eleven) many of which operate longer hours than the larger retail stores. It has also seen the growth of small '24-hour stores' (petrol station shops), and extended opening hours of large retailers. These changes result from increased competition, and attempts to meet consumer needs by providing convenience shopping.

In contrast to Shoprite's vision of becoming 'the cheapest and biggest food retailer in Africa', Woolworths and Pick n' Pay have both targeted a more select market of consumers. Both stores provide a range of fresh and deli foods supplied by dedicated home industries or small businesses, and have introduced new financial services and information technology to their stores.

Woolworths Holdings Limited was established in 1931. It is involved in the retailing of clothing, footwear, toiletries, cosmetics, food and home ware. Its subsidiaries are found in South Africa, New Zealand, Hong Kong, the United Kingdom, and the United States. Its main shareholders are Wooltru Limited, State Street (US) and Old Mutual. In the 1999/2000 financial year, the company embarked on a restructuring process that cost R45 million and resulted in considerable job losses.

Pick n' Pay Stores Limited was founded in 1967. Its major shareholders are Pick n' Pay Holdings Ltd and Ackerman Family Holdings (Pty) Ltd. Shareholders also include Liberty Life Association of S.A and Pick n' Pay Employee Share Purchase

¹⁶⁵ Abdul Milazi, "Chain Store Still Resists Change" Sowetan February 20, 1998, p.31.

¹⁶⁶ <http://www.shoprite.co.za/default.asp?pageID=26708637>

Trust. The company operates in South Africa, Zimbabwe, Botswana, Swaziland, Namibia, Tanzania and Australia.

Hence, four overall changes in the sector have taken place:

- the emergence of chain-stores (including hypermarkets);
- the emergence and growth of franchise stores;
- take-overs, consolidating the dominance of certain retailer groups;
- and the emergence of stores that have extended hours of business.

The nature of non-standard employment in the sector

The majority of employees in the retail sector can be classified as ‘non-standard’. This has been brought about by process of casualisation and externalisation, often leading to informalisation as well.

Trends include the following:

First, the process of casualisation implies a general practice to stop appointing cashiers and packers as permanent full-time employees. Hence, over the last two decades employers in the retail sector have increasingly relied on various forms of ‘casual’ employees, specifically part-time employees, to staff their stores during peak periods, holidays, on weekends and for late night shopping. In the case of large retail stores, the largest %age of employees is now in this category. If smaller retail stores were included, part-time employees would likely form the vast majority of employees. Most of these employees are female.

Ironically, one retail outlet actually used the concept ‘permanent casuals’ to describe their employees. This signals that casuals often work at outlets for years on end. They work for a reduced number of hours, and often these hours are unpredictable. While the word ‘casual’ is still often used to describe this category of workers, the South African Commercial Catering and Allied Workers’ Union (SACCAWU) argues that the concept ‘variable time employees’ is a more accurate description.¹⁶⁷

Second, externalisation has taken place primarily in two areas, although indications are that a third may follow suit.

- Already in the 1980s, stores started to outsource certain non-core functions such as security, cleaning, maintenance, canteen services, logistics and distribution (transport), etc.
- In the 1990s, the subcontracting of merchandisers¹⁶⁸ became a major trend. Hence, these merchandisers (or shelf packers) are no longer employed by the retail firms, but are engaged by the suppliers of goods. Thus, whilst these

¹⁶⁷ Interview with Mduzuzi Mbongwe, Deputy General Secretary, SACCAWU, June 2004.

¹⁶⁸ The Sectoral Determination defines a merchandiser as ‘an employee who draws goods from a storage area, cleans shelving, unpacks and prices products and removes damaged or expired goods.’

workers work on the premises of retailers, they are not employed by them, but by a number of suppliers instead. They tend to be male.

- A more recent trend is for firms to completely outsource the checkout function to a specialised company to manage. It is not clear whether this practice will become more widespread.

Third, a major segment of the retail sector form part of the informal sector (the LFS estimates 38.3% of employees are informal). These include unregistered general dealers, corner shops and spaza shops. Often these business are not registered for tax, and in some cases, those that are registered for tax fail to register their employees for UIF and COIDA. Thus, employees who work in this sector in practice are not covered by any of the labour laws or minimum conditions that are supposed to regulate employment in the sector.¹⁶⁹

Reasons for the rise of non-standard employment

According to employers, restructuring has been necessitated by decreased profits, increased competition and the cyclical nature of consumer demand. The deregulation of prescribed shopping hours has led to an extension of retail opening times which has in turn impacted on working hours. As outlined above, smaller stores have emerged in recent years aimed at providing convenience to consumers. Many petrol stations have small shops open late hours. These shops have increased pressure on larger retailers to extend shopping hours. This in turn has necessitated hiring larger numbers of casuals to staff extended hours of opening on evening and weekends. More recently, changes in employment (both conditions of employment and the structuring of the employment relationship) have taken place in all sectors of the retail industry, but especially in large supermarkets.

While these reasons relate to the changing nature of the industry, the trend towards non-standard employment also has the added 'advantage' of weakening the trade unions organising the sector. Casual workers are used to break strikes as a rule, although the strike by casual workers in Shoprite in 2003 has illustrated that casual workers are not necessarily compliant by nature. The union used the event to sign up 18 000 new members, and is increasingly putting the issue of non-standard employment, specifically casual workers, on the bargaining agenda.¹⁷⁰

The consequences of non-standard employment

The consequence of the rise of non-standard employment in retail has been the segmentation of the labour market into a layer of permanent employees, and those in non-standard jobs. The following table illustrates the differences in wages and conditions for the employment categories at a retail outlet in Johannesburg:

¹⁶⁹ Interview with Richard Mokgata, Manager: SMME's, Wholesale and Retail Sectoral Education and Training Authority, June 2004.

¹⁷⁰ Interview with Mduduzi Mbongwe.

Table 7: Wages and Conditions of Employment Categories in the Retail Sector¹⁷¹

Category	Hours of Work	Hourly wages	Monthly wages	Proportion covered by benefits
Permanents	45.4	R10.45	1 898	94%
Casuals	19.7	R7.17	575	0%
Subcontract	45.1	R7.19	R1 276	28%

Hence, in the retail industry we see the operation of process of both casualisation (for cashiers and packers) and externalisation (for merchandisers). These processes of labour market segmentation have social consequences – significantly, the way in which individuals are allocated to various positions within the labour market. These consequences in turn lead to new divisions within the working class. Those with permanent jobs tend to have better access to housing, water, and electricity. Those who live in households with mostly casual jobs, tend not to have access to the resources needed to meet their basic needs. As Bridget Kenny argues:

These results [of her research] show that the reduction of full-time formal jobs tends to increase the social diversification in working class incomes and living standards, and as such is linked to the expansion of working class poverty. A stable full-time job can be the dividing line between households with a level of basic services and those without. This conclusion is reinforced by the fact that the decline in job security wrought by a changing local labour market emphasises the role of the household as a means of support.¹⁷²

We expand on these this theme in Box 7.

BOX 7: THE SOCIAL CONSEQUENCES OF CASUAL WORK IN RETAIL

In her research on labour market flexibility in the retail sector, Bridget Kenny found that changing patterns of employment in the workplace impacts on households themselves. In the retail sector, cashiers are increasingly doing casual jobs, and the employment function of shelf-packers (or merchandisers) is subcontracted out to suppliers. In Kenny's survey questionnaires, a number of questions were asked that related to the quality of life of employees – including access to type of housing, electricity, water, decent sanitation, etc.

Whether there was a permanent job in the household was the only consistent predictor as to whether households had access to these services. Those households tended to live in formal housing, whilst households with access to only casual jobs – in some cases more than one casual job – generally lived in informal settlements. Pointing to the longer term social consequences of this, Kenny summarises her findings as

¹⁷¹ Source: Kenny, B. 2003. 'Labour Market Flexibility in the Retail Sector: Possibilities for Resistance.' In: Bramble, T. & Barchiesi, F. (eds.). *Rethinking the Labour Movement in the 'New South Africa.'* Aldershot: Ashgate, p. 173

¹⁷² Kenny, 2003, p. 179.

follows:

[F]lexibility not only stratifies workers on the shopfloor... [H]ouseholds that are supported by a casual wage alone are more likely to have lower standards of living... [T]hese very households face diminished future opportunities for their members. Their members have fewer resources to invest in job search efforts and networking, and fewer resources to put into means of self-provisioning that may supplement their poor wages... In the longer term, far from enabling households to hang on, dependence on meagre, marginal jobs will erode working class households' economic positions and diminish the likelihood of these workers getting more sustainable jobs. Tenure in 'bad jobs' coupled by a shrinking 'good job' pool can lead to a disconnection from the labour market.

Apart from illustrating the social consequences of casualisation, Kenny's research shows how one industry – in this case the retail industry – can use casualisation and externalisation for different categories of workers. Cashiers become 'permanent casuals' and shelf-packers are externalised by the use of a range of suppliers who become their employers instead of one retail outlet.

Source: Kenny, B. 2001. '“We are nursing these jobs”': The impact of labour market flexibility on South African retail sector workers' in N. Newman, J. Pape & H. Jansen (eds). *Is there an alternative? South African workers confronting globalisation*. Cape Town: Ilrig.

As pointed out above, minimum conditions of employment in the industry is regulated by the Basic Conditions of Employment Act and Sectoral Determination No. 9. The latter has introduced a number of changes to the dynamics.

- When the old Wage Determination was still in place, casual workers had no non-wage benefits, but they were compensated for this by the payment of a premium of a third of the hourly wage levels of permanent workers. In terms of clause 11 of Sectoral Determination No. 9 an employee who works 27 hours or less per week can agree in writing to either retain a 25% wage premium but forfeit the right to a night work allowance, paid sick leave and family responsibility leave, or is paid the relevant wage rate but is entitled to all other basic conditions of employment on a proportionate basis.
- The Determination also removes any ambiguity as to whether employees formerly known as 'casuals' are employees, although the crucial cut-off of 27 hours or less per week entrenches what the union now call 'variable hour employment'.
- Where the old Wage Determination set a certain ratio for the proportion of casual employees firms can employ, the Sectoral Determination is silent on this issue. The union sees this as a factor contributing to an increase in non-standard employment.

No minimum hours are set by the Determination. However, the Sectoral Determination states that those who work for 24 hours or less per month must receive the prescribed hourly wage rate but for the rest are excluded from the Determination. Many students who work over week-ends fall under this category, which implies that a segment of the labour market is still excluded from the Determination.¹⁷³

With regards to collective bargaining, the rise of non-standard employment in the sector has weakened trade unions considerably. The establishment of a bargaining council is not even considered as an option at this stage. In fact, the major trade union, SACCAWU, has been derecognised by a number of major retail chains. According to the trade union, the prevalence of non-standard employment also pushes the wages of permanent employees down because of their weakened bargaining position.

Employment security for permanent workers as well as ‘casual’ workers is undermined by the growth of ‘variable hour employment’. It is much easier to get rid of ‘casual’ workers without due process. One way of doing this is to reduce the number of hours worked by such workers as a form of discipline. In the absence of a guaranteed number of hours per week or per month, it is hard to prove that such an action constitutes victimisation. Indeed, the union argues that a reduction in hours for casual workers is often used as a form of punishment.¹⁷⁴

In the case of subcontracted merchandisers, retail outlets can request subcontracting firms to remove workers from their premises should they consider such workers to be problematic. The usual insecurity introduced by triangular employment relationships applies here as well.

Irregular hours also impact negatively on health and safety standards – not only in the workplace. The issue of late shifts is a particularly worrying issue for female casual employees. When they have to rely on public transport late at night, they face the danger of violent crime, including rape.

The segmentation of the retail labour market means that especially African women tend to be stuck in the ‘casual trap’. The union argues that they are seldom included in Employment Equity Plans.

With regards to skills development, the union argues that the SETA ‘has no teeth’. As a result, the resolutions of the Growth and Development Summit are not being implemented.¹⁷⁵ The SETA points out that employers are often not interested in sending their non-standard employees for training, usually because they feel that training would lead to the expectation among workers that they may be promoted, receive higher wages, or even be appointed on a permanent basis. In their experience, this is especially the case for smaller retail concerns.¹⁷⁶

¹⁷³ Interview with Mduzuzi Mbongwe.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Interview with Richard Mokgata.

A further problem is the fact that many of the merchandisers who are subcontracted do not fall within the ambit of the Wholesale and Retail SETA. Their employers argue that they form part of the 'services' sector. Hence, there are no training programmes available that target those employees.¹⁷⁷

The W&SSETA does attempt to target smaller retailers by offering to pay for their employees attending short courses at accredited FET Colleges. But a major problem is the 'ad hoc' nature of employment relationships in corner shops and other smaller establishments. One interviewee likened this to the plight of domestic workers. Some of these concerns do not want the SETA to find out about their employees. As in other industries, some retailers just see the skills levy as another tax, and do not even bother to claim it back.

Regulatory and other options

Although workers in the major retail groups have been unionised since the 1980s, and by 1990 several of them had agreements with a single national union, there has never been a bargaining council of any note in the sector.¹⁷⁸ In 1992 approximately 20 major employers in the sector (together employing about 90 000 people), formed a short lived association.¹⁷⁹ In response to changes in the labour market and the introduction of new legislation, another attempt was made to form an employers group. Fourteen major employers joined together to form the Retailers Association.

However, responding to challenges in the sector continues to be difficult. Union organising has declined, and has become increasingly fragmented. Perhaps more than in any other sector there has been a proliferation of small unions, contributing to weak organising and declining working conditions for many casuals. Wage Determination 478 applied for the entire period during which the shift from permanent to 'casual' employment took place, but has now been replaced by Sectoral Determination No. 9.

Although Pick n' Pay and Shoprite have signed flexibility agreements with SACCAWU, regulating some issues of flexibility in their stores, there is no doubt that the bargaining position of SACCAWU, the largest retail union, has been greatly weakened by casualisation. Woolworth's termination of its national recognition agreement with SACCAWU is a case in point. The current definition of workplace means that it will be very difficult for SACCAWU to gain a majority at the company again. Given also the fragmentation of the sector and the proliferation of small unions, there is little prospect of a bargaining council being established.

However, after the strike of casual workers at Shoprite, the union has made some headway in terms of collective agreements with a minority of the major retail firms. A first example is an agreement the union signed with Pick n' Pay. This agreement attempts to establish the notion of a minimum number of hours for variable time employees. The company agreed to guarantee its employees a minimum of 86 hours per month. The union considers this a major step forward. It is attempting to get

¹⁷⁷ Interview with Richard Mokgata.

¹⁷⁸ The only Bargaining Council for the retail sector is in Kimberly and only covers the Kimberly area.

¹⁷⁹ Business Day 13/2/1992.

Shoprite to agree to a minimum of 20 hours per week, but the company is arguing that hours should be averaged over a month, as allowed by the Basic Conditions of Employment Act. The issue is therefore still being negotiated.¹⁸⁰

Further union action includes litigation against Woolworths. Since the union does not have a recognition agreement with the company, they are in the process of pursuing an action based on the Employment Equity Act. They allege unfair discrimination, because the ‘Flexi-8’ and ‘Flexi-28’¹⁸¹ workers do not receive 13th cheques like permanent employees.¹⁸²

2.3 The Evolving Policy and Institutional Environment in South Africa

In the previous section we considered the implications of the rise of non-standard employment in four sectors of the economy. We now turn to an analysis of the existing framework regulating the South African labour market. It follows from what has been said above that this analysis should not be confined to the more usual focus on policies and legislation that regulates the labour market directly. It should also encompass social and industrial legislation and policy impacting on the labour market. However because the impact of the latter two categories is less direct, we shall not deal with it as fully below.

While we draw a distinction between the realms of industrial, social and labour market policy, these measures in practice do not operate in ‘silos’. Our distinction is merely an analytical one. To illustrate: public works programmes can be seen as industrial policy (the development of infrastructure and demand-side measures), social policy (as providing a certain welfare function) and labour market policy (contributing to skills development).

In terms of the multi-disciplinary approach we follow, we briefly sketch the contours of the policy and institutions. We also briefly indicate the historical context in which policies are formulated. In each case we only discuss matters we see as directly relevant to the rise of non-standard employment and possible policy responses. The scope of this report does not allow us to develop a comprehensive overview or evaluation.

2.3.1 Industrial policy and legislation impacting on the labour market

Industrial policy, and the legislation underpinning it, is primarily the sphere of the Department of Trade and Industry (“DTI”). Generally speaking, the industrial policy orientation post-1994 shifted towards what the DTI called a supply-side orientation, where a model of import substitution industrialisation makes way for ‘export-led

¹⁸⁰ Interview with Mduzuzi Mbongwe.

¹⁸¹ ‘Flexi-8’ employees work 8 hours per week, and ‘Flexi-28’ employees work 28 hours per week.

¹⁸² Interview with Mduzuzi Mbongwe.

growth'.¹⁸³ In the early 2000s, in response to criticism that its industrial policy lacked coherence, the DTI published a number of policy documents.¹⁸⁴ However from 2001 onwards the focus of policy was on the sector summits held pursuant to the 1998 Presidential Jobs Summit.

A number of attempts have been made to evaluate the effectiveness of industrial policy in South Africa.¹⁸⁵ Our aim is not to evaluate these policies, as much as to consider how these articulate, or fail to articulate, with labour market policy. Potentially a number of sector summits can lead up to an integrated industrial policy that takes into consideration the diverse dynamics of various economic sectors. In our case study of the household appliance industry, we raised the problem Iscor's policies of import parity pricing that harms the labour-intensive downstream industry. Industrial policy generally has failed to address the problem of monopolies in key sectors.¹⁸⁶

The most important institutional innovation in the post-1994 period from a developmental perspective, the establishment of NEDLAC, is in fact not regarded as a competency of the DTI. The importance of NEDLAC is that it gives institutional form to the notion of a social dialogue between social partners. Thus government is obliged to consult with its social partners at NEDLAC regarding "social and economic policy", which is very broadly defined. The social partners are in turn defined as comprising organised business, organised labour and the community. The various social 'summits' that have been held over the past decade, and most recently the Growth and Development Summit of June 2003, represent a continuation of this dialogue as well as identifying a number of developmental priorities for trade and industrial policy.

Indeed, the only major post-1994 legislation impacting on industrial policy apart from the NEDLAC Act is the *Competition Act*.¹⁸⁷ This Act seeks to regulate take-overs or mergers above a certain threshold.¹⁸⁸ It also seeks to regulate what it defines as

¹⁸³ Alongside a programme of import tariff reduction, the DTI put in place a general set of supply-side measures, including a tax incentive scheme and the provision of low-interest loans to companies in industries undergoing rapid tariff reductions. An initiative called the 'Workplace Challenge' emerged out of the cluster studies that resulted from the Monitor Company's intervention in the mid-1990s. Government also embarked on spatial development initiatives (SDIs) and industrial development zones (IDZs) in order to attract investment to certain geographical regions. See Department of Trade and Industry (DTI). 1998. *Industrial Policy and Programmes in South Africa*. Discussion document., Pretoria: DTI.

¹⁸⁴ e.g. Department of Trade and Industry (DTI). 2001. *Driving Competitiveness: Towards a New Integrated Industrial Policy for Sustainable Employment and Growth*. Framework Document. Pretoria: DTI.

¹⁸⁵ Chang, H-J. 1998. 'Evaluating the Current Industrial Policy of South Africa.' *Transformation*, no. 36, pp. 51-72; Kaplan, D. 2003. 'Manufacturing Performance and Policy in South Africa – A Review.' Paper Presented at the Annual Forum of the Trade and Industry Policy Secretariat (TIPS) and Development Policy Research Unit (DPRU), Johannesburg.

¹⁸⁶ In a country with monopolies in key sectors of the economy, one would ideally put competition policies in place before you liberalise trade. In South Africa, trade was liberalised first, and competition policies were only reviewed afterwards.

¹⁸⁷ Act 89 of 1998.

¹⁸⁸ Mergers are very broadly defined, to include both direct and indirect

restrictive practices. However the Act applies primarily to the ‘horizontal relationship’ between firms. It does not seek to regulate vertical relationships between firms, which refers to the relationship between a firm and its suppliers or customers or both, except where a firm abuses its dominant position in the market, as in the case where a firm charges its suppliers or customers excessive prices.¹⁸⁹

The other major legislation underpinning trade and industrial policy is pre-1994. The *Companies Act* has long enabled businesses to operate as legal entities, in which the liability of the shareholders (and hence the risk to which they are exposed) is limited.¹⁹⁰ The *Close Corporation Act* has provided a simpler form of entity, targeted at small businesses.¹⁹¹ The *Consumer Affairs (Unfair Business Practices) Act* introduces the concept of an “unfair business practice” in the context of consumer protection. Of the legislation regulating specific industries or activities, only that which provides for the establishment of lotteries and gambling was introduced post-1994.

Furthermore, the significance of two other post-1994 initiatives relates more to the policy associated with the legislation than the provisions of any of the statutes concerned. The *National Small Business Act* was adopted in 1996. It seeks to define a small business, for the purposes of support measures to promote the development of small business. It also provides for the establishment of a National Small Business Council. Coupled with this initiative, was the establishment of two statutory bodies, namely the Ntsika Enterprise Promotion Agency, whose object is to provide support services to small business, and the Khula Finance Corporation, whose object is to fund the development of small business.

In 2003 the *Broad-based Black Economic Empowerment Act* (the BBEE Act) was adopted, to give effect to government’s commitment to black economic empowerment (“BEE”).¹⁹² The Act defines BEE as ‘economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies...’¹⁹³ This is a version of empowerment that is significantly at odds with that which has characterised the post-1994 period, in which a new black elite has risen to riches with extraordinary rapidity. Indeed the notion of BEE that is ‘broad-based’ represents an implied criticism of this development, and an attempt to redirect empowerment. It remains to see how successful it will be in doing so. However this will depend on the application of policy more than the provisions of the legislation itself.¹⁹⁴

The GDS agreement sets out a common vision for promoting rising levels of ‘growth, investment, job creation and people-centred development.’ It also seeks to make

¹⁸⁹ A firm is defined to include a person or partnership.

¹⁹⁰ Act 61 of 1973.

¹⁹¹ Act 69 of 1984. A close corporation may not have more than ten members.

¹⁹² Act 53 of 2003.

¹⁹³ Section 1, Act 53 of 2003.

¹⁹⁴ It has recently been argued that the costs associated with black economic empowerment are a major disincentive to investment. See A. Sparks, ‘Business sits idle on its billions’, Cape Times, 15 June 2004, and the Economist.

South Africa ‘the leading emerging market and destination of first choice for investors’ and ‘expanding social equity and fair labour standards.’ But is it possible to achieve all these things, at the same time, within what President Mbeki recently described as a dual economy?

There is an evident tension in the terms in which this vision is described. On the one hand it is of a ‘productive economy with high levels of service, a highly skilled workforce and modern systems of work organisation and management.’ On the other, it is of ‘a society in which there are economic opportunities for all, poverty is eradicated, income inequalities are reduced, and basic services are available to all.’

The objectives of the GDS agreement are threefold. They are, firstly, to build an enduring partnership between the social partners, by promoting a shared vision of South Africa’s growth and development strategy. Sector agreements and development agreements are an important expression of this partnership. Secondly, the objective is to address urgent challenges, by selecting the interventions that hold the promise of the greatest possible impact in the shortest possible time. Thirdly, the object is to secure the commitment and active participation of ‘all constituencies in those areas identified for prioritised action.’

In practice, it is proposed to fulfil these objectives by expanding public investment initiatives (“PIIs”), by expanding public works programmes (“EPWPs”), by local procurement initiatives, by small enterprise promotion, by support for co-operatives and by seeking to avoid further job losses.¹⁹⁵ Of these, only the emphasis on the related initiatives of public investment and public works, and the proposal of supporting the development of co-operatives, are in any sense new.

In theory the co-operative offers the same benefits of legal personality as the company and close-corporation, to an association of persons operating an enterprise according to co-operative principles. But principles of co-operation and self-help run counter to the dominant mode of capital accumulation. It is unlikely, therefore, that there will be a significant growth of co-operatives without targeted support. The proposals for supporting co-operatives are lacking in practical detail, and relate mainly to establishing a legislative and policy environment conducive to the development of co-operatives. In terms of its commitments at the summit, government is shortly to table in Parliament a new Co-operatives Bill.

As regards sector agreements, the GDS agreement records that there were a number of sectors that had already embarked on a process of organising sector summits. These

¹⁹⁵ The type of PIIs envisaged are the construction or maintenance of public facilities (roads, dams, railways and harbours, as well as what are described as multi-purpose centres (“MPCCs”), schools, clinics and prisons) and electrification. Labour-based construction methods will be preferred. The EPWPs envisaged comprise two clusters of activity. The first cluster are activities providing short-term employment, in activities such as school cleaning and renovation, community gardens, erosion control and land rehabilitation, removal of alien vegetation, community irrigation schemes, fencing of national roads, access roads in rural areas, tree planting, maintenance of schools, clinics, drainage, roads and public buildings. Most of these activities have a rural bias, probably because the object is to improve essential infrastructure. It is in rural areas where infrastructure is poorest. The second of these clusters relates to the provision of social services, such as “community home-based care” for people living with HIV/Aids or the aged, or pre-schools or creches.

were metal and engineering, chemical, construction, and information and communication technology (ICT). Importantly, each of these sectors has a significant union presence, although in ICT it is only in the para-statal Telkom that it is significant. Industries in which it was proposed that sector summits be prioritised because they were seen as labour intensive were clothing and textiles, agriculture and agro-processing, tourism, call centres and back-office processing, and cultural industries (film, music, craft etc.)

Clearly the level of education and skills in the society as a whole are a major impediment to reconciling a vision of a highly productive workforce and the achievement of greater equity. The GDS agreement acknowledges (somewhat perfunctorily) the fact that illiteracy levels are high, and that there is a need for adult learning centres. It sets the objective that by March 2005 'at least 70% of workers have at least basic literacy and numeracy according to Level One on the National Qualification Framework.'¹⁹⁶ However the thrust of its strategy to address the skills deficit is through the creation of learnerships, and the Sector Education and Training Authorities ('SETAs') established in terms of the Skills Development Act of 1996. The implications of this are discussed in the section on labour market policy below.

Local initiatives are an important element in implementing the objectives of the GDS agreement. Although this is not stated in the agreement itself, it appears that whilst it falls to the SETAs to fulfil the vision of a highly productive, skilled workforce, local government and other local structures have the primary role to play in poverty alleviation and in triggering PIIs and EPWPs.¹⁹⁷ One of the ways in which local government can promote local economic development is through their procurement policies, as well as through their economic and infrastructure programmes. The GDS agreement proposes investigating mechanisms to make it easier for small enterprises and co-operatives to tender for local government work.¹⁹⁸

2.3.2 Social policy and legislation impacting on the labour market

Payment for work, which for most people means the salary or wage they receive as an employee, is the primary means of securing a decent standard of living. This is the arena of labour law and labour market policy. Social or welfare policy, on the other hand, is mainly targeted at those who are not economically active for one or other reason and need some form of support to secure a decent standard of living, e.g. old-age pensioners and the disabled. In practice labour market policy and social policy should provide a net, or a package of nets, for the economically active and inactive to ensure that nobody is destitute.

However labour market and social policy overlap: compensation for employment-related injuries or diseases as well as unemployment insurance are examples of programmes that have both labour market and social policy elements. Generally, such

¹⁹⁶This is the equivalent of Grade 9 in the schooling system.

¹⁹⁷ Amongst the structures mentioned are 'imbizos', ward committees, school governing bodies, community policing forums, hospital boards and workers forums (although it is not clear what this refers to. Possibly it is intended to refer to workplace forums)

¹⁹⁸Mention has also been made of the proposal of establishing multi-purpose community centres ("MPCCs"), that will provide support services to established and emerging businesses.

programmes (which are linked to employment but assist people who cannot work) are referred to as social security measures, while those that target people outside of the labour market fall within the category of social assistance. Social protection is a term that has been used to cover both social security and social assistance.

Social policy, broadly defined, is wider than the above measures. Education, health, transport and housing provision also form a part of social policy. What distinguishes such provision from the above social security and assistance measures is that they generally involve services rather than income support. The provision of affordable housing, services and health care would positively impact on more sustainable livelihood strategies for the households of casual employees. Apart from this important point, it is beyond the scope of this report to consider education, health and housing policy in any depth. The focus will be on existing social security and social assistance measures and problems relating to their coverage.

The structure of social policy in the post 1994 period has not been significantly changed. As a result there are many inadequacies and cracks in the package of social security and social assistance measures that currently exist. On the one hand, the measures that exist do not pay sufficient income to secure a decent standard of living. On the other hand, there are large gaps between the various measures. It is beyond the scope of this report to examine the levels of the various grants, etc. However, the gaps that exist are of particular importance for this report, because in many cases non-standard employees fall within those gaps. In order to examine these inadequacies we need first to examine what measures are in place.

First, social security measures provided by the state are as follows:

Compensation for employment-related injuries and diseases is provided in terms of the *Compensation for Occupational Injuries Act 130 of 1993 (COIDA)*. The Act benefits employees as well as the dependants of an employee if that employee died as a result of the injury or disease.¹⁹⁹ Included in the definition of employee is “a casual employee employed for the purpose of the employer’s business”; a director or member of a body corporate who has entered a contract of service or of apprenticeship or learnership with the body corporate”; “a person provided by a labour broker”; and, the dependants of a deceased employee or the curator acting for a disabled employee.²⁰⁰

¹⁹⁹The definition of ‘employee’ is interesting in that it differs in form from those in the LRA, BCEA and EEA. In terms of the Act an employee is a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.

²⁰⁰ Excluded from the coverage of COIDA are persons undergoing military training or performing military service, including members of the South African Defence Force who are on service in defence of the Republic; members of the South African Police Service who are on service in defence of the Republic; a person who contracts for the carrying out of work and himself engages other persons to perform such work; a domestic worker employed in a private household; as well as (in terms of section 23(1)(c)) an employee injured outside SA if such an employee has been employed for longer than 12 months outside the country. Also excluded is the mining industry (which is covered by separate legislation, viz. the Occupational Diseases in Mines and Works Act, 78 of 1977). See Olivier et al, 2003, p. 140.

Unlike the LRA and BCEA, COIDA also defines an ‘employer’. The definition includes the State, any person controlling the business of an employer; an employer who temporarily makes the services of an employee available to some other person; and a labour broker. The reason why it is necessary to define an employer in the Act is mainly because the compensation system is financed by employer contributions.

Compensation is paid out to employees or their dependants from the Compensation Fund for temporary or permanent disability (either partial or total) or death, where such disability or death is the result of an employment-related injury or disease. The amount of compensation is calculated in terms of Schedule 4 of COIDA and is subject to minimum and maximum limits.

Unemployment insurance is provided in terms of the *Unemployment Insurance Act 63 of 2001* (UIA). Only employees as defined are covered by the UIA. An employee is defined in the Act as “any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes an independent contractor”. Specifically excluded are employees who are employed for less than 24 hours a month; employees who receive remuneration under a registered learnership agreement; employees of national and provincial government; and, contract labour from outside SA that will be repatriated to their home country at the end of the contract period.

Given that employers also make contributions in terms of the UIA, the Act also defines an employer. The definition refers to “any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal”. Employers of the specifically excluded employees (see above) are also excluded from the coverage of the Act in respect of those employees.

The UIA provides for a contributory scheme, with employers and employees obliged to pay contributions into the Unemployment Insurance Fund. Five types of benefits are paid out in terms of the UIA, i.e. unemployment benefits; illness benefits; maternity benefits; adoption benefits; and, dependant’s benefits. It is important to note that the scheme provides for temporary relief only (i.e. up to a maximum of about six months).²⁰¹

The measures outlined above apply only to those who are in formal employment, or who lose such employment (in the case of UIF).

Apart from these, the state provides a number of grants in terms of the *Social Assistance Act*. These are an old age grant, disability grant,²⁰² foster care grant²⁰³,

²⁰¹ A contributor’s entitlement to benefits accrues at a rate of one day’s benefit for every six days’ of employment up to a maximum of 238 days’ benefit (about six months). Any benefit received in the four-year period prior to the current application for benefits is deducted from the total benefits available, except in the case of maternity benefits. Benefits are paid out on a sliding scale according to the level of remuneration of the applicant, ranging from a maximum of 60% of remuneration for lower income contributors to a lower rate for higher income contributors..

²⁰² This is for medically diagnosed disabled person over 18 years.

care dependency grant,²⁰⁴ and child support grant²⁰⁵. It should be noted that all are non-contributory and are means-tested.

Apart from these measures provided for by the state, a number of private social security measures also exist. On the one hand, there are private contributory provident, pension and retirement schemes that were historically available primarily to white-collar employees and supervisors and managers. Most of the larger bargaining councils also administer provident or pension schemes for the employees covered by the councils' agreements.²⁰⁶ On the other hand, there are private medical aid schemes (again historically mainly for the benefit of white collar employees and supervisors and managers) and some sick benefit schemes administered by bargaining councils (for employees covered by the agreement or, in some instances, the employees of members of the party employers' organisation). With regard to the latter it should be noted that the number of workers that bargaining councils cover is limited.

Hence, we see that social security and protection measures do not form a comprehensive security net. As indicated by the case study of India, this realm of policy-making is crucial to ensure sustainable livelihoods. Non-standard employees are often excluded from social security linked to the employment relationship. Because of means-testing, they may also be excluded from measures targeted at the poor. Thus, the 'grey area' that operates between the formal labour market and outright unemployment is not covered. Some form of predictable income would assist the more vulnerable segments of the non-standard labour market to not be caught in the trap of non-standard jobs. It would also strengthen their bargaining power in relation to employers.

2.3.3 Labour market policy and labour legislation

Labour market policies and legislation have been extensively reformed since 1994, resulting in a new legislative and institutional structure. The cornerstone of this structure was the *Labour Relations Act*, adopted in September 1995 although it only came into operation in November 1996. The LRA made no provision for a general duty to bargain, a right that had been established in terms of the definition of unfair labour practice by the Industrial Court. Instead it provided for a set of organisational rights for representative trade unions, and a protected right to strike after conciliation procedures had been exhausted.

The institution of bargaining councils (formerly industrial councils) were retained as the primary forum for collective bargaining, and bargaining at sectoral level was preferred. Although some concessions were made to small business interests in

²⁰³ Granted to foster families caring for children under 18 years of age.

²⁰⁴ This is for parents of a disabled child (18 years or under) who requires care at home by another person.

²⁰⁵ This grant is paid to the primary care giver for children under 9 years of age.

²⁰⁶ In some cases the schemes are available only for the employees of party employers (i.e. employers that are members of the employers' organisation party to the council).

respect of representation on bargaining councils and the extension of bargaining council agreements, these were arguably of cosmetic nature. However it also provided a mechanism whereby unions (or employers associations) that were not sufficiently representative to form a bargaining council could seek to establish a statutory council, with limited powers to bargain. There was also provision for a plant-level structure, the workplace forum, influenced by the German model of works councils.

The *Basic Conditions of Employment Act* was introduced in 1997. Like its predecessor it created a floor of minimum conditions that applied to all employees. However more explicitly than the LRA, it also attempts to accommodate pressures to introduce a more flexible workplace regime. Consistent with a policy of regulated flexibility, it provides that a number of provisions can be varied, particularly those relating to working time arrangements.²⁰⁷ It also provided for variation of minimum conditions in bargaining council agreements, sectoral determinations and Ministerial determinations (see below). It replaced the Wage Board with the Employment Conditions Commission, a body with less authority than its predecessor, whose role was to advise the Minister on sectoral and Ministerial determinations.²⁰⁸

The *Employment Equity Act* was passed in August 1998. Its most significant requirement, in the present context, is that it requires companies to submit employment equity plans. The adoption of the *Skills Development Act* in the same year, and the institution of the Sectoral Education and Training Authorities (SETAs), represented the last element of the new structure. It was also the culmination of a parallel process of education reform that resulted in the establishment of the South African Qualifications Authority (SAQA). The contentious issue of the funding of skills development and training was introduced via a separate statute, the *Skills Development Levy Act*.²⁰⁹

Accordingly the new structure regulating the labour market can be depicted in terms of Table 8 below.

However in reality there are many more inconsistencies than the tidy scheme set out above suggests. On the left hand side of the table, neither statutory councils nor workplace forums have proved effective, while bargaining councils have certainly not extended their scope to any significant extent in the post-1994 period, and in some sectors have declined.²¹⁰ At least some of the difficulties faced by bargaining councils can be attributed to the growth of non-standard employment.

²⁰⁷ This policy was first articulated by the Labour Market Commission. In an endeavour to resolve the apparently contradictory imperatives of maintaining labour standards and increasing flexibility, the *negotiation* of more flexible work arrangements was proposed. It should be emphasised that as envisaged by the Commission this form of flexibility was premised on strong bargaining partners.

²⁰⁸ Most of the investigative and reporting functions of the Wage Board now transferred to the Department of Labour.

²⁰⁹ Act 9 of 1999, passed by Parliament on 23 September 1999.

²¹⁰ In 2002 bargaining councils covered approximately 2 million workers. However, just over a million workers are covered by newly-established public sector councils. This leaves less than a million employees covered by private sector bargaining councils. See Du Toit et al, 2003, p. 40.

As a result of the limited scope of bargaining councils, as well as the limited coverage of sectoral determinations, the extent to which minimum conditions are in fact regulated is at best uneven. Moreover there has been a significant change with regard to the monitoring and enforcement of labour legislation (and of bargaining council agreements) as a result of the decriminalization of breaches of most of its provisions²¹¹. Now a breach of legislation is treated as a dispute, to which the dispute resolution procedure applies. This has resulted in problems of enforcement, even where minimum conditions are regulated.

Table 8: The New Architecture of Labour Market Institutions in South Africa

	Collective bargaining	Minimum conditions	Employment equity	Education and training
Macro level	NEDLAC	Ministerial determinations	Employment Equity Act	SAQA
Meso level	Statutory councils, Bargaining councils, Non-statutory forums ²¹²	Bargaining Councils, Sectoral determinations	Sectoral charters ²¹³	SETA's
Micro level	Collective agreements, Workplace Forums	Collective agreements	Employment equity plans	Skills plans

The equity reporting requirements of the EEA are relevant to non-standard work only insofar as firms are required to report on non-standard employment in their employment equity plans. This is limited because in terms of the reporting requirements (see also section 57 of the EEA) temporary workers with longer than three months service are treated as the employees of the firm. Such employees are therefore not distinguished as a separate category.

On the right hand side of the table are approximately twenty-five SETAs established in as many sectors, covering the entire economy. Although the SETAs are supposedly autonomous bodies governed by representative of business and labour in each sector, in many sectors there is little or no trade union organisation. Even where there is union representation, the capacity of labour to make meaningful inputs into the functioning of SETAs is limited. The same can be said of small business.

²¹¹ Non-compliance with a limited number of provisions in the BCEA, notably the prohibitions on child and forced labour, do constitute criminal offences.

²¹² Such as the Chamber of Mines.

²¹³ These have emerged as so-called 'voluntary initiatives', such as the Mining Charter and the Financial Sector Charter, often as an attempt to pre-empt stricter regulation from government.

Not reflected in the above scheme is the disputes resolution system on which the above structure is founded. In the first instance there is the Commission for Conciliation Mediation and Arbitration (“CCMA”). However the jurisdiction of the CCMA is circumscribed by the establishment of a Labour Court, presided over by a high court judge, and a Labour Appeal Court. Legislation to absorb both these courts into the structures of the High Court has been published for comment but not yet approved.

Labour regulations and casualisation

Casualisation is a process that is recognised in a limited way by labour regulations. First, the definition of ‘employee’ in the labour statutes draws a distinction only between an ‘employee’ and an ‘independent contractor’.²¹⁴ So if a person is not an independent contractor s/he is an employee. There are no distinctions as to type of employee in the definitions.²¹⁵ So there is no definition in the statutes of a ‘casual’ employee, or a part-time employee or a temporary employee.²¹⁶ All such employees are therefore accorded the rights of the statutes. However, there are instances in which the statutes distinguish between different types of employee. The LRA therefore regulates certain aspects of the employment of probationary employees and also protects the security of employments of employees on fixed terms contracts where there is a reasonable expectation of renewal of the contract. The BCEA excludes employees who work less than 24 hours per month from certain provisions, while the UIA excludes such persons entirely from the coverage of the Act.

We submit that these distinctions do not significantly undermine worker protection. The LRA provides probationary employees with extensive rights. In the case of the BCEA, employees that work fewer than 24 hours a month are nevertheless employees and do have certain protection. We submit, furthermore, that there are not many people that work less than 24 hours a month for the same employer. Probably a more important issue regarding the 24-hour limit is the difficulty of monitoring and enforcing it.

In theory a person who is an employee (and not an independent contractor), is not prejudiced in terms of the BCEA merely because they work for a few days a week or are part-time or are on fixed-term contract. At the same time, nothing in the statutes prohibits such arrangements. A great deal of freedom is therefore allowed by the statutes to employers to structure their contracts with employees in a way that suits them (i.e. in a way that gives them numerical and temporal flexibility).²¹⁷ This is facilitated by the fact that the BCEA does not set a minimum weekly wage.

²¹⁴ Volunteers, i.e. people who do work without receiving or being entitled to receive remuneration are also excluded from the definition of ‘employee’ by implication.

²¹⁵ The definition of ‘employee’ for the purposes of workplace forums excludes senior managerial employees. It also adds the condition that an employee is a person “who is employed in a workplace”.

²¹⁶ COIDA specifically includes casual employees within the ambit of the Act (but does not define a casual employee).

²¹⁷ The statutes provide very little in the way of the regulation of contracts of employment, besides the BCEA which sets minimum conditions with which contracts must comply and which also provides that an employer must provide an employee with written particulars of employment.

Casualisation is therefore not aided by the statutes because they don't reduce such employees' rights, but casualisation is also not restricted by the statutes.

Casualisation and subordinate regulations

The statutes are not the only sources of protection for employees. Ministerial and sectoral determinations and bargaining council agreements also provide protection. Such protection usually means a schedule of minimum wages (except in the case of ministerial determinations), certain additional protections, and some improvements on the conditions prescribed in the BCEA. However, ministerial/sectoral determinations and bargaining council agreements can also vary downwards certain conditions in the BCEA. One such instance is with regard to 'casual' employees.

There are a number of points that need to be considered in this regard. First, section 57 of the BCEA specifically provides that if a matter regulated in the Act is also regulated in a sectoral determination then the provision in the sectoral determination prevails. So a sectoral determination's definition of casual work would appear to override the Act. The fact that the BCEA does not explicitly regulate casual work seems to support the power of a sectoral determination to do so. However, a sectoral determination can regulate only that which the BCEA allows it to regulate. This is dealt with in section 55. While the Act does not explicitly bar casual work, it is not clear that the Act makes provision for sectoral determinations to regulate casual work. Most of the list of fourteen issues that the section allows a sectoral determination to regulate, deal with "conditions of employment" and "remuneration". It is not clear that these terms cover casual work. Whether section 55(n), which provides that a sectoral determination can "regulate any other matter concerning remuneration or other terms or conditions of employment" is sufficiently wide to regulate 'casual' work is a moot point.

Section 55(g) comes closest to regulating different types of work. It makes provision for the prohibition or regulation in a sectoral determination of "task-based work, piecework, home work and contract work". It is not apparent that these categories include casual work.

The lack of clarity regarding the power of sectoral determinations to regulate casual work has not stopped them doing so. So, while the BCEA does not explicitly recognise the notion of a 'casual worker', sectoral determinations have reintroduced the category. For example, the very important *Sectoral Determination 9: Wholesale and Retail Sector*, while not using the term 'casual employee', makes special provision for employees that work 27 hours or less per week. Such employees are accommodated by the wage schedule that provides for hourly rates of pay. On the plus side, such employees are paid a 25% premium on their wage rate.²¹⁸ They must also have two days off every week. On the negative side, employees that work 27 hours or less per week have no right to paid sick leave and no right to family

²¹⁸ However, the 25% applies also to ordinary hours worked on a Sunday (as opposed to the 50% premium that full-time workers would receive). So whether the 25% is actually a benefit or not depends on the what days the employee works on. If he/she works on a Saturday and Sunday every week they would end up with much the same wage as a full-time employee would get for working the same days.

responsibility leave. The employer of such employees is moreover exempted from paying a night work allowance.

The *Sectoral Determination 6: Private Security Sector*, regulates ‘casual work’ more explicitly. It provides a definition of a ‘casual employee’, i.e. an employee without a fixed contract of employment who works not more than 24 hours in any week.²¹⁹ Such an employee is excluded from the provision in respect of meal intervals, is effectively excluded from the family responsibility leave provision, and is also arguably excluded from the annual bonus.

The situation has been further complicated by the recent amendments that provided that all wage determinations still in force (in terms of the transitional provisions in Schedule 3 of the BCEA) would immediately become sectoral determinations. Many of these wage determinations, now sectoral determinations, defined a ‘casual’ employee in the same way that such an employee was defined in the 1983 BCEA, i.e. an employee who worked three or less days per week for the same employer. For example, the Wage Determination for the Goods Transport has a “casual employee” category, i.e. an employee who is employed by the same employer on not more than three days in any one week and not more than 24 days in any period of 90 consecutive days. Such an employee is excluded from, amongst other things, the annual leave and sick leave provisions.

Of course, the fact that a ‘casual employee’ is not defined in a sectoral determination does not mean that such employees are prohibited. If an hourly or daily wage rate is provided then the ground is laid for ‘casual workers’ to be employed. Such workers would however qualify for conditions such as annual leave, sick leave, etc. (usually on a pro rata basis according to time worked), unless the sectoral determination specifically excluded them.

Ministerial determinations also provide for variation on the BCEA. Such determinations cover rather peculiar ‘sectors’ as opposed to industrial sectors or sub-sectors. For example, the ministerial determinations to date apply to small businesses, the welfare sector, and special public works programmes. The *Ministerial Determination: Special Public Works Programmes* provides an interesting example. It provides that all workers on a special public works programme (SPWP) are employed on a temporary basis; they cannot be employed for longer than 24 months in any five-year cycle, and they are disqualified from being contributors in terms of the Unemployment Insurance Act. The determination furthermore provides for “task-based work” and for a “task-rated worker”, i.e. respectively work that has a fixed rate attached to its completion and a worker who is paid on the basis of the number of tasks completed.

The final type of subordinate legislation that could regulate ‘casual work’ is a bargaining council agreement. In terms of section 49 of the BCEA a bargaining council agreement may vary any basic condition of employment excepting a specified

²¹⁹ It is unclear what is meant by a “fixed contract of employment”. The term is not defined in the determination. It might mean a fixed-term contract, but then why the different terminology. It could also be interpreted as meaning there is no written contract of employment or there is no certainty regarding the terms and conditions of the contract.

list of conditions, e.g. the hours of work provisions, night work, etc. Again, there is a lack of clarity regarding the power of a bargaining council to introduce a casual worker category, although it can be argued that the fact the Act does not explicitly prohibit councils from regulating casual work means that they can. But questions remain: Is 'casual work' a "basic condition of employment"? Furthermore, while the specified list of conditions that can be varied includes three sections dealing with hours of work, all of these deal only with maximum hours. Is 'casual work' a reduction of these protections? Arguably not.

On the other hand, the rest of the list should provide considerable protection to casual workers. A bargaining council is not allowed to "reduce an employee's" annual leave to less than two weeks, "reduce an employee's entitlement to maternity leave", or "reduce an employee's entitlement to sick leave". In other words, section 49 appears to provide the same annual leave, etc. conditions to casual workers as it does to full-time employees. However, a closer inspection of the relevant sections indicates that this is not the case. In both the case of annual leave (section 20) and sick leave (section 25) provision is made for the leave to be calculated on a pro rata basis according to the hours or days actually worked. Only in the case of maternity leave is there no difference, but such leave is unpaid so there is no material benefit to a 'casual worker'.

In the absence of a specific provision for casual work, the key is then whether hourly or daily wage rates are provided for in the bargaining council agreement. If they are it would seem that employers are free to structure that contracts with employees as they see fit, including employing them on a 'casual' basis. It is unclear how bargaining councils are dealing with the issue of 'casual work', in what ways they have varied their agreements as allowed by section 49, and whether they provide for hourly and daily wage rates.²²⁰

Labour regulations and externalisation

The key feature of externalisation is that an employment contract is replaced by a commercial contract. The definition of 'employee', which excludes an 'independent contractor', is critical to the process of externalisation. The first aspect of the problem is the stark distinction in the definition between an 'employee' and an 'independent contractor'. The grey area between the two, namely the dependent contractor phenomenon (i.e. independent in law but in practice dependent in much the same way that an employee is dependent), was not, until the recent amendments, dealt with in the statutes (although it is debateable whether the amendments deal at all adequately with this issue). The courts did of course grapple with the problem, without achieving a great deal of success. First the 'control test' was applied, followed by the 'organisation test', and finally the 'dominant impression test'. The first two focused on only certain aspects (albeit important) of the employment relationship, while the

²²⁰ The Labour and Enterprise Project (LEP) is currently conducting a research project on bargaining councils with a view to collecting this type of information. However, not all the data has been collected yet so it is not possible to report on the research at this time. The main problem being faced in the research project is the lack of co-operation on the part of bargaining councils. A short questionnaire was posted to almost all bargaining councils. Despite numerous follow-ups over a period of three to four months, only a handful of questionnaires have been completed and returned.

last can be seen as merely stating that all factors must be taken into account in determining whether an employment relationship exists.

The amendments introduced seven rebuttable presumptions, any one of which would 'qualify' a person as an employee (the presumptions are strongly influenced by the factors that the courts have taken account of in applying the 'dominant impression test'). The presumptions are extensive and on the face of it offer a great deal of protection to persons wishing to establish their rights as employees. However, there are problems (not yet tested by the courts). First, the new section (200A in the LRA and 83A in the BCEA) appears to apply only to individuals. An individual can therefore use the presumptions to determine his/her status as an employee rather than an independent contractor. Second, it is likely that the new section will have a limited impact on the vast majority of outsourcing arrangements. Where an operation is outsourced to a group of people, one of whom is classified as the owner or proprietor of the small business, it is not clear that the section applies. If it does there are a number of questions thrown up. Can the owner or proprietor become an employee and remain an employer? If so, what is the status of his/her employees? Are they employees of the current employer or of the contracting firm?

Second, although the presumptions are extensive they are nevertheless presumptions. They can therefore be rebutted by an 'employer'. The possibility of such litigation, and the tension it would create between the 'employer' and 'employee', is likely a strong deterrent for people utilising the section. This is only partially ameliorated by the provision for advisory awards.

Third, the section draws an interesting distinction between persons earning more or less than the amount determined by the Minister of Labour in terms of section 6(3) of the BCEA. It raises the issue of two different sets of jurisprudence developing around the same question, depending on the level of earnings.

The three problem areas noted above all point to the new section having a relatively narrow scope of application. The section would, for example, deal with the COFESA schemes to turn employees into individual independent contractors (which were in most cases rejected by the courts), but would not deal more broadly with outsourcing and sub-contracting arrangements. There is, however, an important section in the BCEA that could be used creatively to deal with such arrangements, but which has not to our knowledge been utilised to date.

Section 83 of the BCEA gives the Minister of Labour the power to "deem any category of persons... to be employees for the purposes of this Act or any sectoral determination". In a similar vein, section 55(k) of the BCEA provides that a sectoral determination may (within the sector and area concerned) "specify minimum conditions of employment for persons other than employees". Both these provisions give the Minister extraordinary powers to deal with the problem of externalisation and informalisation. The question is, given the growth in non-standard employment and the concern over this within the DoL, why the Minister has not used these powers? One reason could be a reluctance to use administrative fiat to address such a complex problem. But then why give the powers to the Minister in the first place? Why not come up with a more usable alternative? A further question is why there is no procedure in section 83 for unions and workers (and NGOs) to approach the Minister

regarding the employment status of particular workers? If they don't bring such issues to the attention of the Minister, how is he supposed know about them and utilise his powers in terms of the Act?

OHSA provides similar powers. In terms of subsection (2) of the definition of 'employee', the Minister can deem certain categories of person to be employees for the purposes of the Act (and any person vested and charged with the control and supervision of such person will be deemed to be the employer). To our knowledge this provision has never been used by the Minister.

A number of the other provisions in the statutes have relevance to the issue of externalisation. One provision is section 197 of the LRA, which deals with the transfer of contracts of employment when a business or any part of a business is transferred as a going concern. In *NEHAWU v University of Cape Town*²²¹ the question was posed whether outsourcing constituted the transfer of a business or part of a business "as a going concern". The Labour Court decided that the transfer of a business is "markedly different [from] outsourcing". In a transfer or sale of a business "there is a permanent transfer of a business or part thereof", whereas with outsourcing "what is transferred is nothing more than the opportunity to perform the so-called outsourced services". Contracts of employment transferred as part of the same process therefore did not qualify for protection from section 197. On appeal, the Labour Appeal Court found that the transfer of contracts of employment in terms of section 197 was dependent on an agreement to this effect between the transferor and transferee employees.²²²

Fortunately the Constitutional Court and the legislature brought some clarity to the matter when it overruled the LAC judgement about a year later (although it still left a lot of grey areas).²²³ In the meantime Parliament had passed amendments to section 197 that cleared up much of the confusion that had given rise to the LC and LAC decisions.²²⁴

Informalisation and the enforcement of labour regulations

The above sections have dealt with the way in which casualisation and externalisation are regulated (and not regulated) in the new labour statutes. We have seen that while casualisation may reduce the effective protection workers have by virtue of the statutes and subordinate regulations, as long as an employment relationship continues such employees have the formal protection of the statutes. The case of externalisation is more problematical. Individual employees that become independent contractors through a process of externalisation no longer have the protection of the statutes. But the employees of an entity that results from externalisation are employees and have the full protection of the statutes. However, research shows that in many cases

²²¹ [2000] 7 BLLR 803 (LC).

²²² [2002] 4 BLLR 311 (LAC); see: Du Toit D, and D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles with C Bosch. 2003. *Labour Relations Law: A Comprehensive Guide*. LexisNexis Butterworths: Durban, p. 427.

²²³ (2003) 24 ILJ 95 (CC).

²²⁴ See: Du Toit, *et al.*, 2003, p. 427.

employees in casualised or externalised work are effectively unprotected, either because they are ignorant of their rights, or because they are too powerless and scared to enforce their rights, or because they cannot enforce their rights against the entity responsible for undermining them (i.e. where they are in a triangular employment relationship). Casualisation and externalisation have the effect of shifting employees into precarious employment relationships that constrain the ability of workers to make full use of their rights in terms of the labour statutes. The result is informalisation. Informalisation is therefore an interrelated process that in many cases flows from the processes of casualisation and externalisation (informalisation is also fed by new entrants to the job market joining small firms – not necessarily externalised - that do not comply with labour legislation).

Enforcement by the Department of Labour and bargaining councils is therefore a critical issue when examining casualisation and externalisation. In this section we briefly examine two key aspects of enforcement, namely the way in which enforcement is dealt with in the statutes, and the capacity of the Department of Labour and bargaining councils to make use of the enforcement procedures to ensure that casualisation and externalisation do not lead to informalisation.

The new labour statutes introduced significant changes with regard to the enforcement of workers' rights. The LRA and BCEA decriminalised labour legislation (except in the case of child and forced labour) and introduced entirely new monitoring and enforcement procedures. In the BCEA the primary enforcement mechanism is the compliance order issued by a labour inspector. Employers are given a certain amount of time to comply with the order or to appeal against it. Non-compliance (and non-appeal) means the compliance order must be made an order of the Labour Court. Thereafter failure to comply can result in a fine. In cases where a court order is not adhered to, the employer can be found in contempt and imprisoned.

Similarly, bargaining council agreements are no longer enforceable by criminal courts, but are now enforceable civilly through arbitration. Under the new system conciliation must first take place between the council and the employer before the resort to arbitration. Then, if an employer does not comply with an arbitration award, the award must be made an order of court before it can be executed. If the employer still does not comply with the award, the bargaining council must institute contempt proceedings.

The new enforcement system thus far has proven slow and cumbersome – procedures take time and employers can deliberately delay them even more or undermine the system by refusing to comply with the arbitration award. Several provincial offices of the Department of Labour report ongoing frustration with the new system, drawing attention to the long delays in enforcing compliance orders through the courts. Similar complaints have been made by bargaining council officials.

The introduction of the new statutes has placed increased pressure on the Department of Labour. For example, the BCEA covers many more workers than its predecessor, while new statutes such as the EEA and the SDA require substantial monitoring and ongoing administrative work to ensure their implementation and effectiveness. Whether the Department can meet this challenge is questionable. Even before the new legislation was implemented, the capacity of the Department to effectively monitor

compliance with legislation was weak. For example, the number of inspectors staffing provincial offices was often far below the number of posts available. These problems have been exacerbated by the increased workload that has resulted from the new legislation, particularly since it does not appear to have been accompanied by adequate increases in staffing levels.

Prior research on the capacity of provincial offices demonstrates the problem of staff shortages. For example, in July 2002, 53 of the 120 inspector posts in Gauteng North were vacant (i.e. 45% of the posts were vacant), and in Limpopo province 72 of the 104 positions were filled.²²⁵ Most of the other provincial offices reported that they had vacancies for inspectors²²⁶. As a result, many offices reported that inspections tend to be reactive – responding to complaints – rather than proactive, and often proper follow-up is difficult as there are too many other pressures on inspectors. Along with serious understaffing of the inspectorate, are press reports of disputes between inspectors and the Department, demoralisation amongst inspectors, and (as one would expect) numerous resignations.²²⁷

The tables below give some idea of the magnitude of the task facing the Department (although it should be noted that the data is somewhat dated). The first table provides the number of inspectors in each provincial office, the approximate number of workplaces that fall within their jurisdiction, and the approximate number of workers employed at those workplaces.

Table 9: Number of inspectors, workplaces and workers by provincial office²²⁸

Provincial office	No. of inspectors	No. of workplaces	No. of workers
Cape Town	112	+/- 80 000	+/- 1 374 175
East London	96	+/- 29 278	+/- 548 928
Kimberley	22	+/- 10 000	+/- 215 000
Witbank	36	-	+/- 944 858
Gauteng South	122	-	+/- 3 431 126 (incl.
Gauteng North	46	-	Gauteng North)
Bloemfontein	49	-	+/- 1 056 828
Durban	104	+/- 1 606	+/- 315 756
Mmabatho	51	-	+/- 957 470
Pietersburg	47	-	+/- 810 117
TOTAL	685	+/- 120 884	+/- 9 654 258

²²⁵ Telephone interview with the Inspection and Enforcement Services in Gauteng North on 12 July 2002; and telephone interview with the Inspection and Enforcement Services in Limpopo Province on 10 July 2002.

²²⁶ Telephone interviews with the Inspection and Enforcement Services in nine provincial offices, June – August 2002. The Department of Labour confirmed that this was an ongoing problem during a recent Parliament Portfolio Committee briefing on Occupational Health and Safety for 2002, when it was reported that the staff shortage is about 41% (Parliamentary Monitoring Group, 20 August, 2002).

²²⁷ See, for example, ‘Labour department faced with mass exodus’, Mail & Guardian, July 14 to 20, 2000.

²²⁸ Source: Cheadle H and M Clarke. 2000. National Studies on Workers’ Protection: South Africa. Report submitted to the International Labour Office, p. 24.

The second table gives a picture of the number and nature of complains received by each of the provincial offices.²²⁹

Table 10. Inspection and Enforcement: Complaints received per province²³⁰

PROVINCE	BCEA	UIA	COIDA	EEA	LRA	OHS	TOTAL
Eastern Cape	976	209	160	0	522	13	1 880
Free State	2 016	947	7 610	14	0	9	10 596
Gauteng North	9 840	2 528	2 533	15	308	200	15 424
Gauteng South	6 491	4 110	5 494	14	3 095	740	19 944
Kwazulu Natal	13 430	3 039	310	10	0	56	16 845
Limpopo	4 689	3 364	6 123	3	458	1	14 638
Mpumalanga	6 332	1 738	187	10	639	64	8 970
Northern Cape	6 629	302	21	0	0	1	6 953
North West	0	0	0	0	0	0	*6 242
Western Cape	2 857	562	4 093	52	0	225	7 789
TOTAL	46 587	15 086	24 811	106	4 814	1 176	109 281
Average per month	776	251	413	2	80	20	1 821

The Department is aware of the problems outlined above, and has been attempting to enhance its enforcement capacity. The inspectorate has been restructured by merging the existing inspectorates (i.e. Labour Relations, Health and Safety, etc.) into one unit. This means that inspectors are now responsible (and trained) for the enforcement of all labour legislation. A second initiative has been the development and implementation of an ‘Inspection Enforcement Strategy’. Importantly, as part of this strategy the Department is focusing attention on improving the capacity of provincial offices to monitor and enforce legislation, both through increasing the number of officers in each region and by providing ongoing and targeted training to all staff in order to substantially upgrade their skills. In addition, many provincial offices have carried out ‘targeted blitzes’ to focus on problematic sectors. However, although provincial offices welcome restructuring, in the short term it is adding to the problem of understaffing and workload.²³¹

²²⁹ It should be noted that some provincial offices do not break complaints down per individual Act, while different data collection systems used by the provincial offices make the compilation of national statistics difficult.

²³⁰ Information obtained from an official of the Department of Labour; Source: Clarke M and S Godfrey and J Theron. 2003. National Studies on Workers’ Protection: South Africa. Report submitted to the International Labour Office.

* Complaints not broken down per individual statute.

²³¹ For example, on several occasions during our telephone interviews we were unable to reach anyone in many of the provincial offices as most of the staff, except for the receptionist and a handful of other staff, were away on training for several days.

Given the huge increase in informal employment, it is unlikely that the restructuring and strategising on the part of the Department will be sufficient to ensure adequate enforcement of the labour statutes. Effective enforcement and monitoring of the statutes clearly requires even greater changes to increase the capacity of the Department of Labour and its provincial offices. Until that happens it is unlikely that the process of informalisation will be halted. However, until the Department improves the collection and collation of data on enforcement from the provincial offices it will be difficult to establish how effective or ineffective the enforcement endeavour is.

The decline in the number of bargaining councils, which police their own agreements, has added to the burden on the Department of Labour.²³² This problem aside, it is not clear at this point how effectively the remaining bargaining councils are enforcing their agreements.²³³ Research conducted in late 1994 is dated but does provide some sense of the capacity of councils. Bargaining councils vary enormously in size. Of the 18 councils that responded to the questionnaire, the number of inspectors employed varied from one to 69. The total number of inspectors amounted to 180, with median employment at 5. The important figure is the number of workplaces per inspector. Again, this varied widely: from 38 per inspector for the Border Liquor and Catering Council to 1 050 per inspector for the Western Cape Hairdressing Council. The median number for the 16 councils that supplied this information was 118 and the average was 274 workplaces per inspector.²³⁴

There was a wide divergence in the number of firms routinely inspected each year by councils, ranging from a minimum of 43 by the Eastern Cape Clothing Council to a maximum of 26 040 by the National Motor Industry Council. The very large number of inspections carried out by the latter councils skews the statistical results somewhat, as is shown by the median number of inspections (523) compared to the average number (3 016). There is similar variation in the number of inspections conducted each year in response to complaints. The Eastern Cape Clothing Council was again the lowest with 12 inspections, while the National Motor Council was highest with 3 000. The number of workplaces inspected each year by the median council was 256, which was fairly representative of a number of the other councils included in the survey.²³⁵

The number of hours spent tracking down unregistered firms operating within the jurisdiction of councils varied from one to 40 hours per week, with an average of 11 hours per week being spent by the 13 responding councils. This endeavour could have been part of routine investigations or driven by complaints from employees.²³⁶

²³² For example, a number of the bargaining councils in the construction industry – a sector in which enforcement of labour standards is notoriously difficult - have closed down in recent years.

²³³ It was noted above that the Labour and Enterprise Project is currently conducting research on bargaining councils. Unfortunately, the data is still in the process of being collected and therefore cannot be reported on.

²³⁴ Du Toit D, and S Godfrey, M Goldberg, J Maree and J Theron. 1995. *Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business*. Butterworths: Durban, p. 36.

²³⁵ Du Toit, *et al.*, 1995, p. 36-37.

²³⁶ Du Toit, *et al.*, 1995, p. 37.

Of course, the above is based on only a relatively small number of councils and there could have been considerable changes since then. We suggest that it is unlikely that there has been a dramatic improvement in the enforcement capacity of councils. In fact, it is more likely that there has been a decline in their capacity. Leaving aside the councils that have collapsed since 1995, bargaining councils that have been accredited by the CCMA have the additional work of dispute resolution to perform. In many cases it is inspectors that have been trained and must perform conciliations (and in some cases arbitrations). This, together with the ponderous enforcement procedure faced by councils, must have reduced councils' enforcement capabilities.

Given the difficulties regarding enforcement it is remarkable that when the recent amendments to the BCEA were first published, no amendments were proposed to the enforcement procedure. This was rectified to a very limited extent during the course of the negotiations over the amendments. The final amendments therefore introduced a change that clarified and made easier the way in which labour inspectors must secure undertakings from employers, and a technical point that could invalidate a compliance order was removed. Clearly a lot more could have been done to make enforcement easier. The situation regarding bargaining councils was better. The initial set of amendments proposed significantly enhanced the powers of designated agents of councils as well as clarified the way in which councils enforce their agreements (thereby closing a loophole that had made it difficult for councils to enforce their own agreements). Both of these proposals were retained in the final amendments.

Non-standard employment and key labour market institutions

The labour statutes are the most direct means of regulating employment and non-standard employment. However, this is not the only way in which non-standard employment may be regulated. Institutions established in terms of the statutes also have an important role to play. One institution, the bargaining council, has been discussed above. Another institution is the Commission for Conciliation, Mediation and Arbitration (CCMA). It is particularly important for protecting workers against unfair dismissal (which make up 80-85% of all disputes referred to the CCMA). But it seems that not very many informal employees utilise the CCMA. In 1998 only 4% of the cases handled by the CCMA were classified as coming from the 'informal sector'.²³⁷ In 1999 this had dropped to 3%.²³⁸ Research on CCMA arbitrations of unfair dismissal disputes provides an even more alarming picture: only one of 414 unfair dismissal arbitrations involved somebody who was employed by an informal firm.²³⁹ Few informal employees are therefore using the CCMA to protect their rights, and even fewer pursue cases through to arbitration. This could either be because informal employees do not know about the CCMA or for some other reason do not refer disputes to the CCMA. It could also be because the disputes referred by informal employees are screened out of the system.²⁴⁰

²³⁷ CCMA Annual Report, 1998, p. 13. It is unclear how the CCMA defines 'informal'.

²³⁸ CCMA Annual Report, 1999, p. 8.

²³⁹ Theron J and S Godfrey. 2001. The CCMA and small business: The impact of the labour dispute resolution system. Development and Labour Monographs 2/2001. Institute of Development and Labour Law, University of Cape Town, p. 61.

²⁴⁰ This is an issue that clearly requires further research.

Trade unions have arguably the most important role of all in dealing with the shift to non-standard employment. The new LRA gives unions a lot of support. Freedom of association is entrenched, organisational rights are provided, provision is made for agency and closed shop agreements, collective bargaining is promoted (albeit without a duty to bargain), and the right to strike is protected. However, there are some hidden pitfalls. For example, organisational rights can only be exercised in the workplace.²⁴¹ A workplace is defined as the place or places where the employees of an employer work.²⁴² But where an employer carries on or conducts two or more organisations that are ‘independent of one another by reason of their size, function or organisation’ it is the place(s) where employees work in respect of each independent operation. Otherwise it is the places where employees work.

The definition of workplace evidently has as its objective the protection of unions that have already established their representivity. As it stands, a newcomer union would find it extremely difficult to obtain organisational rights. So, a large retail group with branches across the country would be seen as one workplace. A union with organisational rights at such a firm is in a secure position vis-à-vis rival unions, which would need to get representivity throughout the country to challenge the incumbent union. At the same time, should the incumbent union lose representivity and lose its entitlement to organisational rights, it will be very difficult for that union to win them back. The problem is not theoretical. It has happened already in the retail sector. What makes it particularly interesting is that the reason that the incumbent union lost its representivity in the first place was mainly because of the extensive swing to the use of ‘casual’ workers on the part of the firm. A new union that had organised the majority of workers at a number of branches could however not get organisation rights because of the definition of workplace in the LRA.

Non-standard work and skills development policy

The purposes of the Skills Development Act (“SDA”) are not only to develop the skills of those that are formally employed, but also to “promote self-employment”.²⁴³ They aim to encourage employers not only to invest in the education and training of their workforce, but to “provide opportunities for new entrants to the labour market to gain work experience” and “to employ persons who find it difficult to be employed.”²⁴⁴ Indeed, the definition of ‘worker’ includes “an employee, an unemployed person and a work-seeker.”

SETAs are the primary institutions entrusted with implementing these purposes. But they can only do so within the financial constraints imposed by the system. 20 % of the levy all those in employment and their employers contribute is allocated to the National Skills Fund.²⁴⁵ It is from these funds that problems of a generic nature must be addressed. The remainder of the levy is allocated to the SETAs to expend in terms

²⁴¹ See sections 11 to 16 of the LRA.

²⁴² Section 213 of the LRA.

²⁴³ Section 2(1)(a)(iii) and (iv).

²⁴⁴ Section 2(1)(c)(iii) and (iv)

²⁴⁵ Act 9 of 1999, passed by Parliament on 23 September 1999.

of their sector skills plan (“SSP”). Within the overall framework of the SSP, a SETA is entrusted with four specific functions: establishing learnerships, approving workplace skills plans, allocating grants to employers, education and training providers, and monitoring education and training in the sector.²⁴⁶

Undoubtedly the growth of non-standard employment impacts negatively on the development of a coherent skills plan. Casualisation of its nature makes any form of skills development strategy problematic, while externalisation often occurs because the employer is unwilling to make the investment in his workers that long-term employment implies. Even though employers are able to recover much of what they contribute by way of grants, the indications are that for the small employer the difficulties of doing so are perceived to outweigh the benefits, and the levy is simply regarded as another tax. For the enterprise in the informal economy it is of course another tax to be evaded.

²⁴⁶ Section 10(1)(b)

PART 3

3.1 Implications

In this part, we firstly discuss the broader implications of our analysis thus far. We then proceed to a more detailed consideration of some specific implications, looking briefly at the implications for social policy on the one hand and trade and industrial policy on the other, then looking in more detail at the implications for labour market policy and labour legislation.

3.1.1 Broader policy issues

The fundamental assumptions underpinning our regulatory framework

In determining what an appropriate response to the triple challenge of casualisation, externalisation and informalisation in this country would be, it is necessary at the outset, as the EU group of experts have done, to identify the assumptions underpinning our regulatory framework.

To start with, there are the assumptions underlying the distinction between what might be termed industrial citizenship and political citizenship, namely that there is a set of rights to which all citizens are entitled, and a set of rights to which only workers in an employment relationship are entitled. There are two possible justifications for this arrangement, the first being historical, the second being pragmatic. The historical justification relates to a further assumption, namely that workers in an employment relationship are a numerically significant proportion of the working population, or that they are particularly vulnerable to exploitation. The pragmatic justification assumes employment in a standard employment relationship. Thus the assumption that workers are able to fund certain social benefits is based on the additional assumption – that they have a stable income. By the same token it is seen as feasible to implement measures to preserve their security of employment.

Casualisation has called into question the validity of these assumptions, by its segmentation of the workforce in an employment relationship. It demonstrates that to the extent that workers are vulnerable to exploitation, they are clearly not vulnerable to the same degree. By the same token the most vulnerable amongst them either do not have a stable enough income, or a sufficient income, to fund meaningful social benefits. Measures to provide security of employment are not effective to the same extent or at all, for reasons we will consider below.

Externalisation has undermined the validity of these assumptions even more profoundly. Its outcome is that a diminishing number of persons are employed in a standard employment relationship. An increasing number are employed in a

contractual relationship that is not regarded as employment, or in a triangular employment relationship, which is in effect regulated by a commercial contract.

Informalisation can be viewed as symptomatic of a situation in which the assumptions underpinning labour market regulation are seen to be invalid and in which labour market regulation is perceived to be ineffective.

At the same time the validity of the assumption that a business represents a community of workers with varying skills formed around a single economic activity, under the supervision of a single employer, has been eroded over a period of time. This can be attributed to the concentration of capital, in which at least two stages are discernible. The first stage has resulted in the incorporation of the single employer as a branch or subsidiary of a larger group. The second has now resulted in the increasing dominance of finance capital, which no longer needs to own its 'subsidiaries' in order to control them. Thus the large retailer is able to rely on its financial muscle in order to dictate terms to the manufacturer, for example. The franchisor is able to rely on its ownership of the intellectual property rights to a brand or product to exercise control over the franchisee. By the same token finance capital no longer needs to employ the people that work for them, to exercise control over them.

Increasingly, therefore, employment is in services. It also follows from what has been said above that this growth of the services sector reflects a shift in the balance of power, from the traditional engines of economic growth in mining and agriculture, at the primary level, and manufacturing, at the secondary level, to the tertiary level. To continue to speak of the services sector as equivalent to the sectors at the primary and secondary levels is therefore misleading. Indeed the growth of the services sector, and the imbalance of power between services and other sectors, undermines the relevance and coherence of the very notion of the sector.

The constitutional context

The strategic choice between defending the SER whatever the cost, or mere adaptation, is true for South Africa as much as the EU. Moreover South Africa can be regarded as having adopted the course of defending the SER whatever the cost, by virtue of its reluctance to accommodate some forms of casualisation, such as part-time work.

There are also strong indications that the defence of the SER has had the perverse effects warned of. Research on labour broking, for example, shows an exponential growth of labour brokers that has coincided with the introduction of labour legislation. As a result the impact of labour legislation is being undermined. For example, although in theory labour legislation has created an accessible and cheap dispute resolution system, in practice important categories of vulnerable workers are not able to access the system, or able to pursue disputes to a just conclusion.

In this context it becomes imperative to find a third way, such as the EU's group of experts advocate. However the notion of social drawing rights is too slender a basis on which to construct a third way, particularly in a country with as many unemployed as South Africa. If a third way exists, it is more likely to be based on an elaboration of

the notion of a right to work, coupled with an elaboration of notion of a right to fair labour practices.

A right to work is not explicitly recognised in the South African constitution. It is however recognised in the International Covenant on Economic, Social and Cultural Rights, where it is said to include “the right of everyone to the opportunity to gain his [sic] living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”²⁴⁷ It is also recognised in the African Charter, which provides that “every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”²⁴⁸

It may be that the reason a right to work is not explicitly recognised in the South African constitution is because of concerns that its recognition will lead to the erosion of labour standards. For the same reason it might be regarded as controversial. Certainly there will be those who argue for a lowering of labour standards in the name of a right to work, just as there are those who make the same argument in the name of flexibility. At the same time there is no reason why a right to work should be given this interpretation, particularly since the constitution does provide for a right to fair labour practices, as well as other labour rights.²⁴⁹ Moreover the fact that the right to fair labour practices is accorded to “(e)veryone” rather than to ‘employees’ has potentially important implications. It means you do not have to be employed to claim protection of the right.²⁵⁰

Rather what the elaboration of a right to work should entail, is to redefine the debate about job creation and employment in South Africa. Few would disagree with an objective of more jobs and better jobs. But the point of departure ought to be that none of the conventional panaceas, foreign investment or the promotion of small enterprises, are likely to deliver on this objective. Few would take issue with the establishment of PIIs or EPWPs. Yet these are by definition temporary initiatives whose longer-term effects are open to question.²⁵¹ The issue that should really be debated, is about what resources are allocated to the protection of specific rights, and which persons or groups benefit from those rights. If, for example, there are rights that only benefit insiders in standard employment, the question arises as to whether there ought not to be a reallocation of rights.

²⁴⁷ Article 6, International Covenant on Economic, Social and Cultural Rights, 1966. South Africa has signed the Convention, but has not ratified it.

²⁴⁸ Article 15, African Charter of Human and Peoples’ Rights, 1981. South Africa has ratified the Charter.

²⁴⁹ Section 23 (1), Constitution of South Africa (Act 108 of 1996). The other labour rights protected by section 23 are the right to freedom of association, the right to strike and the right to engage in collective bargaining. It also states that national legislation can recognise union security arrangements contained in collective agreements.

²⁵⁰ Benjamin suggests that it could be argued that “the restriction of labour legislation to persons falling within the conventional definition of an employee represents an unjustifiable and unreasonable limitation on the rights of persons who are granted these rights by the Constitution but denied these rights by labour legislation” See Benjamin, P. 2002. ‘Who needs Labour Law? Defining the Scope of Labour Protection.’ In: Conaghan, J. , Fischl, R.M. & Klare, K. (eds.). *Labour Law in an Era of Globalisation*. Oxford: Oxford University Press.

²⁵¹ See A.McCord

The object of such a debate ought to be to achieve to a closer integration of industrial, welfare and labour market policies.²⁵² With this in mind, we now turn to a closer examination of the implications of the processes of externalisation, casualisation and informalisation for those policies.

Implications for industrial policy

The social partners, as represented in NEDLAC, clearly have a vested interest in the outcome of a debate such as envisaged in the previous section. Business organisation in this country has historically been dominated by big business, and still is. Despite a variety of endeavours to facilitate the representation of small business at a variety of levels, there are structural obstacles to achieving effective representation at a national level. Organised labour is representative of a diminishing section of the workforce, as casualisation and externalisation fragments trade union organisation.

As a consequence, the community constituency assumes far greater importance in the scheme established by NEDLAC. However the community constituency only exists as a counterweight to the dominance of organised business and labour. Not even the most optimistic of commentators would suggest that there is adequate organisation of the community constituency, least of all at national level. This in turn calls into question the legitimacy of the social partnership as currently conceived.

The growth of externalisation, and the process of restructuring with which it is associated, has a number of far-reaching implications for industrial policy. It concerns firstly the notion of the business, or the firm (as the Competition Act would have it), that informs such policy. As we have noted, it is primarily the horizontal relationship between firms that is regulated by competition law, rather than the vertical relationship between a firm and its customers or suppliers. However the outcome of externalisation is the proliferation of such vertical relationships, between an economically dominant firm (elsewhere characterised as a core business) and economically dependent firms (elsewhere characterised as satellite enterprises).²⁵³

Consequently the only way in which one can still regard the business as being a community of workers formed around a single economic enterprise is by disregarding legal form, and extending our notion of a business to include the cluster of legal entities formed around that enterprise. However our existing concept of the sector does not allow one to make this mental leap, because such a cluster of entities typically fall under different economic sectors. The concept of a network is of some relevance in this context, but does not adequately describe the relationship between businesses that is at issue here.

The relationship between a core business and satellite enterprise may comprise what the ILO characterises as an ambiguous employment relationship, or a disguised employment relationship. The owner-driver of a truck bearing the logo of the core business, that is used exclusively to transport its products, illustrates the point. However it remains a moot point whether the interests of the owner-driver or society

²⁵² This may even necessitate the re-definition of the jurisdiction of government departments.

²⁵³ See Theron and Godfrey, 2000.

are best served by attempting to regulate the relationship as though it were employment pure and simple. Rather what this exemplifies is how the traditional boundaries between industrial policy and labour market policy are becoming increasingly fluid. So too are the boundaries between commercial and labour law.

An integration of industrial and labour market policy requires that each policy is mindful of the imperatives of the other. If externalisation cannot be avoided, it ought at least not to be taking place under the mantle of empowerment, or the promotion of small businesses. This requires that industrial policy acknowledge the inherent limitations, as well as the benefits, of endeavours to promote small enterprises and empowerment. At the same time it requires that more attention is paid to the vertical relationship between businesses. The notion of an unfair business practice may find application in this regard. It also requires that government play a more active role in propagating alternative forms of enterprise. The implementation of the new co-operatives legislation promises to be a test case.

Implications for social policy

All employees can claim in the event of occupational injuries or diseases, including casual employees. Other social benefits linked to employment are more restricted. There is temporary income support for the unemployed. However only employees as defined qualify, and the benefit is commensurate to the period of employment. Casualisation and externalisation mean more workers are employed for shorter periods. It is also not likely these workers will be able to belong to the same kind of retirement and/or health care schemes as workers in a standard employment relationship, with the possible exception of schemes operated by bargaining councils.²⁵⁴ Yet one of the reasons employers externalise is precisely to avoid the costs such schemes entail.

Informal firms are by definition not registered in terms of COIDA or the UIA. So while employees at such informal firms may in theory qualify for protection, in practice many probably do not. Unemployment insurance also supports only a fraction of the unemployed (the Taylor Committee estimated it was 5%)²⁵⁵ and does not address the problem that unemployment is in the main structural and therefore generally medium or long-term. In short, social security measures linked to employment mean diminishing social security cover, and a widening gap in the cover for which standard and non-standard workers qualify.

Social assistance in the form of the old age grant to some extent mitigates the patchy system of private and bargaining council retirement coverage. There is also the disability grant, which complements the employment-linked COIDA scheme. For the rest the social assistance measures are targeted at children and the care of children. There is no grant or measure to assist the medium to long-term unemployed. There is no unemployment support for those that were in informal employment. There is also no health care insurance for the informally employed.

²⁵⁴ Smaller firms generally do not have private pension or provident schemes, or private health care schemes. Certainly, informal firms will not have such schemes in place.

²⁵⁵ Taylor Committee, 2002: 31.

The working poor and most of the unemployed therefore have no social protection measures reaching them and no measures directly target these two groups (which in practice overlap). For many the only source of social assistance will be one or more recipients of an old age grant in the household, or one or more children below nine years of age in the household (but note slow take-up of this grant), or one or more recipients of a disability grant in the household.

What options are there in terms of social policy? The Taylor Committee explored this issue in great depth. It concluded that a basic income grant (BIG) was the most cost effective means of addressing the gaps in the social protection net, and would have the biggest impact on poverty alleviation. It can also be argued that BIG would stimulate the labour market. However the option currently favoured by government is the Expanded Public Works Programme (EPWP) and other programmes approved at the Growth and Development Summit.²⁵⁶

But it is not clear how EPWPs such as upgrading rural roads and infrastructure will translate into sustainable employment. One way in which government contemplates doing so is to utilise the SETAs to register learnerships, so that workers engaged on EPWPs emerge with a qualification. However it remains to be seen how useful such qualification will be in securing jobs. The role of SETAs is discussed more fully below. Still another strategy would be to promote the development of worker co-operatives, as a form of entity that is able to sustain employment at a low cost. However this would necessitate a re-evaluation of the existing 'emergent contractor' model utilised by government's Working for Water Scheme.

In terms of this model, the 'emergent contractor' becomes the 'employer' of a team of workers. But in truth the 'emergent contractor' is no more than a dependent contractor, relying on a government programme to maintain an artificial economic existence. This in itself this represents a form of externalisation, and is probably not a model that is sustainable in the longer term. It also nicely illustrates the close inter-relationship between industrial, social and labour market policy.²⁵⁷

²⁵⁶ A number of public works programmes have been initiated over the last two decades. Between 1983-1992 the Special Employment Creation Programmes ran, funded to the tune of about R1 billion, and creating an estimated 114 million person-days of work over the period. The Strategic Oil Funds projects spent about R1 billion between 1990-1993 on employment creation projects that created 60 346 jobs. The National Economic Forum designed and launched a job creation programme, which in June 1995 comprised 561 projects with a value of R229 million. The National Public Works Programme (NPWP) and the Community Based Public Works Programme (CBPWP) ran from about 1994-1996. The former was an enabling framework that regulated the terms under which public contracts were granted, including the issue of wage rates, but it did not actually fund any employment programmes. The latter was launched as a Presidential Lead Project within the NPWP, with a grant of R250 million from the RDP Fund to finance the programme through to the end of 1996. However it has continued through to the present. Other more recent public works programmes are Working for Water; Coastal Care; Sustainable Rural Development; Land Care; Community Water and Sanitation; and, Arts and Culture poverty relief projects. See Report of the Presidential Commission to Investigate Labour Market Policy, 1996, Restructuring the South African Labour Market, pp. 127-133.

²⁵⁷ There is no *de jure* poverty grant. So most people who live in poverty, including the working poor, do not receive social security or social assistance transfers. This means that the vast majority of the informally employed do receive transfers (and also, importantly, do not contribute to contributory social benefit schemes). This in turn enhances the attractiveness of strategies to informalise workers, for example through externalisation and casualisation.

Implications for labour market regulation

If it is accepted that a strategy of defending the SER at all costs is misplaced and may result in perverse consequences, then there are two implications for labour market policy that must be clarified at the outset.

First, it is necessary to debunk the supposition that the appropriate response is to refine the definition of employee, or to extend the scope of the employment relationship to encompass the new forms of work, or that labour legislation could be seamlessly applied were this possible. For what this supposition fails to take account of is the extent to which labour legislation is underpinned by assumptions that are valid for the SER, but are not valid for workers in non-standard forms of employment. It also fails to take account of the nature of externalisation.

This is not to discount a provision such as the new presumption created by section 200A of the LRA altogether. Undoubtedly this new presumption will help identify cases of what the ILO terms ‘disguised employment.’ It may even assist some workers in ambiguous employment relationships secure some protections. However the fundamental reason more and more workers are in an ambiguous position is that employment is increasingly triangular in nature, and in effect regulated by commercial contract. The extent of externalisation in the construction industry illustrates this most graphically

Second, it is necessary to acknowledge that non-standard employment is not necessarily bad. In certain circumstances some employees choose flexible work arrangements - for example students or people with children to take care of. Similarly, in certain circumstances individuals prefer operating as independent contractors. Highly skilled people, who rely for their security and bargaining power on the skills they possess, can often benefit from a switch from employment to contractor status. Much depends, however, on the circumstances.

It is necessary to identify the more benign forms of casualisation, since some forms of casualisation are benign relative to externalisation, particularly where there are legislative safeguards. To have legislative safeguards it is necessary to distinguish between categories of employees. It may also be necessary to distinguish between more benign forms of externalisation.

Part-time work is probably the best example of a benign form of casualisation. Although not all sectors are suited to part-time work, it ought to be possible to increase employment in the form of part-time jobs as has indeed happened in the retail sector. However it is also necessary to provide that part-time employees are not employed at less favourable rates than are paid to workers in an equivalent full-time position, as envisaged in the Part-time Work Convention.

There is no reason in principle why a similar provision should not also apply to all forms of temporary work. But temporary work, we have noted, is difficult to define because it encompasses a spectrum of employees. There is the further complication that workers placed by a broker are temporary, although there is in fact nothing in the legislation that prevents such a ‘temporary’ worker being employed indefinitely on

this basis, as some indeed are. The more benign forms of work are of course those that provide employment for a longer period. But it might be counter-productive to encourage such forms of temporary work while failing to address the situation of temporary workers provided by labour brokers.

If a regulatory response were a sufficient response to the growth of non-standard employment, the starting point should be to regulate labour broking. This is both because it is the form of externalisation that is most amenable to regulation, and because it would facilitate measures that will encourage temporary employment other than through a broker. The reason labour broking is amenable to regulation, as argued in the research report on labour broking and temporary employment agencies, is firstly because of the anomalous situation where temporary employment with a broker can be indefinite. Secondly, given that the workplace is the clients, and the client determines the conditions of work, defining the TES as employer is a fiction the legislation has introduced. Although the ILO has sanctioned this fiction, it is nevertheless maintained at a social cost. It is therefore reasonable that in order to benefit from this fiction, TESs should be required to register.²⁵⁸

The phenomenon of LOSC in the construction sector illustrates that labour broking takes many forms. If TESs are required to register it will be necessary to define them more exactly than is the case in the LRA.²⁵⁹ It will also be necessary to differentiate between TES and service providers such as contract cleaning companies which, but for the specialised nature of the service they provide, also exhibit features of a TES. It would also be possible to subsume TESs into the broader category of service provider, with the object of regulating all ‘employers’ providing services to clients, or what the ILO terms user enterprises. For the social cost of maintaining the fiction that TESs are employers relates to a problem inherent in all forms of triangular employment relationship. This is the problem of identifying and holding accountable the employer who actually determines the conditions under which workers work.

On the other hand measures to regulate service providers other than TESs would be too wide-ranging, and would likely provoke resistance. They would also be unlikely to be effective unless there were corresponding measures to strengthen the capacity of workers employed in such situations to address their own situation, individually or collectively. This is a matter we discuss more fully below. However this is the kind of area in which ‘soft law’ provisions such as a code of conduct could find application, both to create greater awareness of the different forms the triangular employment relationship takes, and to identify the difficulties it gives rise to.

3.1.2 Revisiting the assumptions underpinning labour legislation

To strengthen the capacity of workers in non-standard employment to address their own situation it is necessary to revisit the assumptions underpinning labour legislation. First and foremost we need to re-examine the question of employment

²⁵⁸ See note 257 above.

²⁵⁹ Section 198, LRA.

security, since without a measure of security workers will not be able to address their situation at all.

We have suggested that although in theory all employees are protected against unfair dismissal, in fact workers in the informal economy are not able to access the dispute resolution system. There is also another major source of insecurity, in that temporary workers are not regarded as dismissed when the term of their contract expires. To access the system, such workers must persuade an arbitrator that they had a reasonable expectation their contract would be renewed. Routinely such contracts have a standard clause stating that no such expectation will be created. All indications are that employers are increasingly utilising fixed-term contracts to regulate the employment relationship, and avoid the risk of unfair dismissals.

The organisational rights provided in the LRA are intended to enable organised labour to bolster its bargaining position *vis a vis* employers, and to compensate for the lack of a right to bargain. However there is little indication that this has taken place. On the contrary, the indications are that the organisational rights the LRA provides are at best unhelpful, and at worst detrimental to organisation. In the case of workers of a service provider in a triangular employment relationship, the organisational rights are unhelpful, because they do not give the workers any rights in the workplace of a client. In the case of an employer with different branches they are detrimental, because of the contrived definition of a workplace.

There is also a more fundamental problem raised by the growth of non-standard employment, which relates primarily to trade union policies. For the established union movement on the whole subscribes to a tradition of industrial unionism. Consistent with an imperative to achieve dominance in a sector, ever larger unions have been formed. However the rise of non-standard employment relates to a shift in employment from the primary and secondary sectors to services. As a consequence of this shift, the significance of industrial organisation is diminished. At the same time employment has been fragmented. The rise of a multiplicity of small, regional unions, may be seen as the logical consequence of this development. In many cases they constitute the only unions organising non-standard workers. Certainly they should not be discouraged merely because they are small.

Consistent with the tradition of industrial unionism, the preferred forum for collective bargaining is at a sectoral level. In the case of bargaining councils, the sector is demarcated through NEDLAC. However the shift to services makes it increasingly difficult to demarcate sectors along traditional lines. This difficulty is illustrated by the fact that large construction companies now define themselves as providing a project management service. In terms of the sectors demarcated in terms of the SDA, they are therefore regarded as part of services. At the same time as a consequence of externalization, and the inability of the unions to organize non-standard workers, there are fewer sectors in which there is a significant union presence, let alone sufficiently representative unions.

In this context, the philosophy of voluntarism on which our collective bargaining system is premised contrasts starkly with the interventionist role of the state in demarcating all sectors for the purposes of establishing SETA's. At the same time the

institution of statutory councils has proved impractical in its current form. So too, the institution of workplace forums have not taken hold.

The only way in which one can envisage collective bargaining making any contribution to the dilemmas confronting workers in non-standard employment is if government were to adopt a more interventionist role, akin to the role it has adopted in the sphere of skills development. It could do so in one of two ways. One way would be to utilize the provisions of section 83 of the BCEA to deem categories of workers to be employees for the purpose of labour legislation. Another way would be to intervene in the establishment of forums for collective bargaining and workplace consultation. Obviously the latter course is fraught with controversy.

3.1.2 Is there a third way? Government's skills development strategy

Is there a third way such as the EU group of experts envisage, between mere adaption and reactive defence of the SER? And is there scope for a conception of occupational status that is not dependent on employment? If there were scope for such a conception, it would surely have to be built on the existing skills development and training policies. It is also possible in terms of skills development policies to develop the idea that workers are able to accumulate certain credits, and develop certain competencies. However there are a number of problems with these policies as currently implemented.

The fact that skills development and training is financed by a levy on those in employment, and their employers, suggests that those that contribute should be the prime beneficiaries, and it is only through employment that workers can accumulate such credits. Inevitably these tend to be workers in standard employment. It is true that those who do not contribute levies can benefit from programmes provided through discretionary grants, or the National Skills Fund. However SETA's have been given only limited scope to utilize such discretionary grants.

Moreover the heavy emphasis on learnerships in currently skills development policy implies placement in a formal enterprise for a significant time, and discounts the importance of other forms of skills development and training, that are better suited to workers in non-standard employment, and the self-employed.

Although there are indications that there is to be a shift away from an exclusive focus on learnerships, and towards giving SETAs greater discretion in how funds are expended, there are also concerns regarding their ability to do so. In the relatively short period of time SETAs have been in operation it has already been necessary to amend the SDA to address concerns regarding their governance. The root of the problem, it is suggested, is structural. Although supposedly bipartite institutions, they are unable to function as such, because of the weakness of collective bargaining institutions, and weakness of worker organisation. Thus measures to strengthen organisational rights and collective bargaining will ultimately also benefit skills development.

3.2 Policy recommendations

Leaving aside the wider policy measures suggested above (and by our developmental approach to the labour market), what are the options within the narrower confines of the existing labour regulations for regulating non-standard employment? First, however, a caveat. The above research has been conducted with the following question uppermost: How does one better protect non-standard employees? In seeking answers to this question we have been mindful of the need to balance more protection (or security) with flexibility, but we have not examined the economic impact that such better protection might entail. This was not part of our brief and would constitute an entirely separate enquiry.

The following suggestions are put forward somewhat tentatively. We believe that more research needs to be conducted on these issues to get the correct balance between protection and security, and, more importantly, to examine what the implications of these changes might be. The suggestions comprise a mix of direct intervention to secure better protection for non-standard employees (including enforcement), the extension of certain benefits to non-standard employees, incentivising standard employment rather than non-standard employment, and measures to highlight the position of non-standard employees.

Direct measures to regulate non-standard employment

A definition of employer:

It is proposed that consideration should be given to introducing a definition of employer, and of the concept of a ‘user enterprise’ or ‘host’ employer. The construction industry provides an example of obligations and responsibilities being transferred in whole or in part to the main contractor or even the client (in the case of the Construction Regulations in terms of OHSA). Section 89 of COIDA provides a similar transfer of obligations from a ‘contractor’ to a ‘mandator’. SARS has even cottoned onto the idea with regard to the collection of PAYE from LOSCs and sub-contractors, holding the contractor responsible to retain 10% of the contract price if the LOSC or sub-contractor is not registered for tax. The LRA and BCEA do not define an employer. We think that this omission should be re-examined and that an appropriate definition of an employer could include that of ‘user enterprise’ or ‘host’ employer to which is attached certain obligations in respect of workers that perform work for the ‘host’ employer but that are not legally employees.

The obligations should include joint and several liability for non-compliance with applicable labour legislation and collective agreements. In addition, joint and several liability for unfair dismissal should be considered where the ‘employee’ can show that he/she was under the control of the ‘user enterprise’ or ‘host’ employer.

Deeming persons to be employees:

The scope of section 83 of the BCEA needs to be made clear. Does it apply only to large identifiable groups or categories of workers? Or can it apply to individuals and smaller groups? In both cases, but particularly the latter case, how does the ECC come

to hear of such workers? A procedure must be introduced for workers to apply for consideration to be deemed employees in terms of section 83.

Regulation by sectoral determination:

It is suggested the list of different types of work that may be regulated in section 55(4)(g) of the BCEA be expanded and that subsection (k) should be amplified.

Regulation by bargaining council:

It is necessary to make explicit the powers of bargaining councils (in terms of section 28 of the LRA) to regulate sub-contracting and outsourcing arrangements.

Unfair discrimination and affirmative action measures:

A key term throughout the EEA is ‘occupational categories and levels’. Equitable representation, consultation, income differentials, assessment of compliance, etc. are all measured in the different ‘occupational categories and levels’ in an organisation. If ‘occupational categories and levels’ is defined to include non-standard employees as a distinct category then employees and unions would be able to allege unfair discrimination should employees in this category be prejudiced in any way (including indirect discrimination), would be able to attack employment policies and practices that discriminated against such workers, and could push for affirmative action measures to better the position of such workers (especially skills training).

Definition of casual or part-time work:

Consideration needs to be given to a definition of casual or part-time work in the BCEA. This would help set a floor with regard to the various definitions in sectoral determinations and bargaining council agreements, would explicitly protect such workers in terms of their conditions of employment, and would provide a regulated but flexible alternative to externalisation.

A limit to temporary employment:

Section 57 of the EEA provides that a worker provided by a TES becomes the employee of the client (or user enterprise) after a period of 3 months for the purposes of chapter 3 of the Act. The transfer of employment from TES to user enterprise should be considered with regard to other legislation. Section 57 also raises the possibility of temporary workers becoming permanent after a certain period (e.g. three months) or after a contract has been rolled over a certain number of times (e.g. three).

Other recommendations regarding the regulation of temporary work and TESs are left to the report on labour broking and TESs.

Definition of ‘workplace’:

The definition of ‘workplace’ in the LRA must be amended to make it clear that employees can exercise rights against the employer controlling the workplace where they work as well as against their own employer, and to address the situation in the

services sector, where workplace has no exact meaning. In addition the second sentence of paragraph (c) of the definition of workplace should be deleted.

Organisational rights:

The current wording of the organisational right contained in Chapter 3 do not entitle employees of another employer (such as a TES) to exercise organisational rights in a workplace. It should be made explicit and suitable provisions should be included in order that organisational rights can follow workers into other workplaces so that they can be exercised in those workplaces against the employer in control of that workplace.

Definition of employee for purpose of workplace forum:

Consideration should be given to widening the scope of the definition of employee for the purpose of a workplace forum to include other workers who are based at or dependant on the employer firm at which the workplace forum is established. The objective would be for such workers to have representation on workplace forums at the host firm or user enterprise.

Enforcement:

In the enforcement procedure, it is necessary to remove the step that allows an employer to object to a compliance order to the Director General. Employers should be entitled to appeal against an order to the Labour Court only. It may also be appropriate to have an expedited procedure for non-payment of wages, or even to reconsider criminalizing such breaches.

It is also necessary take steps to significantly improve the capacity of the Department of Labour to monitor and enforce labour legislation more effectively, and to give consideration to increased support for bargaining councils in their enforcement of agreements.

The extension of benefits to non-standard employees or improvement of benefits:

Consideration should be given to extending the following benefits for non standard workers:

More generous minimum annual leave entitlements can be introduced to the BCEA, e.g. a minimum of one day's annual leave for any period worked which increases once a certain number of days have been worked (e.g. 17 days)

Make the entitlement to family responsibility leave proportionate to the days per week worked, i.e. one day per year if works one day per week (or equivalent of one day), two days per year if works two days per week, etc. up to a maximum of three days.

Incentives for employing workers on a full-time and indefinite basis:

The compressed working week and averaging of working hours provide employers with temporal flexibility. They should not be allowed to exploit such forms of

flexibility as well as the flexibility provided by non-standard employment. Consideration should therefore be given to the provisions for a compressed working week and averaging of working hours in the BCEA excluding all but full-time employees on indefinite contracts.

Making explicit the position and importance of non-standard employees:

Unfair labour practice

Consideration could be given to utilising section 186 of the LRA to provide that certain unfair acts or omissions relating to the employment of non-standard workers would constitute an unfair labour practice.

Advice regarding sectoral determinations

When advising the Minister on the publication of a sectoral determination in terms of section 54, the Employment Conditions Commission must consider *inter alia* the prevalence and nature of non-standard work in the sector and area concerned.

Reduction of working hours

The consideration in respect of the reduction of working hours in terms of Schedule 1 of the BCEA must take account of the prevalence of non-standard work in a sector.

Regulation by bargaining councils

It is necessary to make explicit the powers of bargaining councils in terms of section 28 of the LRA to regulate sub-contracting and outsourcing arrangements.

Non-standard employment as an 'employment policy or practice'

In section 1 of the EEA the definition of 'employment policy or practice' must include all non-standard employment arrangements.

In conclusion, it is clear that there is no one effective response to casualisation, externalisation and informalisation, and that to address some of the issues raised above will require further deliberations and research. The reporting requirements of the EEA assume greater significance in this regard. However it will be of no avail to introduce additional reporting requirements unless there is also the capacity to collate and interpret data.

Some of the issues raised have potentially profound consequences for our entire labour relations system. Issues of provision of social benefits, the organisation and representation of non-standard workers, collective bargaining, the relationship between SETAs and bargaining councils, require broad ranging public debate. In this regard it may be appropriate for the Department to convene a conference that will raise the level of debate and suggest a way forward in relation to these important issues.

**Appendix 1: The Dynamic Interaction Between Processes of Casualisation,
Externalisation and Informalisation**

Standard Employment Relationship	Casualisation	Externalisation	Informalisation
An employment relationship (usually formalised by a contract of employment)	An employment relationship (not necessarily formalised by a contract of employment)	Commercial contract – labour broker or ‘independent contractor’ (either individual or enterprise)	An unregulated employment relationship, or a commercial contract that facilitates non-compliance with regulations
Employment indefinite (or ‘permanent’)	Employment temporary for fixed-term (period not necessarily specified) and/or	Employment can be indefinite, but is often temporary	Period of employment unregulated (or partially unregulated)
Employment is full-time	Employment is part-time	Employment can be full-time, but is usually part-time	Unregulated (or partially unregulated)