NEGOTIATIONS BULLETIN

APRIL/ MAY 1995

MAY DAY SPECIAL FOCUS ON THE DRAFT LRA

Workers speak with one voice

Almost two million organised workers from COSATU, NACTU and FEDSAL are speaking with one voice on the Labour Relations Bill. The country's three major federations have identified a number of areas in the draft LRA that need to be dealt with for the benefit of all workers.

The three federations demand that the new law should:

- promote basic worker rights;
- strengthen the capacity of trade union organisation in all sectors of the economy;
- cover all workers in South Africa;
- grant workers the full right to strike to defend their interests.

COSATU, NACTU and FEDSAL have met to discuss the details of the law. We believe that:

- the new law has positive features which will help workers to achieve their rights in some areas;
- but it also has many weaknesses

Weaknesses of the bill:

- It allows employers to refuse to negotiate with trade unions — no duty to bargain;
- It does not promote centralised bargaining — bosses can still run away from industrial councils or such forums as are required by workers for purposes of collective bargaining at industry level or company level;
- The workplace forums are not structured properly — it can allow for anti-union action by employers. It also legitimises the collectivity of those who do not want to join the trade unions;
- It does not cover all categories of workers — it excludes the police from its scope of the LRA without putting a clear alternative to dealing with their issues;
- It does not protect workers adequately from unfair dismissal;
- It unfairly limits the right to strike — we are merely protected for participation in the strike;
- It gives bosses unlimited power to use the lockout against workers.

The three federations are striving to finalise a common position on all the outstanding issues.

Joint communique issued by COSATU, NACTU and FEDSAL

We say to our members:

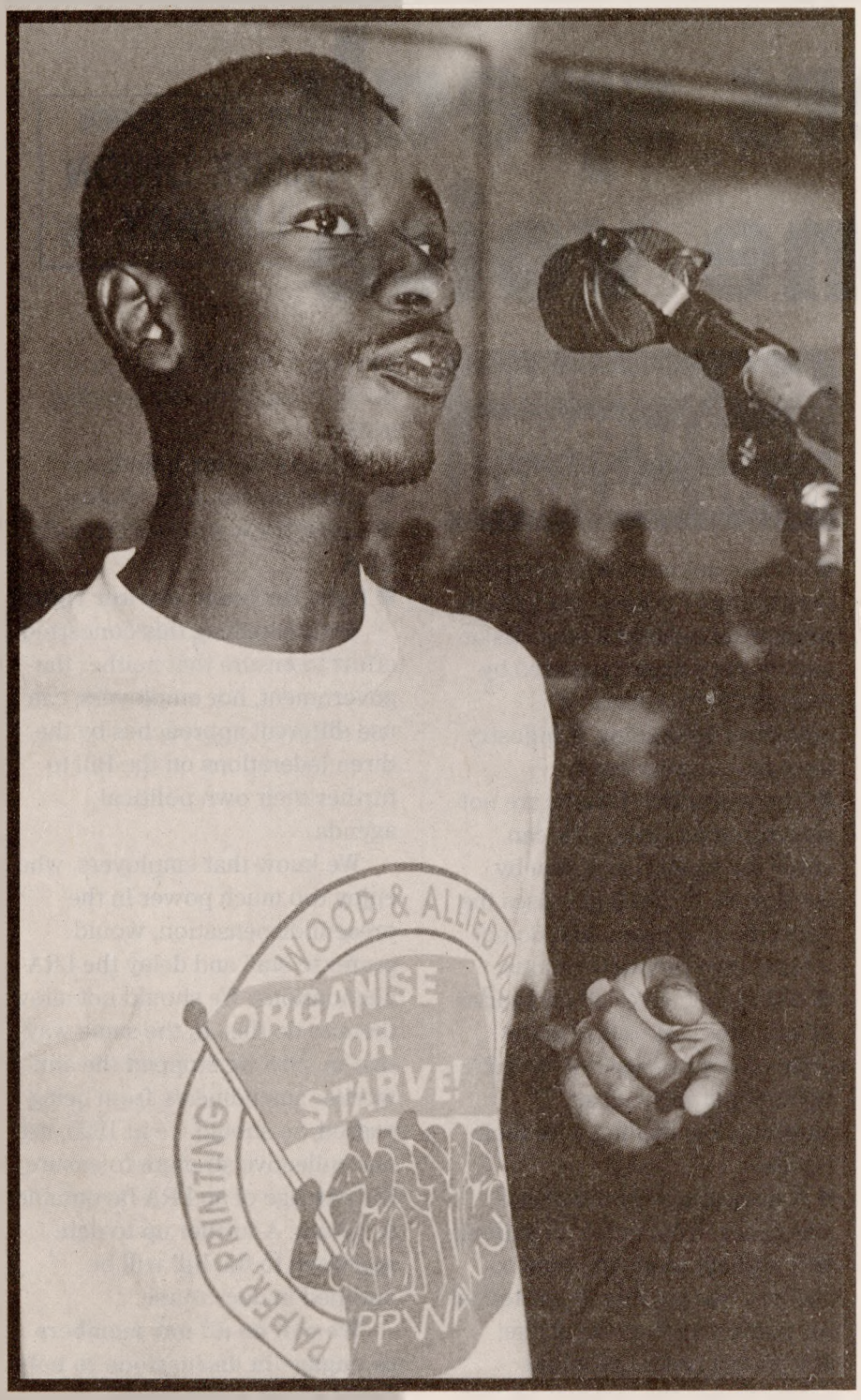
- **stand up for your rights**
- **unite for a worker friendly LRA**
- **fight for basic worker rights**

We are making this concerted effort to ensure that neither the government, nor employers, can use different approaches by the three federations on the Bill to further their own political agenda.

We know that employers, who enjoy too much power in the present dispensation, would prefer to stall and delay the LRA negotiations. We should not allow them to do this. In the same way that in 1988 we stopped the anti-worker amendments from being passed, so should we in 1995, use our collective strength to ensure the passage of an LRA favourable to labour. A further up to date approach to the Bill will be outlined in due course.

We call on all our members to engage in discussions to help bring about a consensus position as quickly as possible — preferably by May Day.

COSATU's stand on the draft LRA



▲ ***DEBATING THE NEW BILL: A COSATU Wits regional shopstewards council to discuss the draft LRA***

INTRODUCTION

The Labour Relations Amendment Bill was released for public comment on 2 February 1995. The process to deal with developing a COSATU response was discussed at a COSATU Executive Committee (EXCO) meeting on 3 and 4 February 1995. EXCO appointed a team of negotiators to lead the labour negotiations on the LRA.

The negotiators, together with the COSATU secretariat, held a two-day workshop to assess the Bill. This was followed by a special two-day Central Executive Committee (CEC) meeting on 21 and 22 February, to put to affiliates the key strategic options and debates we need to resolve.

A basic COSATU position on the Bill was agreed at the CEC held from 23-25 March 1995. The negotiators were requested to liaise with affiliates on those matters not finalised, and to give more detail to certain sections.

This document sets out both areas of agreement and proposed formulations in areas not finalised previously. This document attempts to deal with broad policy options, and not necessarily with all the consequential detail. Once these positions are agreed on, the relevant sections of the Bill will require revision. Where there is agreement with the thrust of the Bill, the document is silent.

APPROACH TO THE BILL

The Bill is an extensive rewrite of basic labour legislation, and contains both the collective rights and procedures governing labour relations, as well as a section on individual rights of workers in respect of dismissals.

The CEC agreed to focus on the collective rights and procedures. We are still working on a position on individual rights.

The CEC agreed that our primary

CAMPAIGNING ON THE BILL

COSATU's overall strategy is to use the LRA campaign to rebuild our organisation, and win substantial rights for workers. It can be a means of recruiting many new members, and building unity among as many unions as possible.

To ensure this, we need to link the campaign to workplace and wage negotiations.

A number of affiliates have started to hold meetings on the Bill. The first phase of this process had largely been completed by the end of March 1995.

- **Regional and local meetings are planned for April.**
- **May Day rallies should focus on the LRA. Workers should come in their thousands, with their families.**
- **The NOB's should visit all regions. These visits are aimed at building locals, regions and addressing the poor servicing of members.**

Other important structural dates:

- **20-23 April: International Policy Conference**
- **26-27 May: Exco (to evaluate areas of dispute and agreement)**
- **Possible Special CEC**

A communication strategy should be developed based on:

- **Regular negotiations/campaigns bulletins**
- **The Shopsteward**
- **Radio Cassettes in the form of conversations**
- **A labour strike ride from Pretoria to Cape Town**
- **Days of action**
- **A human chain**

An education and capacity-building programme based on:

- **Negotiation School from March 5-8**
- **Two-day workshops every month**
- **Secondments of trade union negotiators to various institutions for short periods.**

concern was to capture the strategic direction of the Bill, and to evaluate it against the labour agenda and objectives. This means that we would not start with matters of minor detail, but would first look at the basic structure, and major elements of the Bill.

There were two broad considerations. First, matters of principle which we need to compare with our broad policy. Second, matters of detail, where the details of a proposal, taken together, constitute a major challenge or problem for organised labour.

The mandating process is about clarifying our position on these issues, and uniting our membership on our position. We will also be meeting with Nactu and Fedsal to help consolidate a labour position.

The LRA negotiations offer an opportunity, through a campaign which combines creative and strong worker action with negotiations, to build strong support for our position, strengthen the labour position in negotiations, and use the opportunity to rebuild and regenerate the labour movement.

BUILDING A UNITED LABOUR MOVEMENT

An important test we apply to the Bill is to what extent it will promote the unity of workers on the shop floor. A Bill which makes it easy for small splinter unions to operate in our workplaces will divide workers.

COSATU therefore favours a Bill which promotes majority unionism. This is called a majoritarian system, and means setting rights at the shop floor or industry level so that only one union (the majority union) is recognised, and has access to organising facilities.

The Bill introduces an important advance which we have been fighting for: that basic trade union rights should be set out in legislation. The Bill provides for rights to access, meetings, subscriptions, ballots and time-off for union representatives, once unions have reached a certain level of membership. This level is left to Nedlac to determine.

While this is an advance, the Bill may at the same time widely open the door and allow for smaller splinter unions to be set up, since there are now statutory rights to certain union facilities.

The Bill also grants unions rights of shop steward representation, and access by majority unions to company information for collective bargaining.

Proposals for consideration:

1. That we promote the majoritarian union approach, as a means of building a united labour movement.

2. That the basic trade union rights set out in the Bill be available to trade unions on the following basis:

2.1 Where there is a bargaining council in place, a union shall be entitled to all the rights, provided it has at least 30% of the workers in the industry as members, except where a different level of representation or arrangement has been agreed by the bargaining council. This means that:

2.1.1 Until otherwise agreed by the council concerned, all the existing councils will be made up by all unions currently within it, who will then enjoy all the rights set out in the law.

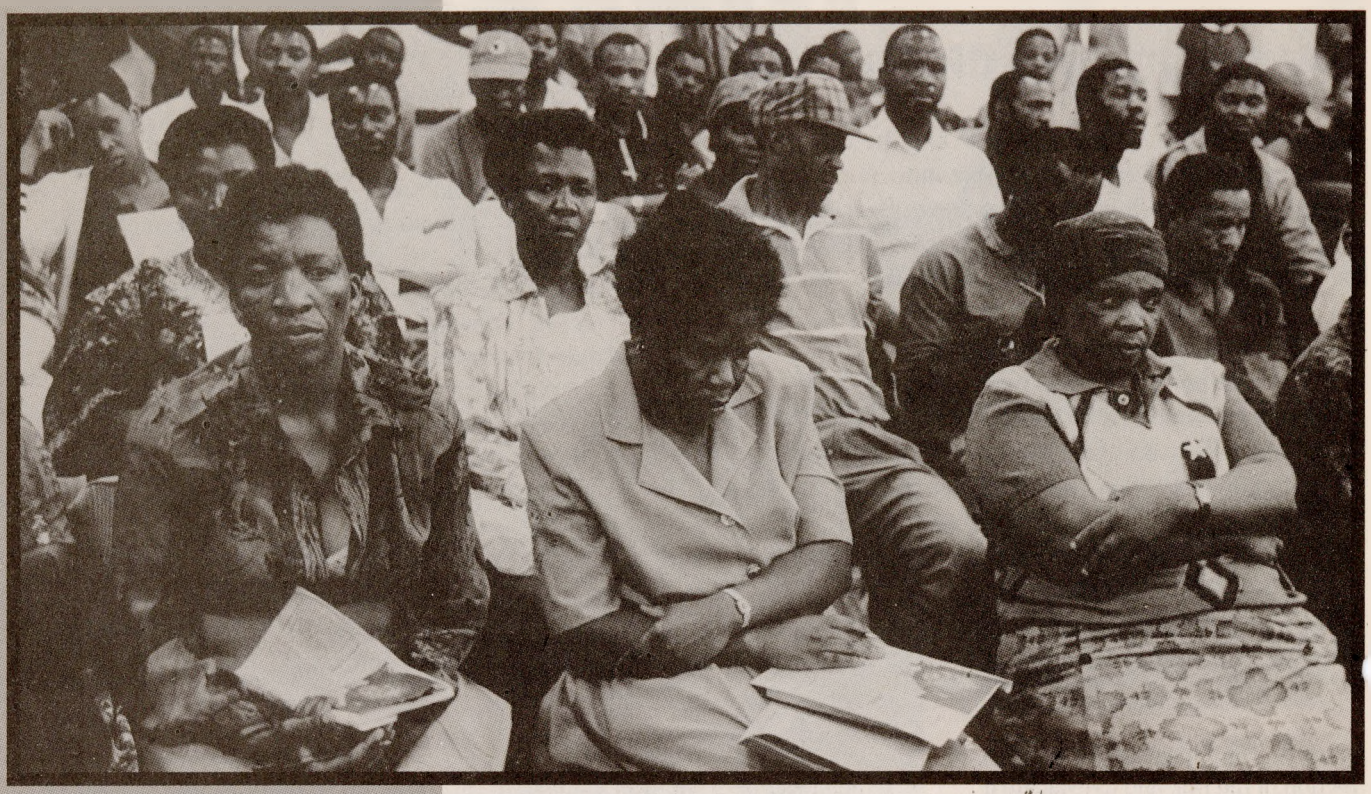
2.1.2 The public sector negotiations forums will, for now, be left unaffected.

2.1.3 Rights will be tied to industry representation, hence promoting large unions.

2.2 Where there is no bargaining council in an industry, a union shall be entitled to rights in the following manner:

2.2.1 Where a trade union has at least 50%+1 of the workers as members at a workplace, it shall solely be entitled to all the rights, and

2.2.2 Where no trade union has 50%+1 of the workers as members, then any trade union with at least 30% of the workers as members at the workplace shall be entitled to all rights, save for rights of representation and bargaining. Notwithstanding the provisions of



"The LRA negotiations offer an opportunity, through a campaign which combines creative and strong worker action with negotiations, to build strong support for our position, strengthen the labour position in negotiations, and use the opportunity to rebuild and regenerate the labour movement."

clause 2.2.2, once any trade union has achieved representation of 50%+1 at a workplace, the arrangement set out in 2.2.1 above, shall apply.

3. The definition of "worker" for purposes of representation should be all those in the agreed bargaining unit. The bargaining unit should be determined on an expedited basis by the CCMA. If there is no agreement between the trade union and employer, at the time when a trade union first applies, basic organising rights should be granted to it. The bargaining unit can be changed thereafter by a majority union through the normal mechanisms of collective bargaining, including the use of industrial action.

4. The definition of a "workplace" for purposes of representation should be reviewed, to avoid fragmentation of trade unionisation. The definition of a "workplace" for purposes of representation should refer to a "company", or geographically separate division. In particular, it should not, in the retail sector refer to an "outlet". The application of this definition to the public sector should be considered.

5. Consideration shall be given to a transitional period of one year, after which the above procedures are applied.

THE DUTY TO BARGAIN

A duty to bargain is a requirement in law that an employer and a trade union must bargain with each other.

The options which are available for a legislature, in addressing this matter, are to have:

- a legal duty to bargain,
- complete voluntarism, or
- an encouragement to bargain

A duty to bargain may cover;

- the requirement to bargain,
- the level at which bargaining must take place,
- the bargaining partner,
- the bargaining topics

The advantages of a duty to bargain are that employers cannot frustrate majority unions, and that it takes the principle of bargaining outside the conflict area. The disadvantages are that it may be applied to unions too on matters we may not wish to bargain on. The courts may enter the bargaining process by judging if we are bargaining "in good faith" and it may grant a small union rights to bargain at plant level in an industry where actual wages are negotiated at industry level.

The Bill contains no duty to bargain. It argues instead that this matter should not be regulated by law, but left to the economic powers of the parties. By granting unions basic organising

rights, and workers the right to strike, the Bill seeks to increase the power of the unions in their fight to gain rights to bargain. In our view such an increase in power is not sufficient to leave the duty to bargain out of the Bill.

Proposals for consideration:
1. A duty to bargain on employers to be set out in the law.
2. We should point out that the organisational power of workers are significantly weakened by the entitlement to employers to employ scab labour. This undermines the argument that an effective alternative to the duty to bargain exists in the Bill.

CLOSED SHOPS AND AGENCY SHOPS

The current LRA permits closed shops. In the past, a number of racially exclusive unions used the closed shop to discriminate against black workers. Over the last few years, an increasing number of COSATU unions have entered into closed shop or agency shop agreements. Currently close to 200 000 COSATU members are covered by closed shop agreements. The COSATU Special Congress in September 1993 endorsed the closed shop and agency shop.

The Bill effectively bans closed shops, on the assumption that they may be unconstitutional. Existing closed shops are only allowed to continue until the new constitution comes into place (in about two years' time). It proposes an alternative to the closed shop, by way of an agency shop.

Proposals for consideration:
1. COSATU should promote both the agency and closed shops. The law should allow both facilities, if agreed between unions and employers.
2. Provision should be made for single and multi-union closed shops.
Clarification: a multi-union closed shop would apply at industry level, and would allow a worker to choose which union to belong to, but does not permit the worker to be a non-union member. In other words, no worker should be allowed not to belong to a union.
3. The closed shop should be democratised through a provision to hold ballots among all workers covered by the closed shop, in order to determine whether to continue with the closed shop.
Proposed mechanisms:
(a) ballots to be held for all new closed shops, and every five years thereafter.
(b) a 55 % majority of workers need to vote in favour of the closed shop.
(c) a ballot may be held on a petition signed by 40% of workers in the scope of the closed shop.
4. For multi-union closed shops at industry level, participating unions would need to have at least 30% membership before being party to the closed shop, unless otherwise agreed.
5. Unions with closed shops need to make provision to record requests by members who do not wish their subscriptions to be used for political party purposes.
6. In instances where an agency shop provision applies, the agency shop fee should come directly to the party union/s, with separate administration of the monies to ensure it is used specifically for collective bargaining and training purposes.
7. The parties at Nedlac should put a joint proposal to the Constituent Assembly to ensure the wording of the new constitution does not prohibit closed shops.

INDUSTRY BARGAINING

One of COSATU's main demands has been for centralised bargaining institutions to be set up in each industry. In general, we favour industrial councils, because they have the power to have agreements extended to non-parties, and they have a machinery to ensure agreements are implemented.

The Bill makes a number of changes to the council system:
- The scope of the councils are extended to cover sectoral economic policy.
- Nedlac will determine the demarcation of industries, though only reactively.
- Provision is to be made for representation by small and medium enterprises in the constitutions of councils.
- The representatives of the parties for purposes of extending agreements to non-parties is clarified, and is based on workforce size, not number of employers.
- An independent exemptions committee is to be set up by all parties to consider requests for exemptions on "grounds of undue hardship".

The Bill leaves the decision on bargaining councils to the parties — it retains a voluntary system. It makes two exceptions: for the public service and the education sector, it statutorily entrenched the bargaining councils in place. The Bill falls short of COSATU's requirements. In some respects, such as exemptions to non-parties, it may even be weaker than the current LRA.

Proposals for consideration:
1. Bargaining Councils should, in law, be set up in each industry. Nedlac should be required to define the industrial scope of each council.
2. Unions should be entitled to bargain at council level, once a certain level of representation (30%) has been reached, unless otherwise agreed.
All employers should be required to be represented at council level.
3. Bargaining should take place at Bargaining Council level once the trade union party/parties have reached a 50%+1 level of representation.
4. The agenda of negotiation shall be any matters agreed to by the parties to the council. In the event of a dispute over the agenda, the parties shall be free to resort to industrial action.
5. The proposals in the Bill on the extension of agreements to non-parties fall away, because all employers will be party to the industrial council.
6. Exemptions from the terms of the agreement: only by agreement of the parties to the council, with the right of appeal to the exemptions committee only on grounds that the application was not considered in good faith.
7. Agreements of a Bargaining Council in the municipal sector shall override municipal by-laws or

"The composition of the workplace forum should be the shop stewards committee. No separate elections for the workplace forums should take place . . . The agenda of the workplace forum should exclude any matter covered by a collective bargaining agreement. When any new collective agreement covers an item previously covered by a workplace forum, the terms of the collective agreement will prevail."
– COSATU proposal

regulations.
(This is similar to Clause 23 (2) of the current LRA)
8. Small business enterprise representation on bargaining councils to be effected where appropriate, and SBEs to be carefully defined:
- **size of employment: 20 or fewer**
- **turnover: per annum.**

THE RIGHT TO STRIKE

The right to strike is the fundamental demand of the trade union movement. It is the basis of securing many other rights, and the main weapon to advance the interests of workers.

The LRA currently recognises the freedom to strike, but affords no protection against dismissals. It has been left to the courts to decide whether dismissed strikers should be reinstated.

The Bill makes a major advance in this area. It recognises the right to strike (as it is in any event required to do in terms of the interim constitution), and grants protection against dismissal for striking workers. It grants striking workers protection against eviction from accommodation provided by the employer.

It does not protect strikes
- on issues covered by arbitration, like dismissal of workers, or which are unprocedural, or
- in essential services and maintenance services.

The Bill does not define essential services in detail — other than stating that it refers to services where interruption will endanger life, health or the safety of the population, or a section of the population — but provides for a special committee, the Essential Services Committee, to define essential services. The law introduces a new concept — maintenance services — where interruption can lead to the destruction of work areas, plant or machinery.

The Bill does not require a ballot to be held before a strike is called. By granting all workers the right to strike, it also opens the door for legal strikes — with full protection against dismissal — by a small group at the workplace.

The law is silent on scab labour, except where an employer has a section of the workforce classified under maintenance service, in which case no scab labour is to be employed. The use of scab labour has been a major contributor to violence during industrial disputes.

Proposals for consideration:
1. We should tighten up the wording of the clause dealing with protection against dismissal for procedural strikes, to the extent necessary. Specifically, it should not entitle employers to dismiss on grounds of a fear of irreparable economic harm or damage.
2. Scab labour should not be permitted during procedural strikes.
3. The right to strike, with full protection, should only be applied for strikes authorised by a representative trade union.
4. The definition of essential services is to be agreed between trade union and employers in the sector or the institution concerned, and the role of the Essential Services Committee should be limited to being the appeals body if no agreement is reached between the parties concerned. The parties to a dispute should seek to agree to the identity of the arbitrator who will hear such a dispute. The terms of office of persons serving on the Essential Services Committee should be agreed at Nedlac.
5. Provision should be made for essential services and maintenance services to be defined as narrowly as possible.
6. Provisions in the draft Bill which restrict strike action in the event of disputes of rights should be deleted. Only where the parties agree to the use of arbitration to resolve a particular dispute should there be no resort to industrial action.
7. The jurisdiction of the Labour Court in respect of industrial action on socio-economic matters is too wide and should be substantially limited. (Specific provisions to be added here). In addition, in special circumstances, the required notice to be given to Nedlac should be as the circumstances may warrant, which may be shorter than the 14 days notice stipulated in the Bill.
8. Local authority regulations on picketing and assembly should not

▲ *COSATU is proposing that the definition of essential services be agreed on between trade union and employer in the sector or institution concerned*

override the rights set out in the Bill.

THE USE OF THE LOCKOUT

A lockout is the facility for employers to refuse to let workers perform their work, and earn their wages, in order to force workers to accept certain conditions of employment. A defensive lockout is one applied by employers only after workers have gone on strike. An offensive lockout is used on any proposal from an employer. (The same restrictions which apply to a strike will also apply to an offensive lockout).

Employers are guaranteed the facility of lockout as a recourse, but not a right, in the interim constitution. At the same time, the completely unrestricted use of the lockout can have serious negative consequences for workers.

Proposals for consideration:

1. Employer recourse to lockouts be confined to defensive lockout only.

2. Unions be granted the right to challenge lockouts in court on grounds of equity.

3. No scab labour be allowed during lockouts.

WORKPLACE FORUMS

The major new institution in the Bill is the "workplace forum". It is a body elected by all workers, and it is given certain powers in law, dealing with rights to information, consultation and joint decision-making.

It is intended to create a means to deal with matters which are either

- not covered by collective bargaining, or
- not suited to collective bargaining

Matters covered by workplace forums will not be subject to strikes or lockouts to solve conflicts or differences. In those cases, it relies on arbitration.

COSATU has called repeatedly for workplace democratisation. The debate is now on the suitable means and mechanism to give effect to this call.

There are a number of problems with the formulation of workplace forums in the Bill. These include:

- It can be used to undermine the established shop stewards structure.
- It excludes the trade union movement from the operation of the forums.
- It covers areas of traditional collective bargaining.
- It confines the forum to one site, and to workplace issues mainly, not general corporate issues.

Proposals for consideration:

1. The composition of the workplace forum should be the shop stewards committee. No separate elections for the workplace forums should take place. Where more than one recognised union exists, the shop stewards should serve jointly on the workplace forum, on the basis of proportional representation. The normal terms of recall of representatives which apply to a shop steward shall apply in respect of a workplace forum.

2. All workplaces with 50 or more workers should qualify for the rights granted to a workplace forum. In the retail sector a workplace shall be defined as a company.

3. The agenda of the workplace forum should exclude any matter covered by a collective bargaining agreement. When any new collective agreement covers an item previously covered by a workplace forum, the terms of the collective agreement will prevail.

4. Trade union officials and experts from the representative union will be entitled to attend meetings of the workplace forum.

5. Provision needs to be made for meaningful representations of worker representatives at corporate level, including on company boards.

6. Provision needs to be made for workplace forums at workplaces owned by the same holding company to hold "multi-plant" joint meetings on matters common to all such plants.

7. The full cost of all workplace forum activities should be borne by the employer.

8. The schedule of issues for immediate legislation should be as set out below and should be an Annexure to the Bill.

Nedlac should seek to amend and add to the list from time to time.

8.1 Consultation and information

- **Strategic business plans**
- **Investment decisions**
- **Product development plans**
- **Mergers**
- **Transfers of ownership**
- **Export promotion/customers**

8.2 Joint decision-making

- **Introduction of new**

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– COSATU proposal

technology
• Production planning systems

GENERAL ISSUES

A number of matters of important detail need to be addressed in the Bill. Some of these matters are set out below, but would need to be expanded. In addition, our position on individual dismissals, and the dispute resolution procedures, would need to be worked out.

1. The scope of the LRA should apply to the police and the intelligence services.
2. The references to time off for trade union representatives should contain reference to paid time off. No minimum should be set out in law.
3. The 5% collection fee for trade union subscriptions should be deleted.
4. The clause on the right to information should be substantially reworked to have fewer qualifications.
5. The LRA should provide for financial relief to the trade union movement, through:
• providing that no taxation be levied on trade union subscriptions/levies/other income.
• exempting buildings owned by trade unions, and utilised for bona fide trade union activities, from local or provincial rates.
6. The definition of a "workplace" to be carefully considered, to maintain the integrity of bargaining units, and to promote the broadest possible bargaining units.
7. The registration of new unions should take into account the representivity of the union concerned for the industries for which registration is sought.

OTHER ISSUES

There are matters which fall outside the scope of the LRA but which should be agreed to as part of this round of negotiations on the LRA. These are:

1. The Insolvency Act to be reviewed to give preference to worker claims against companies going into liquidation.
2. The Intimidation Act to be reviewed to ensure it does not restrict peaceful picketing.
3. Trade unions to be rated for VAT purposes to allow refunds on any VAT paid on bona fide union purchases.

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