

**THE SOCIAL RESPONSIBILITY OF SOUTH AFRICAN TRADE
UNIONS: A LABOUR LAW PERSPECTIVE**

by

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Submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

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JUNE 2015

DECLARATION

I declare that the thesis entitled 'The Social Responsibility of South African Trade Unions: A Labour Law Perspective' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SUMMARY

Trade unions have been in existence for many years. Although their introduction was generally met with resistance, since their establishment trade unions have been important agents of social change worldwide. Over the years, trade unions have been involved in politics and other societal activities. In South Africa, trade unions for many years not only fought for worker's rights within the workplace but also beyond the workplace. Trade unions started as friendly societies aimed at assisting their members with various matters, including offering financial help for education purposes and also in cases of illnesses. Although the main purpose of trade unions is to regulate relations between employees and their employers, trade unions perform other functions in society which can be broadly referred to as their social responsibility role. Unlike corporate social responsibility, which is recognised and formalised, trade union social responsibility is not, with the role and importance of social responsibility for trade unions having been largely ignored. This thesis aims at changing this by investigating their core responsibilities and their social responsibilities and subsequently making recommendations on how trade unions could recognise and accommodate their social responsibilities in their activities. It also considers factors that could assist trade unions in fulfilling their social responsibilities. Trade unions generally obtain legislative support for their core responsibilities, but not their social responsibilities; however this should not obstruct trade unions in such endeavours. As modern organisations it is high time that trade unions make a contribution towards sustainable development through their social responsibility role.

KEY TERMS

Trade union; freedom of association; social responsibility; social movement; collective bargaining; core responsibilities; industrial action; job regulation; job security; principal function of trade unions; social protection; the economy; HIV/AIDS; poverty alleviation; job creation; the environment; politics; education and training; financial and legal assistance

ACKNOWLEDGEMENTS

I would like to thank the Almighty God, who is my creator (Jehovah-Bara) for the ability, wisdom and strength He gave me to start and finish this project.

I would also like to express my gratitude to my supervisor, Dr AH Dekker, for her guidance and for finding time to peruse drafts of the thesis and provided helpful and valuable comments. My sincere thanks are also extended to Alexa and Gerry Barnby for editing and formatting the text.

I am indebted to my wife, Elisabeth, for her constant encouragement and support during the years I was busy with this project. I am also indebted to my son, Pheny, and daughter, Theto, for their understanding when I was not always available to give them my attention.

I would like to thank my parents, SK and MR Manamela who brought me into this world and encouraged me to study and work hard from an early age. Thanks also to my brother, Tukishi and sisters, Reinett and Lethabo, for their support.

I also want to express my gratitude to all the teachers (primary and high school) and lecturers who contributed towards building the required intellectual base for this project.

My sincere gratitude also goes to the National Research Fund (Thuthuka Fund) and the University of South Africa for the financial assistance I received from them for this project.

Dei Gratia (By the grace of God)

List of abbreviations

ACCI:	Australian Chamber of Commerce and Industry
ACTU:	Australian Council of Trade Unions
AIDS:	Acquired Immune Deficiency Syndrome
AIRC:	Australian Industrial Relations Commission
ALP:	Australian Labour Party
APHEDA:	Australian People for Health, Education and Development Abroad
ASCC:	Australian Safety and Compensation Council
AWAs:	Australian Workplace Agreements
AWU:	Australian Workers Union
BCEA:	Basic Conditions of Employment Act, 1997
BECTU:	Broadcasting, Entertainment, Cinematograph and Theatre Union
BEE:	Broad-based Black Economic Empowerment
BIG:	Basic Income Grant
BLF:	Builders Labourers' Federation
BUSS:	Building Unions' Superannuation Scheme
CAC:	Central Arbitration Committee
CBI:	Confederation of British Industry
CBPWP:	Community Based Public Works Programme
CCMA:	Commission for Conciliation, Mediation and Arbitration
CEPPWAWU:	Chemical, Energy, Paper, Printing, Wood and Allied Workers Union
CGF:	Community Growth Fund
CNETU:	Council of Non-European Trade Unions
CODESA:	Convention for a Democratic South Africa
COHSE:	Confederation of Health Service
COIDA:	Compensation for Occupational Injuries and Diseases Act, 1993
CONNAPP:	Consultative National Environmental Policy Process
COSATU:	Congress of South African Trade Unions
CRE:	Commission for Racial Equality

CSEU:	Confederation of Shipbuilding and Engineering Unions
CSR:	Corporate Social Responsibility
CUSA:	Council of Unions of South Africa
CWIU:	Chemical Workers Industria Union
DEA:	Department of Economic Affairs
DOL:	Department of Labour
DRC:	Disability Rights Commission
ECC:	Employment Conditions Commission
ECHR:	European Convention on Human Rights
EEA:	Employment Equity Act, 1998
EOC:	Equal Opportunity Commission
EPWP:	Expanded Public Works Programme
ETS:	Emission Trading Scheme
EU:	European Union
FAWU:	Food and Allied Workers Union
FEDUSA:	Federation of Unions of South Africa
FNETU:	Federation of Non-European Trade Unions
FOSATU:	Federation of South African Trade Unions
FWA:	Fair Work Australia
GEAR:	Growth Employment and Redistribution Strategy
GFWBF:	General Factory Workers Benefit Fund
HIV:	Human Immunodeficiency Virus
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICFTU:	International Confederation of Free Trade Unions
ICU:	Industrial & Commercial Workers Union of South Africa
ILO:	International Labour Organisation
IWA:	Industrial Workers of Africa
JEF:	Joint Economic Forum
LRA:	Labour Relations Act, 1995
LUCRF:	Labour Union Co-operative Retirement Fund
MAP:	Millenium Partnership for the African Recovery Programme

MAWU:	Metal and Allied Workers Union
MDA:	Mining Development Agency
MDGs:	Millennium Development Goals
MHA:	Mine Health and Safety Act, 1998
NACTU:	National Council of Trade Unions
NALGO:	National and Local Government Officers' Association
NDP:	National Development Plan
NEDC:	National Economic Development Council
NEDLAC:	National Economic Development and Labour Council
NEPAD:	New Partnership for Africa's Development
NES:	National Employment Standards
NGO:	Non-Government Organisation
NLCC:	National Labour Consultative Council
NMC:	National Manpower Commission
NOHSC:	National Occupational Health and Safety Commission
NUM:	National Union of Mineworkers
NUPE:	National Union of Public Employees
OAU:	Organisation of African Unity
OECD:	Organisation for Economic Cooperation and Development
OHSA:	Occupational Health and Safety Act, 1993
POPCRU:	Police and Prisons Civil Rights Union
PPWAWU:	Paper, Printing, Wood and Allied Workers Union
PSCBC:	Public Service Coordinating Bargaining Council
RDP:	Reconstruction and Development Programme
SACP:	South African Communist Party
SACTWU:	South African Clothing and Textile Workers Union
SADC:	Southern African Development Countries
SAMWU:	South African Municipal Workers Union
SAPU:	South African Police
SDA:	Skills Development Act, 1998
SETA:	Sectoral Education and Training Authorities
TAC:	Treatment Action Campaign

TEC:	Training and Enterprise Councils
TGWU:	Transport and General Workers Union
TUC:	Trades Union Congress
TULCRA:	Trade Union and Labour Consolidation Act, 1992
TURERA:	Trade Union Reform and Employment Rights Act 1993
TUTA:	Trade Union Training Authority
UDF:	United Democratic Front
UDHR:	Universal Declaration of Human Rights
UIA:	Unemployment Insurance Act, 2001
UN:	United Nations
UTP:	Urban Training Project
WfW:	Working for Water
WPWAB:	Western Province Workers' Advice Bureau

Table of contents

DECLARATION	i
SUMMARY	ii
KEY TERMS.....	iii
ACKNOWLEDGEMENTS	iv
List of abbreviations.....	v
Table of contents	ix
List of figures.....	xv
List of tables	xv

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE SOCIAL RESPONSIBILITY OF TRADE UNIONS 1

1. INTRODUCTION	1
2. OBJECTIVES AND AIMS OF THE STUDY	4
2.1. Research Question.....	4
2.2. Purpose.....	5
2.3. Approaches to the Study.....	5
2.3.1. Comparative Approach.....	5
2.3.2. Legal Approach.....	7
2.3.3. Historical Approach	7
2.4. Assumptions, Limitations and Expected Findings	7
3. OVERVIEW OF THE STUDY.....	8
4. EXPLANATION OF IMPORTANT CONCEPTS	10
4.1. What is a Trade Union?.....	10
4.2. Trade union Forms and Styles	13
4.3. Trade Union Role Players	15
4.3.1. Trade Union Members.....	15
4.3.2. Officials,Office-bearers and Trade Union Representatives.....	17
4.4. Trade Union Core Responsibilities and Social Responsibility	18
4.4.1. Trade Union Core Responsibilities	18
4.4.2. Trade Union Social Responsibility	19
4.4.2.1. Introduction	19
4.4.2.2. The meaning of Social Responsibility.....	20
4.4.2.3. Social Responsibility and Trade Unions	21
4.4.2.4. Why is Social Responsibility on the part of Trade Unions Necessary?	23
4.4.2.5. Beneficiaries of Trade Union Social Responsibility	24
4.4.2.6. Social Responsibilities for Trade Unions	24
5. CONCLUSION.....	27

CHAPTER 2: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS: A SOUTH AFRICAN POSITION..... 28

1. INTRODUCTION	28
2. HISTORICAL DEVELOPMENT AND LEGISLATIVE FRAMEWORK BEFORE THE NEW LABOUR RELATIONS ACT 1995	30
2.1. The Early Years of Trade Unionism in South Africa: The Period from 1850 to 1924... ..	30
2.2. The Industrial Conciliation Act 11 of 1924.....	32
2.3. The Industrial Conciliation Act of 1956	34
2.4. The Emergence of the Black Trade Union Movement.....	34
2.5. The Wiehahn Commission.....	37
2.6. The Trade Union Movement after the 1980s	39
2.7. Trade Unions since 1993	39

3.	THE SOUTH AFRICAN CONSTITUTION AND TRADE UNIONS	40
4.	THE REGULATION OF TRADE UNIONS UNDER THE LABOUR RELATIONS ACT 1995	43
5.	CORE RESPONSIBILITIES OF TRADE UNIONS IN SOUTH AFRICA	44
5.1.	Introduction	44
5.2.	Job Regulation: Basic Conditions of Employment Act 75 of 1997	44
5.3.	Job Security: The Labour Relations Act 66 of 1995	46
5.4.	Employment Equity: Employment Equity Act 55 of 1998	48
5.5.	Health and Safety: Occupational Health and Safety Act 85 of 1993	50
5.6.	Skills Development: Skills Development Act 97 of 1998	51
6.	SOCIAL RESPONSIBILITIES FOR SOUTH AFRICAN TRADE UNIONS	52
6.1.	Introduction	52
6.2.	The Economy	54
6.3.	Politics	57
6.4.	HIV/AIDS	59
6.5.	The Environment	60
6.6.	Poverty Alleviation	62
6.7.	Job creation	63
6.8.	Education and Training	65
6.9.	Financial and Legal Assistance	66
6.10.	Social Protection	67
7.	CHALLENGES FACING SOUTH AFRICAN TRADE UNIONS	70
8.	CONCLUSION	71
CHAPTER 3: THE FORMAL FRAMEWORK OF REGISTRATION; COLLECTIVE BARGAINING AND INDUSTRIAL ACTION – SUPPORT AND/OR HURDLES FOR TRADE UNIONS IN SOUTH AFRICA?		73
1.	INTRODUCTION	73
2.	REGISTRATION: SUPPORT OR HURDLE FOR TRADE UNIONS?	74
2.1.	Historical Background	74
2.2.	The ILO and the Registration of Trade Unions	76
2.3.	The South African Constitution and the Registration of Trade Unions	77
2.4.	Registration of Trade Unions under the LRA	79
2.4.1.	Procedural Requirements for Registration	80
2.4.1.1.	The Purpose of the Organisation	80
2.4.1.2.	Trade Union Independence	81
2.4.2.	The Purpose of Registration under the LRA	82
2.4.3.	The Legal Status of Registered Trade Unions	83
2.4.4.	Benefits of Registration under the LRA	84
2.4.4.1.	Organisational Rights	84
2.4.4.2.	Union Security Arrangements	85
2.4.4.3.	Collective Agreements, Bargaining Councils and Statutory Councils	86
2.4.4.4.	Industrial Action	87
2.4.4.5.	Workplace Forums	88
2.5.	The Position of Unregistered Trade Unions	90
3.	COLLECTIVE BARGAINING: SUPPORT OR HURDLE FOR TRADE UNIONS?	92
3.1.	Introduction and Historical Background	92
3.2.	The ILO and Collective Bargaining	93
3.3.	The South African Constitution and Collective Bargaining	94
3.4.	Collective Bargaining under the LRA	95
3.4.1.	Collective Agreements	98
3.4.2.	Organisational Rights and Collective Bargaining	99

3.4.2.1.	Right of Access to the Workplace	100
3.4.2.2.	Right to Stop Order Facilities	101
3.4.2.3.	Right to Elect Trade Union Representatives	101
3.4.2.4.	Right to Leave for Trade Union Activities	102
3.4.2.5.	Right to Disclosure of Information	102
3.4.3.	Union Security Arrangements and Collective Bargaining.....	103
3.4.4.	Collective Bargaining Structures	105
3.4.4.1.	Bargaining councils	106
3.4.4.2.	Statutory councils	107
3.4.4.3.	Advantages of Sector Level Bargaining.....	108
3.4.4.4.	The Legal Effect of Collective Agreements	110
4.	INDUSTRIAL ACTION: SUPPORT OR HURDLE FOR TRADE UNIONS?.....	111
4.1.	Introduction and Historical Background.....	111
4.2.	The ILO and Industrial Action	113
4.3.	The Constitution and Industrial Action.....	113
4.4.	Industrial Action under the LRA.....	114
4.4.1.	The Right to Strike under the LRA.....	114
4.4.1.1.	Definition	114
4.4.1.2.	The Right to Strike.....	115
4.4.2.	The Right to Picket.....	118
4.4.3.	Disputes of Right and Interest.....	119
4.4.4.	The Right to Protest Action.....	120
5.	THE EFFECTS OF REGISTRATION, COLLECTIVE BARGAINING AND INDUSTRIAL ACTION ON SPECIFIC ASPECTS RELATING TO THE CORE RESPONSIBILITIES AND SOCIAL RESPONSIBILITIES OF TRADE UNIONS	122
5.1.	Core Responsibilities.....	122
5.1.1.	Introduction	122
5.1.2.	Job Regulation	122
5.1.3.	Job Security	124
5.1.4.	Employment Equity and Discrimination	125
5.1.5.	Health and Safety	126
5.1.6.	Skills Development	127
5.2.	Social Responsibilities.....	128
5.2.1.	The Economy.....	128
5.2.2.	Politics	129
5.2.3.	HIV/AIDS	131
5.2.4.	The Environment	131
5.2.5.	Poverty Alleviation	133
5.2.6.	Job Creation.....	133
5.2.7.	Education and Training	134
5.2.8.	Financial and legal assistance.....	135
5.2.9.	Social Protection.....	135
6.	CONCLUSION.....	136
CHAPTER 4: THE INTERNATIONAL PERSPECTIVE: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS IN GREAT BRITAIN		140
1.	INTRODUCTION	140
2.	HISTORICAL BACKGROUND OF TRADE UNIONS IN GREAT BRITAIN.....	142
2.1.	Introduction	142
2.2.	The Development of Trade Unions in Great Britain	143
2.3.	The ILO and Trade Unions in Great Britain	145
2.4.	The Constitution of Great Britain and Trade unions	146

2.5.	TULRCA and Trade Unions in Great Britain.....	146
2.5.1.	Definition of Trade Union	146
2.5.2.	The Legal Status of Trade Unions in Great Britain	148
3.	THE LISTING OF TRADE UNIONS IN GREAT BRITAIN	148
3.1.	Introduction	148
3.2.	Advantages for Listing.....	149
3.3.	Advantages of Certification of Independent Trade Unions	150
3.4.	Independent Trade Unions and Collective Bargaining	151
3.5.	Duties of Listed Trade Unions	152
4.	TRADE UNIONS AND COLLECTIVE BARGAINING IN GREAT BRITAIN	152
4.1.	Introduction	152
4.2.	Historical Background of Collective Bargaining in Great Britain	153
4.3.	Collective Agreements	155
4.3.1.	The Importance of Collective Agreements.....	157
4.3.2.	Legal Effect of Collective Agreements	157
4.4.	Closed Shop and Agency Shop Agreements.....	158
4.4.1.	Closed Shop Agreements.....	158
4.4.2.	Agency Shop Agreements	158
4.5.	Trade Union Recognition and Organisational Rights	159
4.5.1.	Recognition	159
4.5.2.	Disclosure of Information.....	161
5.	TRADE UNIONS AND INDUSTRIAL ACTION IN GREAT BRITAIN	161
5.1.	Introduction	161
5.2.	Dismissal of Employees Engaged in a Strike	164
5.3.	Benefits during a Strike	164
5.4.	Secondary Action	165
5.5.	Picket	166
6.	CORE RESPONSIBILITIES OF TRADE UNIONS IN GREAT BRITAIN	166
6.1.	Introduction	166
6.2.	Job Regulation	167
6.3.	Job Security	169
6.4.	Employment Equity and Discrimination	171
6.5.	Health and Safety	172
6.6.	Skills Development	173
7.	SOCIAL RESPONSIBILITIES OF TRADE UNIONS IN GREAT BRITAIN.....	175
7.1.	Introduction	175
7.2.	The Economy.....	176
7.3.	Politics	177
7.4.	HIV/AIDS	179
7.5.	The Environment	180
7.6.	Poverty Alleviation	180
7.7.	Job Creation.....	181
7.8.	Education and Training	182
7.9.	Financial and Legal Assistance.....	183
7.10.	Social Protection.....	184
8.	CHALLENGES FACING TRADE UNIONS IN GREAT BRITAIN.....	185
9.	CONCLUSION.....	186

CHAPTER 5: AN INTERNATIONAL PERSPECTIVE: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS IN AUSTRALIA	189
1. INTRODUCTION	189
2. HISTORICAL BACKGROUND OF TRADE UNIONS IN AUSTRALIA.....	190
2.1. Introduction	190
2.2. The Development of Trade Unions in Australia	191
2.3. The Commonwealth of Australia Constitution and Trade Unions	193
2.4. Definition and Legal Status of Australian Trade Unions	194
2.4.1. Definition of Trade Union in Australia	194
2.4.2. The Legal Status of Trade Unions in Australia	195
3. THE REGISTRATION OF TRADE UNIONS IN AUSTRALIA.....	196
3.1. Introduction	196
3.2. Advantages for Registration.....	198
3.3. Duties and Obligations of Registered Trade Unions.....	198
4. TRADE UNIONS AND COLLECTIVE BARGAINING IN AUSTRALIA	199
4.1. Introduction	199
4.2. Historical Background of Collective Bargaining in Australia	200
4.3. Collective Agreements	203
4.3.1. Certified Agreements.....	203
4.3.1.1. Types of Enterprise Agreement	204
4.3.2. The Effect of Certified Agreements	205
4.3.3. Variation of an Enterprise Agreement	205
4.4. Closed Shop and Agency Shop Agreements.....	206
4.4.1. Closed Shop Agreements.....	206
4.4.2. Agency Shop Agreements	207
4.5. Organisational Rights: Right of Entry	207
5. TRADE UNIONS AND INDUSTRIAL ACTION IN AUSTRALIA	208
5.1. Introduction	208
5.2. Secondary Boycotts	211
6. CORE RESPONSIBILITIES OF TRADE UNIONS IN AUSTRALIA	212
6.1. Introduction	212
6.2. Job Regulation	213
6.3. Job Security	214
6.4. Employment Equity and Discrimination	215
6.5. Health and Safety	217
6.6. Skills Development	218
7. SOCIAL RESPONSIBILITIES OF TRADE UNIONS IN AUSTRALIA.....	219
7.1. Introduction	219
7.2. The Economy.....	219
7.3. Politics	221
7.4. HIV/AIDS	222
7.5. The Environment	223
7.6. Poverty Alleviation	224
7.7. Job Creation.....	224
7.8. Education and Training	225
7.9. Financial and Legal Assistance.....	226
7.10. Social Protection.....	227
8. CHALLENGES FACING TRADE UNIONS IN AUSTRALIA.....	228
9. CONCLUSION.....	229

CHAPTER 6: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS: SUMMARY, RECOMMENDATIONS AND CONCLUSION	231
1. INTRODUCTION	231
2. RESEARCH QUESTION ANSWERED	232
3. SUMMARY: HISTORICAL DEVELOPMENT OF TRADE UNIONS AND THE IMPACT OF INTERNATIONAL INSTRUMENTS ON THEIR ROLE	234
4. SUMMARY: CORE RESPONSIBILITIES OF TRADE UNIONS IN SOUTH AFRICA, GREAT BRITAIN AND AUSTRALIA.....	241
5. SUMMARY: SOCIAL RESPONSIBILITY ROLE OF TRADE UNIONS IN SOUTH AFRICA, GREAT BRITAIN AND AUSTRALIA	244
6. SUMMARY: REGISTRATION, COLLECTIVE BARGAINING AND INDUSTRIAL ACTION – HURDLES OR SUPPORT FOR TRADE UNION CORE RESPONSIBILITIES AND SOCIAL RESPONSIBILITIES?	248
7. CHALLENGES AND RISKS FOR TRADE UNION SOCIAL RESPONSIBILITY IN SOUTH AFRICA	251
7.1. Balancing Core Responsibilities and Social Responsibilities	251
7.2. Resources	252
7.3. Free Riders	253
7.4. Changing Nature of Employment: Worker Individualism	254
7.5. Reporting.....	254
8. RECOMMENDATIONS TO EMPHASISE AND INCREASE THE SOCIAL RESPONSIBILITY OF TRADE UNIONS	255
8.1. Voluntary or Compulsory	255
8.2. Legislative Changes	256
8.3. Code of Good Practice	258
8.4. Policies	259
8.5. Alliances with Other Stakeholders	260
8.6. Good Governance	260
8.7. Finance	262
8.7.1. Membership Fees and Other Fees by Members	262
8.7.2. Trade Union Investment Cooperatives	263
8.7.3. Private Companies	264
8.7.4. Non Profit Organisations	264
8.7.5. Government.....	265
9. IMPLEMENTATION OF INCREASED SUPPORT FOR AND RECOGNITION OF TRADE UNION SOCIAL RESPONSIBILITY IN SOUTH AFRICA	266
9.1. Recognise trade union social responsibilities alongside their principal purposes	267
9.2. Maintain core responsibilities for members and identify social responsibilities based on membership (contributory social responsibility activities/benefits)	269
9.3. Identify non-membership social responsibilities (non-contributory social responsibility activities/benefits)	270
9.4. Identify ways and methods for raising funds for social responsibilities	271
9.5. Training of officials; office bearers and trade union representatives in the social responsibility role	271
10. CONCLUSION.....	272
BIBLIOGRAPHY	274

List of figures

Figure 1.1: Core responsibilities of trade unions	19
Figure 1.2: The social responsibilities of unions	26

List of tables

Table 2.1: HIV statistics	60
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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE SOCIAL RESPONSIBILITY OF TRADE UNIONS

“Trade unions are one of the most powerful forces shaping our society and determining our future.”¹

1. INTRODUCTION

People in general have had a wrong perception about trade unions, most assuming that they serve little purpose other than to promote industrial unrest and cause problems for employers,² and this usually leads to an ambivalent reaction to trade unions.³ Trade unions play an important role in the development of the societies and communities in which they operate. This has generally been manifested in them directly contributing to improving the living standards of employees by negotiating not only better terms and conditions of employment and decent wages but also other benefits such as medical, housing, pension etc. At different stages of their history, their role beyond workplace collective bargaining moved from just being organisations that represent the interests of workers to placing them at the centre of the development agenda of the societies in which they function.⁴

The role of trade unions has been especially evident in developing countries during liberation struggles.⁵ In South Africa, trade unions in general emerged as social movements when industrialisation rose as a result of the discovery of gold and diamonds in the late 1800s.⁶ Social movement unionism based in semi-skilled manufacturing work emerged in opposition to oppressive regimes and harsh workplaces. This is a type of unionism that

¹ See Clegg HA *Trade Unionism under Collective Bargaining: A Theory based on Comparisons of Six Countries*, Blackwell, Oxford (1976) at 11.

² See Du Toit MA *South African Trade Unions: History, Legislation, Policy* (1976) at 1.

³ See Savage K *The Story of British Trade Unions* (1977) at 45-46.

⁴ See Buhlungu S *A Paradox of Victory: COSATU and the Democratic Transformation in South Africa* (2010) at 2-3.

⁵ *Ibid* at 2.

⁶ See Bezuidenhout A *Towards Global Social Movement Unionism? Trade Union responses to Globalization in South Africa: Discussion Paper/115/2000* at 1.

establishes alliances with community and political organisations.⁷ In the 1980s and early 1990s, the South African labour movement adopted a model of a militant and progressive movement, consequently engaging in a successful struggle for democracy against the apartheid regime.⁸ Trade unions became involved in the fight for human emancipation, recognition and dignity and the Congress of South African Trade Unions (COSATU) joined hands with the United Democratic Front (UDF) in the fight against apartheid with the aim of promoting a working class leadership.⁹ This need for trade unions to participate in other matters outside the workplace was brought about by the discovery that ‘the working class, while rooted in employed workers, also included unemployed persons and other dependents of workers’.¹⁰ As a consequence, trade unions became important agents of social change. This was a move which enabled trade unions to engage in wider political struggles for human rights, social justice and democracy. Through this, trade unions formed part of a group of political activism which included religious groups, civic and residents’ organisations and student groups.¹¹

The social movement unionism campaigns in South Africa included, amongst others, the following: ‘the people’s budget’ in 2000 presented by COSATU, the National NGO Coalition and several religious groups, aimed at increasing the money budgeted for social goods, quality jobs and ensuring that the budget process is more open and participatory. Another campaign was one with the slogan of ‘crush poverty, create quality jobs’, through which in May 2000, four million workers embarked on in a one-day general strike as part of a campaign to put unemployment on the national agenda. Another campaign was the ‘People before profits’ campaign through which

⁷ See Von Holdt K *Transition from Below: Forging Trade Unionism and Workplace Change in South Africa* (2003) at 8-9.

⁸ See Adler G & Webster E *Trade Unions and Democratisation, 1985-1997* (2000).

⁹ See Pillay D *Cosatu, Alliances and Working Class Politics in Trade Unions and Democracy: Cosatu Workers’ Political Attitudes in South Africa* (2006) at 171.

¹⁰ See Pillay op cit note 9 at 169.

¹¹ See http://en.wikipedia.org/wiki/Social_Movement_Unionism visited on 21 August 2015.

COSATU and AIDS NGOs created both a local and an international campaign for the manufacture of less-expensive HIV/AIDS medicines.¹²

According to Webster and Fairbrother, trade unions have dimensions based on the assumption that they are a particular form of social movement that 'contains progressive and accommodating dimensions'. They further argue that 'trade unions are social movements rooted in the realities of the interface between market and society, and the variants thereof'.¹³ This is based on the assumption that trade unions start by organising members who are part of society; hence all unions start as social movements.

Since many countries, including South Africa, are now politically emancipated and in the face of the global changes that are taking place, including changes to the nature of employment,¹⁴ the role of trade unions has generally been affected. As a result, the future and way forward for trade unions in many countries is unclear. Some writers even think that the role of trade unions as social movements has eroded¹⁵ because in certain cases trade union membership has declined.¹⁶ Von Holdt argues that after independence, South African trade unions have left social movement unionism.¹⁷ This change has been attributed to the recognition of trade unions as social partners, labour legislation that provides sufficient protection to workers' rights and the introduction of tripartite bodies such as the National Economic Development and Labour Council (NEDLAC) which allow trade unions to voice their concerns and participate in the overall industrial relations of the country. It must, however, be stated that society in general and the globalised world seek trade unions with a social transformation vision.¹⁸ According to Lambert,¹⁹ global social movement

¹² See Naidoo R Social Movement Unionism in South Africa: A Strategy for Working Class Solidarity (August 2001). Article from US left publication, *Dollar and Sense* at 4-5.

¹³ See Webster E & Fairbrother P *Social Movement Unionism: Questions and Possibilities* (2008) at 4.

¹⁴ Opportunities are opening up globally for skilled professionals and locally work is being casualised.

¹⁵ See Webster E & Buhlungu S *Between Marginalisation and Revitalisation? The State of Trade Unionism in South Africa* (2004) at 1 *Review of African Political Economy*.

¹⁶ See Fairbrother P & Griffin G 'Trade Unions Facing the Future' in *Changing Prospects for Trade Unionism: Comparisons between Six Countries* (2002) at 1.

¹⁷ See Von Holdt op cit note 7 at 8-9.

¹⁸ See Bezuidenhout op cit note 6 at 1.

¹⁹ See Lambert R 'Globalization: Can unions resist?' *South African Labour Bulletin* (1998) 22(6) at 72.

unionism arises when trade unions become aware of the connection between the workplace, civil society, the state and global forces and develop a strategy to avoid the negative impact of globalisation by creating a movement to connect these spheres.

In 1996, COSATU constituted a commission of enquiry known as the September Commission in order to assess its position in the context of societal and global changes and challenges.²⁰ The Commission recommended that the South African labour movement should tackle the current challenges by building on its history of social movement unionism. It described social unionism as being one concerned with wide social and political issues, as well as the immediate concerns of its members, aimed at becoming a social force for transformation.²¹ There is a need for trade unions to move from fighting for basic labour rights to maintaining those rights in the face of globalisation.²²

The formation and continued existence of trade unions has raised a number of legal questions, including whether they still have a role to play and whether they also have a social responsibility role.

2. OBJECTIVES AND AIMS OF THE STUDY

2.1. Research Question

The research aims to investigate the social responsibility of trade unions in South Africa from a labour law perspective. The study will look at the development of trade unions and their role within and beyond the workplace as agents of social change. The role of trade unions in the workplace, which relates to the employment relationship between employers and employees, will be referred to as their core responsibility²³ and the one beyond the

²⁰ The Commission recommended among other things that COSATU should start organising casual workers and proposed six themes in that regard which included an annual campaign to recruit vulnerable workers; the creation of advisory services; etc (see Bezuidenhout op cit note 6 at 13). COSATU took a resolution in 1997 to form 'super unions' and as a result several unions merged.

²¹ *September Commission*, Sixth National COSATU Congress, 1997.

²² See Bezuidenhout op cit note 6 at 27.

²³ This is discussed later and will cover their roles as prescribed or stipulated in different legislations.

employment relationship will be referred to as their social responsibility.²⁴ The social responsibility of trade unions still needs to be researched given its importance and the role South African trade unions, especially COSATU, played during the struggle for freedom. Much has been written about the social responsibility of business, but little about that of labour.

2.2. Purpose

Given the aim as outlined above, this study is pivotal. It will contribute towards the development and knowledge of the social responsibility of trade unions and the functioning of trade unions, since little has been written on the subject. The study will help identify the roles trade unions play both within and beyond the workplace and those they can still play and how those roles may be achieved. An improved understanding of their role will enhance the effectiveness of trade unions in South Africa.

2.3. Approaches to the Study

2.3.1. Comparative Approach

The approach of this study is comparative in nature. Although South Africa is not as developed as the countries with which comparisons are made, trade unions are global modern institutions which at times encounter the same forces and challenges. First the study looks at South African trade unions, their core responsibilities and social responsibilities. It demonstrates how legislation was used to hamper their functioning and how it is now used to support them. It also investigates whether registration, collective bargaining and industrial action serve as support for or hurdles to trade union core responsibilities and social responsibilities. In Chapters 4 and 5, the study compares the core responsibilities and social responsibilities of trade unions in Great Britain and Australia and also the effects of registration, collective bargaining and industrial action on their roles. Great Britain has been chosen for purposes of this study because of its history of trade unionism. South Africa was a British colony and its trade union movement developed

²⁴ This is referred to later and will cover other roles beyond those prescribed by legislation.

out of the British trade union system.²⁵ Industrial relations began in Great Britain and therefore a study of labour laws and industrial relations in general should involve Great Britain. Australia has been chosen because it also has British colonial origins, which shaped its trade union movement; however, its industrial relations development took a different route, as Australia did not continue with the voluntary British tradition of industrial relations. Instead it established a system of compulsory arbitration of industrial disputes;²⁶ which differs from the South African system. Its trade unions also play a multidimensional role.²⁷

A comparative enquiry is an excellent educational tool, contributing to a better perception of one's own national system,²⁸ especially for the South African legal system which is linked to that of Britain through the influence of English law. Blanpain stated that comparativism is no longer a purely academic exercise but has become an urgent necessity for the industrial relations resorted to by legal practitioners.²⁹ Legal comparison is important because the world has become a 'global village' and no country exists in isolation.³⁰ Bodies such as the United Nations (UN) and the International Labour Organisation (ILO) also promote international corporations. In this research, relevant international instruments such as the ILO Conventions and UN instruments are discussed where applicable in different chapters.³¹ Kahn-Freud stated that the use of a comparative method requires not only knowledge of foreign law, but also of its social and political context.³² Keightly also stated the following regarding the importance of international law:

²⁵ The first union in South Africa (Cape Town) was established on 23 December 1881 as a branch of the Amalgamated Society of Carpenters and Joiners of Great Britain (see Du Toit op cit note 2 at 10-11 and Van Jaarsveld SR & Van Eck S *Principles of Labour Law* 3ed (2005) at 214, para 580).

²⁶ See Brooks B *Labour Law in Australia* (2003) at 13. An industrial dispute is defined in s 4 of the WRA, 1996 as 'matters pertaining to the relationship between employers and employees' and extends to include a 'threatened, impending or probable (interstate) dispute' or a 'situation that is likely to give rise' to such a dispute.

²⁷ See amongst others para 7.10 of Ch 4.

²⁸ See Blanpain R *Comparative Labour Law and Industrial Relations in Industrialised Economies* (2001) at 4.

²⁹ *Ibid* at ix.

³⁰ See Kleyn D & Viljoen F *Beginner's Guide for Law Students* 4ed (2010) at 247.

³¹ See for example paragraphs 3 of Ch 2; 2.2 of Ch 3; 3.2 of Ch 3; 4.2 of Ch 3; 2.3 of Ch 4; 2.1 of Ch 5 and 3 of Ch 6.

³² See Kahn-Freund O 'On Uses and Misuses of Comparative Law' *Modern Law Review* at 27.

In many respects, international standards have been at the forefront of developments in human rights. It seems devious therefore that if human rights are to be afforded full recognition and protection in future ... it will be crucial for the governing authorities to adopt appropriate existing international instruments as the international standards will serve to buttress whatever domestic human rights standards are included in domestic constitutions.³³

No Southern African Development Countries (SADC) were chosen for the purpose of this study because the South African trade union movement is the largest and the most successful in the SADC region and probably in the continent.³⁴

2.3.2. Legal Approach

A legal approach to the study is used because trade unions in different countries, including South Africa, are regulated by legislation, as discussed in Chapter 2. The South African Constitution³⁵ protects and guarantees the right to freedom of association and the formation of trade unions. These rights are also regulated in terms of the Labour Relations Act (hereafter 'the LRA').³⁶ South Africa has also ratified a number of international conventions, which constitute international law and human rights law, and these have influenced the development of labour law in South Africa.

2.3.3. Historical Approach

This study also uses a historical approach because trade unions in South Africa have an important history, as discussed in Chapter 2. This history is linked to the struggle against apartheid and the fight against the violation of human rights in the country.

2.4. Assumptions, Limitations and Expected Findings

The study is based on a number of assumptions. Firstly that the labour movement in South Africa contributed immensely to the struggle against

³³ See Keightly R 'International Human Rights Norms in a New South Africa' (1992) 8 SAJHR 171-172.

³⁴ See http://www.southafrica.info/business/economy/policies/trade_unions visited on 28 August 2015.

³⁵ The Constitution of the Republic of South Africa, 1996

³⁶ Labour Relations Act 66 of 1995.

apartheid and social change. Since their establishment legislation has played a significant role in the functioning of trade unions and the registration of trade unions, collective bargaining and industrial action also play a significant role in the operation of trade unions.

It must also be noted that this study has some limitations. The most obvious limitation in this study is the scarcity of sources that directly address the social responsibility of trade unions as little has been written about this area of labour law. The application of a comparative approach is also a limitation as there is no formal system regarding the social responsibility of trade unions in many countries. Also one should be careful when following other legal systems without having recourse to the contexts within which they operate, as different legislation could be based on different policies. The socio-economic conditions in different countries also vary, especially when a comparison is made between developed countries and a developing country like South Africa.

This study is likely to confirm the above assumptions and further state that social responsibility for trade unions can be developed and that trade unions need to do more to ensure that it is promoted. Trade unions will therefore need the involvement of other social partners such as business, Non Government Organisations ('NGOs') and government to assist them in pursuing their social responsibilities.

3. OVERVIEW OF THE STUDY

In this chapter (Chapter 1), an introduction to the study is provided that looks at definitions of trade union;³⁷ trade union forms, trade union styles and theories;³⁸ and the concept of social responsibility in relation to trade unions.³⁹ This is considered a good starting point as it explains the concept of social responsibility and outlines both the core responsibilities and the

³⁷ See para 4 of this chapter.

³⁸ See para 5 of this chapter.

³⁹ See para 7 of this chapter.

social responsibilities of trade unions. It will also lay a good foundation for the discussion that follows in the chapters that follow.

In Chapter 2, South African trade unions are examined in greater detail. Firstly, the historical background of South African trade unions is examined.⁴⁰ The legislative framework for the core responsibilities and the social responsibility of trade unions in South Africa is also considered.⁴¹ This chapter will, on the one hand, focus on the way the law generally assists South African trade unions in their overall functioning and, on the other, highlight the restrictions imposed by law.

Chapter 3 will deal with the general support for trade unions and the hurdles that exist to limit them in their functioning. Here the role of factors such as the registration of trade unions;⁴² collective bargaining⁴³ and industrial action⁴⁴ as support for or hurdles to the functioning of trade unions in South Africa will be considered. The extent to which these factors enhance or hamper the role of trade unions in practice in South Africa is also examined.

Chapter 4 presents a comparative enquiry into the role of trade unions in Great Britain. The role of factors such as the registration of trade unions,⁴⁵ collective bargaining⁴⁶ and industrial action⁴⁷ as support or hurdles to the role of trade unions in Great Britain is considered. In addition, the extent to which these factors enhance or hamper the role of trade unions in practice in Great Britain is examined. Great Britain is used in this comparative study because the South African trade union movement originated and developed from its English counterpart. The development of English trade unions is therefore important to assist in understanding the early development of

⁴⁰ See para 2 of Ch 2.

⁴¹ See para 6.1 of Ch 2.

⁴² See para 2 of Ch 3.

⁴³ See para 3 of Ch 3.

⁴⁴ See para 4 of Ch 3.

⁴⁵ See para 2 of Ch 4.

⁴⁶ See para 3 of Ch 4.

⁴⁷ See para 4 of Ch 4.

trade unions in South Africa.⁴⁸ The influence of English law in South Africa also links the South African legal system to that of Britain.⁴⁹

Chapter 5 presents a comparative enquiry into the role of trade unions in Australia. Again the role of factors such as the registration of trade unions,⁵⁰ collective bargaining⁵¹ and industrial action,⁵² as support or hurdles to the role of trade unions in Australia is considered. Further, the extent to which these factors enhance or hamper the role of trade unions in practice in Australia is examined. Australia is used because, like South Africa, Australia was a British colony; however, although Australia's British colonial origins shaped the character and structure of Australian trade unionism, the evolution of industrial relations in Australia took a different turn from the mother country.⁵³

Chapter 6 contains the summary and conclusions for the study. In this chapter, the social responsibility of trade unions and ways through which it is achieved is summarised; recommendations are made and conclusions are drawn.

4. EXPLANATION OF IMPORTANT CONCEPTS

4.1. What is a Trade Union?

A definition for the term 'trade union' is important as a tool to assist in determining the role that trade unions play and whether this role is limited to the workplace or can go beyond the workplace into the society at large.

The Webbs define a trade union as follows:

⁴⁸ See Van Jaarsveld SR & Van Eck S *Principles of Labour Law* 3ed (2005) at 214. In 1881 the first trade union was established in South Africa which was merely a branch of the English trade union.

⁴⁹ See Kleyn D & Viljoen F op cit note 30 at 32-33.

⁵⁰ See para 2 of Ch 5.

⁵¹ See para 3 of Ch 5.

⁵² See para 4 of Ch 5.

⁵³ See Brooks B *Labour Law in Australia* (2003) at 13.

A trade union as we understand the term is a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives.⁵⁴

According to this definition, a trade union is a mere association of wage earners which maintains or improves their working conditions. This definition limits the role of trade unions to the employment relationship between employers and their employees.

In South Africa trade unions are currently regulated under the LRA, which defines a trade union as

... an association of employees whose *principal purpose* is to *regulate relations between employees and employers*, including any employers' organisation [my emphasis].⁵⁵

In terms of the above definition, in order for a trade union to exist there must be some form of association by employees. This association must mainly 'regulate relations between employers and employees'.⁵⁶ The definition in the LRA does not limit the role of trade unions like the Webbs' definition provided above does.

Salamon defines a trade union as follows:

[A]ny organisation, whose membership consists of employees, which seeks to organise and *represent their interests both in the workplace and society*, and, in particular, seeks to regulate their employment relationship through the direct process of collective bargaining with management.⁵⁷ [my emphasis]

⁵⁴ See the definition by Sydney and Beatrice Webb in Bendix S *Industrial Relations in South Africa* 5ed (2010) at 161; Maree J *Trade Unions, Redundancies and New Technology Agreements* Carnegie Conference Paper No 122 1984 Second Carnegie enquiry into poverty and development in Southern Africa Cape Town.

⁵⁵ See s 213 of the LRA. See also *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries* 1995 ILJ 903 (IC) (decided in terms of the old LRA; however, the definitions are comparable). An association formed primarily to assist employees who have been dismissed is not a trade union as defined in the LRA; *Nomabunga v Daily Dispatch* [1997] 11 BLLR 1519 (CCMA); *Vidar Rubber Products (Pty) Ltd v CCMA* [1998] 6 BLLR 634 (LC) at para 24; *National Manufactured Fibres Employers Association v Bikwani* 1999 ILJ 2637 (LC).

⁵⁶ See Du Toit D; Godfrey S; Cooper C; Giles G; Cohen T; Conradie B & Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) at 218.

⁵⁷ See Bendix op cit note 54 at 175.

The *Encyclopaedia Britannica* defines trade unions as

... associations of employed persons for collective bargaining about their conditions of employment and also for the provision of benefits, legal defence and the promotion of their members' interests by bringing pressure to bear on governments and parliaments and in certain cases, by political action.⁵⁸ [my emphasis]

The above two definitions provide a better exposition of what a trade union is and what its overall functions should be. They indicate that a trade union is an organisation that seeks to represent the interests of its members in both the workplace and society. These definitions confirm that trade unions in general seek to improve the position and welfare of their members within and beyond the workplace. The interests of members in the workplace, which relate to the regulation of the relationship between employees and the employer, are the principal or core responsibilities of trade unions. All other interests fall into the category of the non-principal or social responsibilities of trade unions. The role of trade unions is therefore not limited as the definition by the Webbs above would suggest.

The definition of trade union provided by the LRA indicates that its 'principal purpose' is the regulation of relations between employees and employers. The word 'principal' means: 'belonging to the first rank; among the most important; prominent; leading; main'.⁵⁹ Therefore the role of regulating relations, as indicated by the definition, is the leading or main definition; however, it is not the only one. The phrase 'to regulate relations' is not defined in the LRA, however, academic writers have interpreted it to mean 'to co-ordinate or organise employees with respect to their employment relationship with one or more employers'.⁶⁰ This interpretation, it is submitted, implies that whatever the trade union does as part of its principal purpose must relate to the employment relationship. In the pursuit and the protection of members' interests, a trade union will seek to regulate and secure the jobs of its members, yet its role does not end there as it may

⁵⁸ See *Encyclopaedia Britannica* Vol 3 at 554.

⁵⁹ *Oxford English Dictionary* see <http://www.oed.com/> visited on 21 August 2015.

⁶⁰ See Du Toit et al op cit note 56 at 218.

play other wider roles that do not have a direct bearing on the employment relationship.⁶¹

4.2. Trade union Forms and Styles

In general, trade unions operate either in the public⁶² or private sector⁶³. In an attempt to protect the interests of their members, trade unions take different forms which may be influenced by political, economic and social factors and challenges, including globalisation.⁶⁴ The economic and political history of a country also plays a pivotal role in shaping trade unions and this is clearly evident in South Africa, as was seen in paragraph 1 and as is discussed further in Chapter 2. The following are some of the forms trade unions may take: occupational unions,⁶⁵ industrial unions,⁶⁶ general

⁶¹ See Bendix op cit note 54 at 170. See also *Overview of Corporate Social Responsibility* <http://www.bsr.org> visited on 15 October 2012 and Grogan J *Collective Labour Law* (2010) at 34.

⁶² Public service is defined by s 213 of the LRA as 'the service referred to in section 1(1) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 to that Act, but excluding – (a) the members of the National Defence Force; (b) the National Intelligence Agency; and (c) the South African Secret Service. The public sector unions are unions that represent workers in the public service, such as in the prison services and the health services. Historically, South African public service trade unions have been racially organised and their method of operation was dictated by the government. Those representing skilled white workers were co-opted into the system and their interests were looked after by the government. By contrast, black workers were compelled to participate in 'in-house' structures with little power to improve their economic position. Until 1995, when bargaining in the public sector was redefined and consolidated, state employees were generally excluded from the scope of the LRA. In 1990 the police began organising themselves and the Police and Prisons Civil Rights Union (POPCRU) was formed and later the South African Police Union (SAPU) followed.

⁶³ A private sector union is a union organising employees outside the 'public service', as defined in the LRA, i.e., mainly employees mainly in industries and companies. In terms of s 213 of the LRA 'sector' means, subject to s 37, 'an industry or a service. It is an area of the economy identified on the basis of the similarity of products manufactured, resources exploited or services provided'.

⁶⁴ See Bendix op cit note 54 at 186. See also Fairbrother & Griffin op cit note 16 at 9.

⁶⁵ Occupational unions are those unions that organise employees only in a particular occupation, regardless of the industry or area in which the work is done. In broad terms, an occupational union is one that restricts its membership to workers performing a certain job (See *Managing Industrial Relations in South Africa* 1990 edited by Slabbert JA, Prinsloo JJ & Backer W at 4-20). The first unions established in this class were the *craft unions* in 1892. The main feature of these unions is their concern for and protection of the skilled status of their members. They concentrate on recruiting apprentices to their trade and regulating the training of apprentices. Most of the craft unions in South Africa achieved their goals by lobbying the government for protective legislation in the form of legalised job reservation and restricting apprenticeship opportunities to whites only. However, the introduction of technology has caused a dilution of skills and, as a result, very few pure craft unions still exist in South Africa. Another type of union established under occupational unions was the *promotion union*. Promotion unions can be defined as those unions having as members workers skilled in a certain task, but who cannot be categorised as artisans or craftsmen because they did not attain their status by serving a recognised apprenticeship. The workers instead acquired their skills through 'on the job' practice and reached their status through promotion on merit and competence (see Bendix op cit note 54 at 164).

⁶⁶ The Industrial and Commercial Workers Union, established in 1919, was one of the first industrial unions. Unlike other types of union, the aim of an industrial union is to organise all the workers in a particular industry, or at least as many workers as possible, irrespective of their jobs, in that specific industry, e.g. clothing, mining and catering industry. Such a union, may seek to be a monopoly union, in which case it will try to be the only union for all workers in an industry, or to be merely a single-industry union, which is a union confining its efforts to organising workers in one

unions⁶⁷ and white collar unions.⁶⁸ Trade unions may also form federations of trade unions in order to enhance their power and influence.⁶⁹

In addition to the social movement unionism discussed above, trade unions may follow other different styles in their functioning, depending on what their main objectives are. According to Bendix, the following styles of trade unionism can be identified: business unionism,⁷⁰ community unionism,⁷¹ welfare unionism,⁷² economically responsible unionism⁷³ and political unionism.⁷⁴

The role and purpose of trade unions can also be determined from looking at the different theories on the creation and operation of trade unions. The main theories emanate from the Marxists and the Transformation

industry only. The advantages of industrial unions are that: they lead to stronger unions, help to eliminate inter-union competition, reduce the number of unions with which an employer has to bargain, and bring correspondence between union organisation and employer organisation (see *Participation and Progress: Labour Relations in South Africa 2001* edited by Van Rensburg R at 3-314).

⁶⁷ As the name suggests, the membership of general unions is open to any employee. General unions organise all employees irrespective of the sector, area, skill or occupation. While general unions may include skilled and unskilled workers in any industry, they generally tend to organise unskilled workers (see *Trade Unions: What they are: What they do: Their Structure: International Confederation of Free Trade Unions* (1962) 5ed at 19).

⁶⁸ These unions consist of professional and administrative staff. White collar unions respond to issues such as job restructuring based on technological changes which affect administrative personnel in particular, for example the introduction of computers, calculators and word processors. An example of such a union in South Africa is the Media Workers Association which represents the interests of media employees (see Bendix op cit note 54 at 165; Van Rensburg op cit note 66 at 3-4).

⁶⁹ The word 'federation' is not defined in the LRA, although it does mention the qualification that such an organisation must have 'the promotion of the interests' of employees 'as a primary object' (see s 101(1) of the LRA). Trade union federations are formed when individual trade unions from different groupings join forces in order to enhance their power and status. A federation may operate in a particular sector or nationally. Federations that operate nationally are mostly powerful and able to influence political life and government policies (see *Participation and Progress* op cit note 60 at 3-5). In South Africa, the largest federations of trade unions are COSATU, the National Council of Trade Unions (NACTU) and the Federation of Unions of South Africa (FEDUSA). COSATU joined hands with the African National Congress in mobilising support for the introduction of the new government in 1994.

⁷⁰ See Bendix op cit note 54 at 175. Trade unions following this style concentrate on the improvement of wages and working conditions at either plant or industry level. Such unions lobby for or provide input in regard to proposed labour legislation or comment on economic policy.

⁷¹ Ibid. Those following this style are actively involved with the communities from which their membership is derived, and protect the interests of such communities. Where communities are divided, they may choose to take a particular political stance.

⁷² Ibid. Trade unions following this style derive their strength from the fact that they provide benefits for members in the form of pension and sick funds, funeral benefits and educational assistance. Sometimes they even control national funds, some of which are established by them.

⁷³ Ibid. In terms of this style, trade unions see themselves as the promoters and protectors of general economic welfare at the industry or national level.

⁷⁴ Ibid. In this style, the focus is on the promotion of a particular party or on general socio-political change. Such a union uses its power base to support a political party or to lobby influential organisations, or it uses mass action to provide the impetus for political change. See also Hyman R *Understanding European Trade Unionism: Between Market, Class and Society* (2001) London.

Unionists.⁷⁵ Marxism views trade unions as vehicles for bringing about change in the wider civil society and not dealing only with company issues. It views compromises between management and workers as capitulation and, as a result, it aims for an adversarial relationship with management. For Karl Marx, a trade union was an organisation of workers whose struggle involved starting from the economic level and developing into a political and revolutionary movement.⁷⁶ The Transformation Unionists see trade unions as vehicles for continual and incremental change. In contrast to the Marxists; they reach compromises with management on condition that such compromises will benefit unions in future.⁷⁷

It must, however, be highlighted that these theories suggest that trade unions have a broader role to play than just representing members' interests in the workplace.

4.3. Trade Union Role Players

Trade union role players are important because they constitute the collective identity of a trade union and shape the goals and activities a trade union must pursue and how it pursues them. Trade union role players include members, officials, office-bearers and trade union representatives.

4.3.1. Trade Union Members

The word 'union' indicates the existence of a group of persons. Employees accordingly exercise their right to freedom of association and form a trade union.⁷⁸ A trade union is therefore an association of employees. In *NEWU v Mtshali & another*,⁷⁹ the Labour Court held that the fact that the LRA seeks to protect job seekers from discrimination does not make them employees. It found that a trade union cannot amend its constitution in order to permit job seekers to be members.

⁷⁵ See Van Rensburg op cit note 66 at 3-12

⁷⁶ See Slabbert et al op cit note 65 at 4-13.

⁷⁷ See Van Rensburg op cit note 66 at 3-12

⁷⁸ This right is an internationally acknowledged right provided for by the ILO Convention 87 of 1948. In South Africa this right is protected in terms of ss 18 and 23(2)(a) of the RSA Constitution, 1996.

⁷⁹ (2000) 21 ILJ 1166 (LC) at 1171-1172.

All employees irrespective of their seniority are entitled to join or hold office in a trade union. However, the Labour Court has noted that employees still owe a duty of fidelity to their employers as at times there may be a conflict of interests between the role of employees as managers and as office-bearers in trade unions.⁸⁰ Trade unions represent their members' interests, while members must pay membership fees as prescribed by the union and these fees will assist a trade union in advancing its roles and objectives.⁸¹

Membership is not an automatic right. Since a trade union is a legal persona, it can decide who to admit as members.⁸² Trade unions acquire authority over their members when the latter submit to the rules as contained in the union's constitution. On becoming members, employees grant unions a mandate to negotiate the improvement of working conditions on their behalf and to represent their other interests. In South Africa no trade union may in its constitution discriminate against any person on the grounds of race or gender.⁸³ This means that racially exclusive trade unions may not be registered. Every member of a trade union is entitled to participate in the activities of the trade union;⁸⁴ participate in the election of officials and office-bearers⁸⁵ and be appointed as an official, office-bearer or trade union representative.⁸⁶

Just as companies are managed and act in the interests of their shareholders,⁸⁷ so trade unions should act in the interests of their members. Trade unions owe a duty of care to their members and they can be held liable in delict if they breach this duty.⁸⁸

⁸⁰ See *IMATU & others v Rustenburg Transitional Local Council* (2000) 21 ILJ 377 (LC).

⁸¹ In terms of s 95(5) of the LRA, the union's constitution must provide for membership fees and methods for determining them.

⁸² See *Garment Workers Union v Keraan* 1961 (1) SA 744 (C); *Spilkin v Newfield & Co of SA (Pty) Ltd v Master Builders & Allied Trades Association, Witwatersrand* 1934 WLD 160.

⁸³ See s 95(6) of the LRA.

⁸⁴ See s 4(2)(a) of the LRA.

⁸⁵ See s 4(2)(b) of the LRA.

⁸⁶ See s 4(2)(c) and (d) of the LRA.

⁸⁷ See Havenga M 'The Company, the Constitution and the Stakeholders' (1996) 5 *Juta's Business Law* 134 at 136.

⁸⁸ See Cohen T, Rycroft A & Whitcher B *Trade Unions and the Law in South Africa* (2009) at 83.

4.3.2. Officials, Office-bearers and Trade Union Representatives

The management of trade unions is vested in executive committees which are constituted of elected office-bearers and appointed officials.⁸⁹

In terms of the LRA, 'official'

'in relation to a trade union ... federation of trade unions or ... means a person employed as the secretary, assistant secretary or organiser of a trade union, ...or in any other prescribed capacity, whether or not that person is employed in a full-time capacity'.⁹⁰

When appointed, officials become employees of the union.⁹¹ An official may serve as an advisor to the union but may make no determinations of his or her own accord.

An 'office-bearer' is

... a person who holds office in a trade union ... federation of trade unions ... and who is not an official.⁹²

Besides their leadership and representational functions, union office-bearers and officials have an administrative role. They are responsible for recruiting and enrolling new members, ensuring that membership fees are paid, keeping books of account⁹³ and administering benefit funds on behalf of the union.⁹⁴

A 'trade union representative' is:

a member of a trade union who is elected to represent employees in a workplace.⁹⁵

Trade union representatives are 'office-bearers' who perform union duties during the course of their employment and can directly represent employees' rights with both management and the union. The primary role of a trade

⁸⁹ See ss 4(2) and 95(5)(j)-(k) of the LRA.

⁹⁰ See s 213 of the LRA.

⁹¹ See Bendix op cit note 54 at 178.

⁹² See s 213 of the LRA.

⁹³ See ss 98 & 99 of the LRA.

⁹⁴ See Bendix op cit note 54 at 180.

⁹⁵ See s 213 of the LRA.

union representative is to ensure that the relationship between the union and its members is maintained and promoted.⁹⁶

The Companies Act of 2008 provides that ‘a director of a company, when acting in that capacity, must exercise the powers and perform the functions of the director in good faith and for a proper purpose in the interests of the company’.⁹⁷ In the same manner, trade union officials, office-bearers and trade union representatives must exercise a duty of care in their functions and for a proper purpose in the interests of the members in both core responsibilities and social responsibilities.⁹⁸ The proper and effective functioning of trade unions to a large extent depends on these people. Therefore the success or failure of trade unions in terms of their role and responsibilities depends on their effectiveness. In their everyday duties they guide, influence and apply trade union policies.

4.4. Trade Union Core Responsibilities and Social Responsibility

4.4.1. Trade Union Core Responsibilities

The common law principle of freedom of contract operates on the premise that the employer and employee are on an equal footing when negotiating the terms and conditions of employment.⁹⁹ This is, however, seldom the case in practice.¹⁰⁰ The employer is usually in a stronger bargaining position because of its economic and social power. This position has in the past enabled the employer to dictate terms and conditions of employment to employees and to again unilaterally change them. Over the years, the legislature has addressed the unequal bargaining power between these parties through legislation. This was done by recognising employees’ right to freedom of association through which they could form trade unions. Trade

⁹⁶ See s 14(4) of the LRA for other functions of trade union representatives. This is discussed in detail later.

⁹⁷ See s 76(3)(a) and (b) of the Companies Act of 2008.

⁹⁸ See Cohen et al op cit note 88 at 83.

⁹⁹ The term ‘common law’ is used to denote the entire body of the law of South Africa that does not originate from legislation. It refers to Roman-Dutch law (see Hahlo HR & Kahn E *The South African Legal System and its Background* (1973) 132. The common law entails Roman-Dutch law as interpreted, developed and extended by our courts. See also Beatty M D ‘Labour is not a Commodity’ in Reiter JB & Swan J (eds) *Studies in Contract Law* (1980) 334.

¹⁰⁰ See Hyman R *Industrial Relations: A Marxist Introduction* (1975) at 23.

unions would then engage in collective bargaining with the employer on behalf of employees about terms and conditions of employment. Legislation generally supports trade unions in fulfilling their core responsibilities, as most aspects falling under trade unions' principal role are regulated by statute. Aspects covered under core responsibilities include job regulation,¹⁰¹ job security,¹⁰² employment equity,¹⁰³ skills development,¹⁰⁴ and occupational health and safety.¹⁰⁵

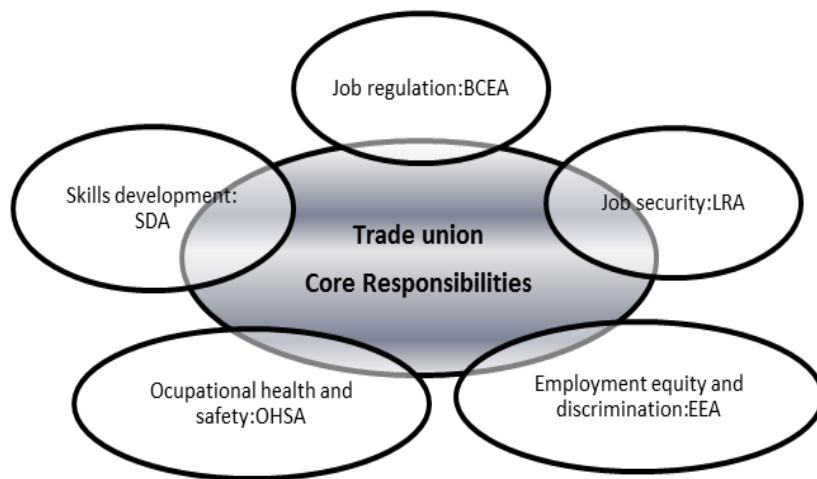


Figure 1.1: Core responsibilities of trade unions

4.4.2. Trade Union Social Responsibility

4.4.2.1. Introduction

Social responsibility has become a subject of public policy internationally. It forms part of the debates on globalisation and sustainable development.¹⁰⁶ Worldwide, governments are no longer in a position to protect individuals from economic insecurities.¹⁰⁷ This has led to public expectation that organisations, including trade unions, have responsibilities in furthering the general interests of the public. However, it is not always clear what these

¹⁰¹ This was done through the introduction of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

¹⁰² This was done through the introduction of the Labour Relations Act 66 of 1995 (LRA).

¹⁰³ This was done through the introduction of the Employment Equity Act 55 of 1998 (EEA).

¹⁰⁴ This was done through the introduction of the Skills Development Act 97 of 1998.

¹⁰⁵ This was done through the introduction of the Occupational Health and Safety Act 85 of 1993 (OHSA) and the Mine Health and Safety Act 20 of 1998. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 may also be relevant in this regard.

¹⁰⁶ See Sheldon R *Corporate Social Responsibility and the Crisis of Globalization* at www.prwatch.org visited on 22 April 2013.

¹⁰⁷ See Crowther D & Jatana R *International Dimensions of Corporate Social Responsibility* Vol II (2005) v-vi.

interests are. This has culminated in the formulation of concepts such as ‘corporate social responsibility’ or just ‘social responsibility’. These concepts and related matters are discussed in more detail below.

4.4.2.2. *The meaning of Social Responsibility*

At this stage it should be highlighted that the terms ‘social’ and ‘responsibility’ or ‘social responsibility’ are not defined in any South African labour legislation nor have they been afforded a specific meaning in terms of common law.¹⁰⁸ However, the terms are generally used as though their meaning were self-evident or universally understood. In the absence of guidance from labour law sources one may again have to resort to company law¹⁰⁹ where concepts such as ‘corporate citizenship’ and ‘corporate social responsibility’ (CSR) are generally used. Section 7(d) of the Companies Act of 2008 states that one of the Act’s purposes is to reaffirm the concept of the company as a means of achieving economic and social benefit. ‘Corporate citizenship’ is described as ‘business taking greater account of its social, environmental and financial footprints.’¹¹⁰ According to Hinkley, ‘Corporate Social Responsibility’ occurs, when, in an effort to protect the public interest, a company does more than the law requires. As a company becomes more socially responsible, its behaviour approaches corporate citizenship.¹¹¹ However, when looking at the King III Report, it would appear that these concepts can be used interchangeably.¹¹²

The term ‘social responsibility’ denotes an organisation’s obligation to maximise its long-term positive impact and minimise its negative impact on society.¹¹³ The social responsibilities of business are the set of widely accepted expectations of how business should behave. These are the

¹⁰⁸ See footnote 99 for an explanation of the common law.

¹⁰⁹ Corporate social responsibility issues are prominent in the Companies Act of 2008. In terms of s 7(d) of this Act, one of the purposes of this Act is to reaffirm the concept of the company as a means of achieving economic and social benefit.

¹¹⁰ See Zdec S *The Civil Corporation: The New Economy of Corporate Citizenship* (2001) at 7.

¹¹¹ See Hinkley R ‘Do No Harm: A Corporate Hippocratic Oath’ (2007) *The Australian Financial Review* 63.

¹¹² See Hamann R & Acutt N ‘How should Civil Society (and the Government) Respond to ‘Corporate Social Responsibility’? A Critique of Business Motivations and the Potential for Partnerships’ (2003) 20 *Development Southern Africa* 255; where it was said that corporate social responsibility and corporate citizenship are meant to link the market economy with sustainable development.

¹¹³ See *The Concise Blackwell Encyclopedia of Management* edited by Cooper C L & Argyris C (1998) at 606.

expectations of society as a whole and they can come in the form of laws or may take non-legally binding forms. They can be set out formally, where a government adopts laws or regulations, or informally as widely shared cultural values. At times social responsibilities are determined and identified through social dialogue or tripartite consultation.

The issues that represent an organisation's social responsibility focus vary by business, size, sector, and geographical region.¹¹⁴ Socially responsible behaviour has been described as 'action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good'.¹¹⁵

According to Parkinson¹¹⁶ there is relational responsibility and social activism. For corporations, relational responsibility refers to assistance offered to groups such as employees, suppliers, consumers, and suchlike. Social activism, on the other hand, refers to assistance offered to groups that fall outside the organisation's activities such as those involved in social issues arising independently and which are an extension of the corporate activity of the organisation.¹¹⁷ For the purposes of trade unions, relational responsibility will deal mainly with the core responsibilities and social activism will deal with social responsibilities.

4.4.2.3. *Social Responsibility and Trade Unions*

Similar to the provisions of section 7(d) of the Companies Act of 2008, section 1 of the LRA states that the purpose of the LRA is 'to advance economic development, social justice, labour peace and the democratisation of the workplace'. This indicates that in the labour law sphere social responsibility is also given consideration. In South Africa, trade unions are institutions established in terms of the LRA and therefore they are one of the vehicles through which the Act seeks to achieve social responsibility and sustainable development. It is submitted that trade unions are established

¹¹⁴ See *Overview of Corporate Social Responsibility* <http://www.bsr.org> visited on 28 August 2015.

¹¹⁵ See Slaughter C 'Corporate Social Responsibility: A New Perspective.' 1997 *The Company Lawyer* 321.

¹¹⁶ See Parkinson JE *Corporate Power and Responsibility* (1996) ch 9.

¹¹⁷ *Ibid* at 269.

on the basis of the principles of Ubuntu. Ubuntu is an ancient African word which means 'humanity to others'. The concept also means 'I am what I am because of who we all are'. In line with this concept, through trade unions employees come together to form a collective unit (trade union) through which their collective interests are protected. This promotes a form of solidarity in workers. Ubuntu is also the basis of social responsibility, ensuring responsibility and concern for others, neighbourliness and the spirit of inclusion, community and a sense of belonging.¹¹⁸ All of these are encapsulated in the concept of social responsibility through which societal needs and development are considered.

Social responsibility is an important concept which is changing the environment in which trade unions function. Corporations have realised this role and now it is time for trade unions to also do so formally. This new environment is no longer an option for trade unions; however, they must first recognise both the challenges and the opportunities it brings. The challenge for trade unions is to prevent non-core responsibilities from substituting the core responsibilities, while the opportunities include using social responsibility as a way of promoting good industrial relations and meeting the other needs of their members and those of the society in general. According to Salamon, social responsibility displays an expectation that trade unions will exercise their role and activities in a way that is not detrimental to the existing capitalist economic, social and political system.¹¹⁹

In this era, the successful agenda of organisations, including trade unions, will to a greater degree be shaped by their ability to play an active and constructive role in the society in which they operate. The premise for putting this position is that the transformed political and economic position in various countries offers new challenges to trade unions. Consequently, socially responsible trade unions will not only be about representing the

¹¹⁸ See De Kock PD & Labuschagne JMT 'Ubuntu as a Conceptual Directive in Realizing a Culture of Effective Human Rights' 1999 *THRHR* 114 at 118.

¹¹⁹ See Salamon M *Industrial Relations Theory and Practice* 3ed (1998) at 117.

interests of members in the workplace¹²⁰ and the way that is done, but will also cover even those interests which are beyond the workplace.

4.4.2.4. *Why is Social Responsibility on the part of Trade Unions Necessary?*

Trade unions are important organisations in society and have a moral obligation to help society deal with its problems and to contribute towards its welfare and sustainable development.¹²¹ Trade unions should ensure that they represent their members' interests and those of the communities in which they function. As stated above, the social responsibility of trade unions extends beyond the terms and conditions of the formal contract of employment to recognising workers as human beings. Social initiatives taken by trade unions will promote goodwill and public favour and trust. All these will subsequently contribute to the long-run success of trade unions. The broader social responsibility of trade unions will also lead to workers and society in general having confidence in trade unions. Those who are not members may develop an interest in a trade union that is able to take care of its members and their communities by contributing to their general development.

It is also important for trade unions to learn to engage in social investment. Social investment refers to the degree to which the organisation is investing both money and human resources to solve social problems.¹²² The goals of social responsibility should be directed at what the society needs. Although an organisation has a moral duty to serve its members and the communities in which it functions, this may also benefit the organisation itself. In as much as business obtains benefits for its social responsibilities, trade unions as socially responsible organisations may thus also obtain the following benefits:

¹²⁰ In *University of the Western Cape v University of the Western Cape United Workers Union* (1992) 13 ILJ 699 (ARB) the arbitrator set out the main aim of a trade union as follows: 'the union on the other hand is primarily although not exclusively concerned with the protection and improvement of the interests of its members with specific regard to their working conditions'. See also Chamberlain WN 'The Union Challenge to Management Control' (1962-63) 16 *Industrial and Labour Relations Review* 184 at 186 and Perline MM 'Organized Labor and Managerial Prerogatives' (1971) xiv *California Management Review* 46 at 47.

¹²¹ See Chew R and Chew SB 'Union Social Responsibility: A Necessary Public Good in a Globalised World' at 2 www.apeaweb.org/confer/hk10/papers/chew-chew.pdf visited on 14 April 2014.

¹²² See www.bigsocietycapital.com/what-social-investment visited on 22 April 2013.

- Good public image that shows that trade unions are not just about demands and strikes.
- An ability to retain members and to attract new members.
- Projects such as job creation will improve the morale among members and the community, thus stimulating the economy.
- A well-cared-for environment that will benefit society.
- Government intervention, which normally requires more taxes from employees, will be limited.¹²³

4.4.2.5. *Beneficiaries of Trade Union Social Responsibility*

The following may be regarded as possible beneficiaries of the social responsibility of trade unions:

- Members
- The community in which the organisation operates
- The society in general
- The environment

The discussion that follows will point to some of the social responsibilities that trade unions may pursue in an attempt to meet their members' interests and other societal expectations.

4.4.2.6. *Social Responsibilities for Trade Unions*

It is evident from the discussions above that over and above their core responsibilities regulated by legislation, trade unions become involved in other broader social responsibilities which are not necessarily regulated by legislation and do not undermine their principal purpose. In 2000, the UN¹²⁴ adopted the Millennium Declaration from which emerged the Millennium Development Goals (MDGs) which include, amongst other things, the eradication of poverty, combating HIV/AIDS and environmental

¹²³ See Slaughter op cit note 115 at 321; Parkinson op cit 116 at 299.

¹²⁴ The United Nations is an international organisation whose aims are to facilitate cooperation in international law; international security; economic development; social progress; human rights; and the achievement of world peace. It has 192 nations as member states and each is a member of the United Nations Assembly. South Africa has been a member of the United Nations since 7 November 1945.

sustainability.¹²⁵ This declaration contains a statement of values, principles and objectives for the international agenda for the twenty-first century.¹²⁶

South Africa is also part of the New Partnership for Africa's Development (NEPAD),¹²⁷ which is the vision and strategic framework adopted by African leaders¹²⁸ at the 37th Summit of the OAU held in Lusaka, Zambia to address poverty and underdevelopment throughout the African continent. Subsequently, South Africa came up with the National Development Plan (NDP)¹²⁹ which is aimed at ensuring that all South Africans attain a decent standard of living by eliminating poverty and reducing inequality by 2030. The key elements of the NDP include, amongst others, employment, quality education and skills development, social protection and a clean environment. The NDP is a plan for the whole country and trade unions should indentify their role in its implementation. The government has clearly stated its commitment to the NDP and other potential role players such as trade unions should do likewise.¹³⁰

South Africa also has enacted the Employment Services Act¹³¹ which came into effect in 2015. This Act is aimed at, among other things, promoting employment; improving access to the labour market for work seekers; and improving the employment prospects of work seekers, in particular vulnerable work seekers. This is to be done by for example providing public employment services and establishing schemes to promote the employment of both young workers and other vulnerable persons.¹³² Role players such as trade unions should also play a part in ensuring that all these are achieved.

¹²⁵ In September 2000, the largest gathering of world leaders at the United Nations Headquarters in New York adopted the United Nations Millennium Declaration (adopted by 189 nations) which contains the Millennium Development Goals. These are eight goals that respond to the world's main development challenges.

¹²⁶ See <http://www.un.org/en/development/devagenda/millennium.shtml> visited on 21 May 2013.

¹²⁷ Its broad approach was initially agreed at the 36th Heads of State and Government Assembly of the Organisation of African Unity (OAU) held in Algeria in 2000.

¹²⁸ See <http://www.nepad.org> visited on 28 January 2013. NEPAD is a merger of two plans for the economic regeneration of Africa: the Millennium Partnership for the African Recovery Programme (MAP), led by Former President Thabo Mbeki in conjunction with former President Abdoulaye Wade of Senegal.

¹²⁹ The National Planning Commission was set up in May 2010 to draft the NDP.

¹³⁰ See <http://www.sanews.gov.za/south-africa/national-development-plan-unpacked> visited on 24 August 2015.

¹³¹ Act 4 of 2014.

¹³² See section 2 of the Employment Services Act.

South Africa has also endorsed the International Labour Organisation's Decent Work Country Programme which aims to bring positive change into workers' lives, by increasing job creation, extending social protection and suchlike.¹³³

All the above goals, programmes and plans acknowledge the existence of social ills and inequalities which need to be addressed by the different role players, including trade unions. Based on the discussion above, the following matters may be identified as possible social responsibilities for trade unions: the economy; politics; HIV/AIDS; the environment; poverty alleviation; unemployment; education and training; financial and legal assistance; and social protection. It is submitted that these responsibilities should not be seen as an exhaustive list, as there may be others.¹³⁴

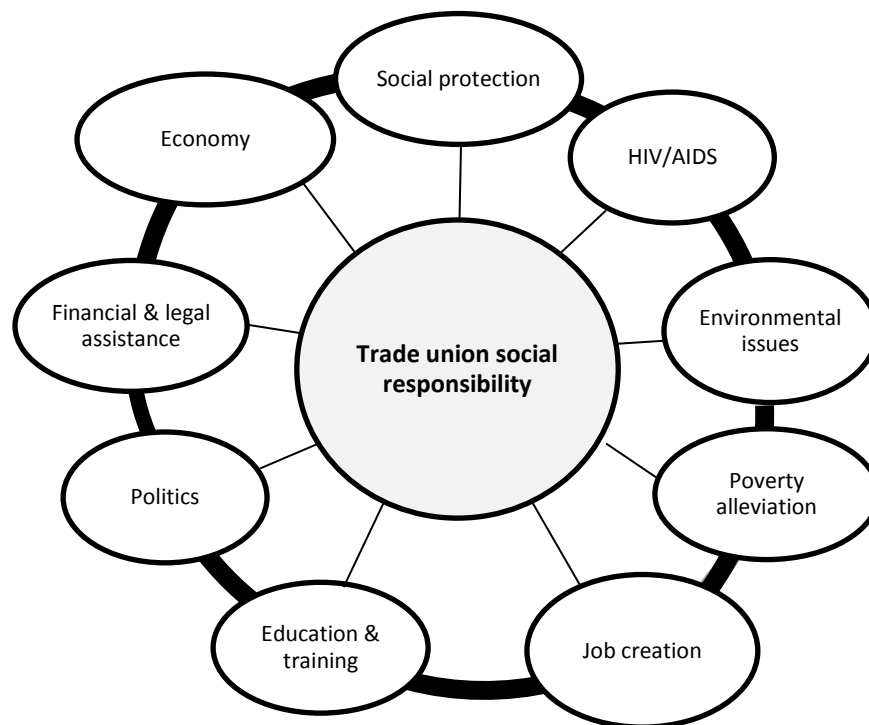


Figure 1.2: The social responsibilities of unions

¹³³ See <http://www.ilo.org/jobspact/resourcesvisited> on 21 August 2015. See also Theron J 'Decent work and the crisis of labour law in South Africa' (2014) 35 ILJ 1829.

¹³⁴ See paras 1 and 7 of this chapter.

5. CONCLUSION

The establishment and growth of trade unions has always been of major importance for employees throughout history as a means of counterbalancing the injustices perpetrated on them by exploitative employers.¹³⁵ The traditional labour relationship also indicates that the power of employers is best matched by workers combined, who by collective action obtain more concessions from employers than as individuals.¹³⁶ Nonetheless, employees have had to make strenuous efforts to establish trade unions. Throughout history, trade unions have played an important developmental and transformational role especially in developing countries.

An analysis of the different definitions of a trade union reveals that trade unions are not merely shop floor organisations but are important vehicles for change in their societies. Historically, trade unions organised themselves in terms of the interests of their communities and their members.¹³⁷ The forms of trade unions and the styles they adopt indicate the efforts on their side to offer better service to their constituencies and to be relevant in terms of their focus and operation. Trade unions have played an important role in bringing about political reforms in various countries, including South Africa.¹³⁸ However, as a result of these changes and the effects of globalisation, the interests of members and trade union objectives have somehow been affected. The challenge facing post-apartheid trade unions is therefore to adopt a cooperative stance and to formulate their objectives in an attempt to satisfy these interests and needs, while at the same time implementing appropriate strategies for their accomplishment. One such challenge is for trade unions to play a social responsibility role without neglecting their core responsibilities.

¹³⁵ See Slabbert et al op cit note 65 at 4-6.

¹³⁶ See Bendix op cit note 54 at 161.

¹³⁷ Ibid at 164.

¹³⁸ See 'COSATU Mass Action Programme' 1992 4(7) *South African Labour News* at 3. COSATU played an important political role by challenging the apartheid regime and forcing employers to put pressure on the government to introduce political changes. Although the political role of trade unions still remains, the new challenge is to redress issues of gender, discrimination etc.

CHAPTER 2: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS: A SOUTH AFRICAN POSITION

1. INTRODUCTION

The purpose of this Chapter is to examine the historical development of trade unions in South Africa in order to illustrate their huge impact on transformation in the workplace and in the community at large.¹ In this chapter the origins and development of trade unions in South Africa will first be discussed. It should be noted that legislation played an important role in the establishment and development of trade unions. This discussion will therefore also look at the legislative framework within which trade unions have developed and are functioning, including the Labour Relations Act, 1995, (LRA) which currently regulates trade unions in South Africa. The LRA marked a major change in South Africa's industrial relations system. According to Du Toit et al,² 'it encapsulated the new government's aims to reconstruct and democratise the economy and society in the labour relations arena' and trade unions should play a role in this endeavour. The discussion will show that the South African legislative framework strongly supports the core responsibility of trade unions, but not necessarily their social responsibility.³ It will further consider the influence of the new Constitution and International Labour Organisation (ILO) standards on the role of trade unions.⁴

Since 1994, the South African government has extensively reformed the labour laws, including the LRA. COSATU, which played a big role in bringing the ANC to power, also had a great influence in the creation and

¹ See para 1 of Ch 1.

² See Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B & Steenkamp *Labour Relations Law A Comprehensive Guide* 6ed (2015) at 5.

³ See para 6 of this chapter.

⁴ Relevant ILO Conventions include Freedom of Association and Protection of the Rights to Organise Convention 87 of 1948 and the Right to Organize and to Bargain Collectively Convention 98 of 1949. See also s 23 of the RSA Constitution. The ILO was founded in 1919 and has as its tasks the setting of international labour standards by way of conventions and recommendations which are subsequently ratified and implemented by member countries. South Africa was expelled from the ILO because of its then apartheid system, but has now been readmitted as a member and its labour law and practices must therefore be measured by the standards established by the ILO. See Betten L *International Labour Law* (1993) at 12-13.

promulgation of the new laws⁵ and in the formulation of the Reconstruction and Development Programme (RDP). Besides the LRA, other reforms included the Basic Conditions of Employment Act⁶ (BCEA), which provides minimum employment standards for employees;⁷ the Employment Equity Act⁸ (EEA), which eliminates all forms of discrimination in the workplace⁹ and the Skills Development Act¹⁰ (SDA), which addresses the skills shortage in South Africa.¹¹ All these pieces of legislation affect the role of trade unions in one way or another in their purpose of representing workers' interests, as some of them address historical imbalances.

Also of relevance is the social security legislation¹² which includes the Occupational Health and Safety Act¹³ (OHSA) which provides for the health and safety of all persons at the workplace; the Unemployment Insurance Act¹⁴ (UIA) which provides for the payment of unemployment benefits; and Compensation for Occupational Injuries and Diseases Act¹⁵ (COIDA) in terms of which compensation is provided for losses incurred as a result of occupational injuries and diseases. These pieces of legislation establish social insurance schemes to assist employees in cases where certain risks occur.¹⁶ South Africa supports the ILO concept of 'decent work', which requires that workplace injuries be prevented, that compensation be made

⁵ See Du Toit et al op cit note 2 at 16-17.

⁶ Act 75 of 1997.

⁷ The preamble to this Act says: 'To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment.'

⁸ Act 55 of 1998.

⁹ The preamble to the Act states as follows: 'Recognising -- that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws, Therefore, in order to -- promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation.'

¹⁰ Act 97 of 1998.

¹¹ The preamble to this Act says: 'To provide an institutional framework to devise and implement national, sector and work-place strategies to develop and improve the skills of the South African workforce ... to provide for learnerships that lead to recognised occupational qualifications.'

¹² In 2002, the Committee of Enquiry into a Comprehensive Social Security System (the Taylor Committee) was appointed to investigate the shortcomings in the social security system (see the Report 'Transforming the Present – Protecting the Future' (Draft Consolidated Report) March 2002).

¹³ Act 85 of 1993.

¹⁴ Act 63 of 2001.

¹⁵ Act 130 of 1993.

¹⁶ This will include risks such as injury on duty and loss of employment.

available for ill or injured employees and that those employees are reintegrated back into work. The South African social security system cannot provide protection for everyone in the country and therefore trade unions can assist in this regard as part of their social responsibility.¹⁷ The chapter will therefore also examine whether there is sufficient legal provision or policy measures that indicates if and what role trade unions can play as far as social transformation and development are concerned.

2. HISTORICAL DEVELOPMENT AND LEGISLATIVE FRAMEWORK BEFORE THE NEW LABOUR RELATIONS ACT 1995

2.1. The Early Years of Trade Unionism in South Africa: The Period from 1850 to 1924

Until the 1850s there was little interest in the formation of trade unions in South Africa.¹⁸ However, with the discovery of diamonds and gold in 1870 and 1871 respectively, industrialisation started in Kimberly and on the Witwatersrand.¹⁹ As a result, new workers came to South Africa. Among them were those from Britain²⁰ who had knowledge and a background of trade unionism.²¹ They brought with them their union ideas and soon established branches of their home unions in South Africa. The first trade unions in South Africa were established towards the end of the nineteenth century. The date on which the first union was established in South Africa is accepted as 23 December 1881. This was a branch of the Amalgamated Society of Carpenters and Joiners of Great Britain and was set up in Cape Town.²² Branches of the Amalgamated Society of Engineers were also

¹⁷ Social insurance schemes protect only employees in the formal sector of the economy since they have the opportunity to belong to an employer subsidised pension or medical aid if such fund exists. Employees in the informal economy do not have this opportunity.

¹⁸ This was mainly due to the fact that few industries were established in South Africa.

¹⁹ See Du Toit op cit note 2 at 10. Before these events South Africa was mainly agrarian society. At this stage no industrial relations existed. Employment relationships that existed were governed by the Master & Servants Act of 1841 (see Bendix S *Industrial Relations in South Africa* 5ed (2010) at 57).

²⁰ Trade unions emanated from the guild system that developed in Western European communities during the Middle Ages. In England 'friendly societies' replaced the labour guilds and by the seventeenth century trade unions were established. Their aim was mainly mutual assistance. See http://www.historylearningsite.co.uk/medieval_guilds.htm visited on 21 August 2015.

²¹ See Du Toit op cit note 2 at 10.

²² See Muriel H *South African Trade Unionism: A Divided Working Class* (1961) at 1.

established in Durban, Kimberley and Johannesburg between 1886 and 1893.²³ The first local union was the Durban Typographical Society established in May 1888, which in 1898 combined with other similar organisations to form the South African Typographical Union.²⁴

Legislation has always played a role in the regulation and recognition of trade unions. In South Africa, trade unions received de facto recognition and legal recognition earlier, with the first attempt being made before 1915 through an Industrial Disputes and Trade Unions Bill. The Bill was, however, shelved as a result of protests by unions and employers.²⁵ In 1915, the Transvaal Chamber of Mines recognised its workers union, which within a short space of time experienced growth and recruited several thousand members. However, the union's recognition was later modified. As a result of this setback the radically minded workers (not necessarily trade unions) began to concern themselves with various movements for greater political participation as a prerequisite for their industrial emancipation.²⁶

After the First World War, industrial expansion began in South Africa and this gave trade unions an opportunity to coordinate and form trade and labour councils. Those trade unions had high subscriptions which enabled them to make provision for 'friendly societies'.²⁷ From 1919, trade and labour councils nominated their own candidates for local government and municipal elections. In the same year, the South African Labour Party, which was founded in 1910 as a political front for trade unions, decided that it should endeavour to play a decisive role in industrial relations as well as politics. These politically inspired trade unions were also able to force social reform.²⁸ In 1922, mine workers engaged in a strike which became known as

²³ See Rutherford TC *History and Functions of Trade Unions in South Africa: The South African Typographical Journal of the South African Typographical Union* July 1960 at 25; Gitsham E & Trembath JF *A First Account of Labour Organisation in South Africa* Durban 1962 at 14; Horrel M *South African Trade Unionism* SA Institute of Race Relations Johannesburg 1961 at 1.

²⁴ See Rutherford op cit note 23 at 26. Other trade unions that were established around this time include the following: the Witwatersrand Mining Employees' and Mechanics' Union (1892), the South African Engine Drivers' Association (1896) and the Transvaal Miners' Association (1902) (see Du Toit op cit note 2 at 11).

²⁵ See Du Toit op cit note 2 at 14.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid at 5.

the Rand Rebellion. Through this strike and others, the government realised the strength of the workers and decided that it needed to establish statutory machinery for collective bargaining.²⁹ This resulted in the drafting of the Industrial Conciliation Act of 1924,³⁰ which for the first time provided for the regulation of trade unions in South Africa.³¹

2.2. The Industrial Conciliation Act 11 of 1924

It was through the Industrial Conciliation Act, 1924, that trade unions were given statutory recognition.³² The Act provided for the registration of trade unions and regulated their activities.³³ Nevertheless, no union representing black males could register under the Act, because the definition of ‘employee’³⁴ excluded ‘pass bearing natives’.³⁵ Black unions were therefore not allowed to register and join industrial councils. However, when the Act was amended in 1930, the Minister was empowered to extend the terms of an industrial agreement to include black workers.³⁶ The emergence and development of black trade unions is discussed in more detail later.³⁷

The Act further introduced a framework for collective bargaining and regulated strikes and lockouts. It promoted voluntary centralised bargaining by providing for the establishment of industrial councils by agreement between an employer’s organisation and a registered trade union/s.³⁸ However, where there was no industrial council, the Act provided for the creation of an ad hoc conciliation board for bargaining and dispute

²⁹ See Coetzee *JAG Industrial Relations in South Africa* (1976) at 4.

³⁰ The Industrial Conciliation Act 11 of 1924.

³¹ From 1841, Master and Servants Acts (repealed by s 51 of the Second General Law Amendment Act 51 of 1974) were in force in the four provinces. Between 1911 and 1918 different Acts were passed (see Jones RA & Griffiths HR *Labour Legislation in SA* (1980) at 3-15; Du Toit op cit note 2 at 11.

³² See Davis R *Essays in Southern African Labour History* (1978) 73-78; Lever J *Essays in Southern African Labour History* (1983) 91-105.

³³ See Muriel op cit note 22 at 9. See also Coetzee op cit note 29 at 14.

³⁴ See the definition of ‘employee’ in s 24 of the Industrial Conciliation Act 11 of 1924.

³⁵ Black females were at that stage not obliged to carry passes and were included under the legislation. However, the Native Laws Amendment Act 54 of 1952 later extended influx control to African women, closing a loophole that had allowed them the status of employees in terms of the Industrial Conciliation Act. See also Bendix op cit note 19 at 62.

³⁶ See Muriel op cit note 22 at 11.

³⁷ See para 2.4 of this chapter.

³⁸ See s 2(1) of the Industrial Conciliation Act 11 of 1924.

settlement between the parties.³⁹ The industrial councils became the recognised bargaining bodies and agreements concluded through them were, if gazetted, legally enforceable.⁴⁰

In addition to the Industrial Conciliation Act 11 of 1924, the Wage Act⁴¹ was passed to cater for the setting down of wages for unorganised workers. The Wage Act allowed for the establishment of minimum wage rates for all employees, irrespective of race, in industries where collective bargaining structures were established. The 1924 Act was replaced in 1937 by a consolidated Industrial Conciliation Act 36 of 1937. However, this new Act failed to solve the problems of the dual industrial relations system which separated blacks and whites as divisions in the socio-political system continued to find a place in the industrial relations system.⁴²

In 1948, the Botha Commission was established in order to investigate and report on the existing industrial legislation (the Industrial Conciliation Act and the Wage Act). The Commission made certain recommendations and it also stated that if parity representation were granted to blacks it would lead to equality between races which would put white supremacy at stake. It recommended that a 'co-ordinating body' be established to which all industrial council agreements should be referred for scrutiny prior to ratification by the Minister of Labour. The Commission also recommended that black trade unions be recognised subject to stringent conditions and without the right to strike.⁴³ This recommendation was, however, rejected by the then government.⁴⁴ In 1953, the National Party passed the Black Labour Relations Regulation Act⁴⁵ aimed at averting trade unionism among blacks by providing for the establishment of workers' committees for black employees. Consequently, the Industrial Conciliation Act 28 of 1956 (also

³⁹ See s 4 of the Industrial Conciliation Act 11 of 1924. The Minister had to be satisfied that the parties were sufficiently representative before appointing a conciliation board.

⁴⁰ S 9(1)(a) and (b) of the Industrial Conciliation Act 11 of 1924.

⁴¹ Act 27 of 1925.

⁴² See Bendix op cit note 19 at 67.

⁴³ See the Report of the Industrial Legislation Commission of Enquiry (UG 62-1951).

⁴⁴ See Bendix op cit note 19 at 68.

⁴⁵ Act 48 of 1953. The aim of this Act was to avert trade unionism among blacks.

known as the Labour Relations Act of 1956) was passed, which became the new basis for labour legislation relating to collective bargaining.

2.3. The Industrial Conciliation Act of 1956

Similar to its predecessor, the 1956 Act excluded all blacks from its protection and further prohibited the registration of mixed unions, except with ministerial permission.⁴⁶ It also placed restrictions on the registration of already mixed-race unions and provided that such trade unions could not have mixed executives.⁴⁷ Existing trade unions with white and coloured members were required to establish separate branches for members, hold separate branch meetings and only white members could hold executive positions.⁴⁸ Under this Act, trade unions were also not allowed to be affiliated to political parties.⁴⁹ This was influenced by the fact that a number of unions made contributions to the Communist and Labour parties.⁵⁰ Leftist trade union leaders regarded it as the democratic right of unions to participate in politics because the majority of trade unions in the world support political parties and that economics and politics cannot be separated.⁵¹ Those who were opposed to affiliations stated that matters of mutual concern are important to both employees and employers and exclude political aims, and that it is the right of the individual to decide whether he wants to participate in politics.⁵²

2.4. The Emergence of the Black Trade Union Movement

The first union for black workers in South Africa is believed to have been formed in 1918. The union was called the Industrial Workers of Africa (IWA) and was established as a result of dissatisfaction with wages.⁵³ The union worked closely with the Transvaal Native Congress and the African People's

⁴⁶ See s 4(6) of the 1956 LRA.

⁴⁷ See s 8(3)(a) of the 1956 LRA; see also Bendix op cit note 19 at 69.

⁴⁸ See s 8(3)(a) of the 1956 LRA.

⁴⁹ See Du Toit op cit note 2 at 23.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid at 24.

⁵³ See Bendix op cit note 19 at 61; Du Toit op cit note 2 at 34-35.

Organisation (which were political organisations).⁵⁴ After the mineworkers' boycott of compound shops in 1918⁵⁵ and the strike by black municipal workers, a joint meeting of the above three bodies (IWA, Transvaal Native Congress and the African People's Organisation) called for a general strike to launch a 'shilling a day' campaign on behalf of all black employees.⁵⁶ The then prime minister, Louis Botha agreed to look into the complaints of black workers; nonetheless, not much was done.⁵⁷

The IWA was, however, later overtaken by the Industrial & Commercial Workers Union of SA (ICU), established in Bloemfontein in 1920 at a meeting of various black organisations, but this union disintegrated in the late 1920s.⁵⁸ As discussed above, after the promulgation of the Industrial Conciliation Act, 1924, the participation of blacks in trade unions was discouraged.⁵⁹ Blacks were excluded from the benefits gained from industrial level bargaining. Moreover, blacks, who were without legitimised power in the political sphere, were also denied the right to legitimate exercise of power in the labour relationship.⁶⁰ In 1927 the Bantu Administration Act⁶¹ was enacted. This Act was designed for fields in which employees were not organised and their conditions could not be decided upon by mutual agreement.⁶²

After the disintegration of the ICU, numerous small black union bodies were established and, in 1928, they amalgamated to form the Federation of Non-European Trade Unions (FNETU) which disbanded in 1929. However, between 1931 and 1939, Max Gordon organised 22 black trade unions to establish a Joint Committee of African Trade Unions, which served as their

⁵⁴ See Bendix op cit note 19 at 61.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ See Du Toit op cit note 2 at 34.

⁵⁸ See Bendix op cit note 19 at 61. See also Du Toit op cit note 2 at 6 and 27. The union was established under the leadership of Clements Kadalie and, by 1924, had a membership of 30 000 workers.

⁵⁹ See para 2.2 of this chapter.

⁶⁰ See Bendix op cit note 19 at 62

⁶¹ Act 38 of 1927.

⁶² See Coetzee op cit note 29 at 18.

coordinating and controlling body.⁶³ After South Africa entered the Second World War, the Joint Committee became ineffective and several unions broke away while others disbanded. In 1942, all the existing unions and federations came together and formed the Council of Non-European Trade Unions (CNETU); however, by 1950 its power and influence had declined.⁶⁴ In the same year (1942), the War Measure Act⁶⁵ was introduced which prohibited strikes by black workers and allowed the Minister of Labour to appoint arbitrators to settle disputes with black workers.⁶⁶ Black trade unions had reached their peak by 1945 as a result of, among other things, lack of official recognition.⁶⁷

In the 1950s attempts were made to accommodate the interests of black employees.⁶⁸ This effort was, however, made not as a genuine concern but as an attempt to pre-empt conflict. Separate legislation was enacted providing for the establishment of employee representative bodies at plant level. Committees such as works committees and the liaison committees⁶⁹ were introduced to serve as channels of communication between black employees and their employers. Nevertheless, trade unions representing blacks continued to grow and attract large numbers of members.⁷⁰ The Suppression of Communism Act⁷¹ however came as a setback, as many black trade union leaders were listed and had to resign from their posts.⁷² There was consequently a shift on the South African Labour scene between the years 1950 and 1970 from a time of heightened action by unions to a

⁶³ See Coetzee op cit note 29 at 27. Max Gordon was one of the leaders of the Federation of Non-European Trade Unions.

⁶⁴ See Bendix op cit note 19 at 66. CNETU showed blacks that they could wield some influence in the economic sphere, and brought political awareness of their position in South Africa. CNETU was not only an economic body but also a people's body, representative of a mass movement and employee interests.

⁶⁵ Act 145 of 1942.

⁶⁶ See Du Toit op cit note 2 at 40.

⁶⁷ Ibid at 39.

⁶⁸ Ibid.

⁶⁹ These committees were established in terms of the Black Labour Relations Regulation Act of 1953.

⁷⁰ Ibid.

⁷¹ Act 44 of 1950.

⁷² This Act formally banned the Communist Party of South Africa and proscribed any party or group subscribing to the ideology of communism. It defined communism as any scheme that aimed 'at bringing about any political, industrial, social, or economic change within the Union by the promotion of disturbance or disorder' or that encouraged 'feelings of hostility between the European and the non-European races of the Union the consequences of which are calculated to further disorder'. No person listed as a communist could hold public office.

phase of relative peace.⁷³ However, during the mid-70s blacks were no longer prepared to accept their secondary status in industry and exerted pressure on government in the form of political and industrial unrest.⁷⁴ The government reacted to the strikes by passing the Black Labour Relations Regulation Act of 1973, which again provided for the establishment of liaison committees for black employees and granted blacks a limited freedom to strike.⁷⁵

From 1974 and more especially after the Soweto Riots of 1976, the then government banned many people who were involved in the organisation and promotion of black trade unions.⁷⁶ This again resulted in a decline in the momentum of the development of black trade unions. However, in 1979 a number of unions established the Federation of South African Trade Unions (FOSATU) and, in 1980, another federation called the Council of Unions of South Africa (CUSA) was founded. Subsequently, the continuing problems in the South African industrial relations system resulted in the appointment of the Wiehahn Commission.

2.5. The Wiehahn Commission

In 1977, a Commission of Inquiry into Labour Legislation, known as the Wiehahn Commission, was appointed. The brief of the Commission was, among other things, to rationalise the then existing labour legislation, to seek possible means of adapting the industrial relations system to 'changing needs' and to 'eliminate bottlenecks and other problems experienced in the labour sphere'. According to Bendix, in retrospect it appears highly probable that the Commission was instructed to consider a method by which black trade unions could be controlled and incorporated into the industrial system.⁷⁷ The Commission reported its findings in 1979 and recommended a

⁷³ See Bendix op cit note 19 at 72.

⁷⁴ See Bendix op cit note 19 at 74. In 1973 in Natal alone an estimated 61 000 black employees went on strike. The strike had no immediate cause and the strikers made no fixed demands, but their actions were indicative of general dissatisfaction among black employees.

⁷⁵ See Bendix op cit note 19 at 76.

⁷⁶ Ibid.

⁷⁷ See Bendix op cit note 19 at 77.

number of reforms that would drastically transform the industrial relations system.⁷⁸ It recommended, among other things, the following:

- that full freedom of association be granted to all employees regardless of race, sex or creed
- that trade unions irrespective of composition in terms of colour, race or sex be allowed to register
- that stringent requirements were required for trade union registration
- that labour laws and practices should correspond with international conventions and codes etc.

Most of the recommendations of the Commission were accepted by the government and this resulted in the changing of labour laws. The Industrial Conciliation Act of 1956 (later known as the Labour Relations Act of 1956) was subjected to significant amendments. The Black Labour Relations Regulation Act was also repealed. One of the most important reforms emanating from the Wiehahn Commission report was that trade unions representing black employees gained access to the institutions (industrial councils) created by labour legislation.⁷⁹ However, those trade unions were reluctant to be part of such institutions.⁸⁰ The Industrial Conciliation Amendment Act of 1979⁸¹ was enacted to introduce some of the recommended innovations and was further amended in the early eighties. Among other things, the term 'employee' was redefined to include all persons working for an employer. A further result of the Commission was a strong

⁷⁸ The Report of the Commission of Inquiry into Labour Legislation (RP 47/1979).

⁷⁹ See par 3.38 and 3.72 of the Report op cit note 75.

⁸⁰ Amongst others, industrial councils were seen as institutions catering for the interests of employers and trade unions with a history of opposing the interests of black employees. See Bendix op cit note 19 at 80.

⁸¹ This Act no longer excluded black African workers from the definition of employee and granted all South African employees equal rights in the industrial relations sphere, leading to a rapid growth in trade union membership among black employees and the institution of plant-level bargaining systems. However, since this was only an industrial relations development, workers still did not have a say in the political sphere and this led to pressure being exerted on the industrial relations system and the politicisation of the trade union movement (see Bendix op cit note 19 at 80).

pattern of plant-level bargaining; often referred to as the 'recognition agreement system',⁸² which developed during the early 1980s.

2.6. The Trade Union Movement after the 1980s

In the early 1980s the established trade unions found their power not only on the shop floor, but also in gaining the support of the community.⁸³ Those trade unions adopted an anti-government stance and refused to register.⁸⁴ Trade union growth coincided with the beginning of protest movements, and trade unions as the major representatives of the black working class, increasingly found themselves involved in politics. Later they formed one federation called the Congress of South African Trade Unions (COSATU), which was launched on 30 November 1985. COSATU by then had 33 affiliates, including the former Federation of South African Trade Unions (FOSATU) affiliates.⁸⁵ By the early 1990s, the trade union movement and collective bargaining had become established and protected in the private sector of the South African economy. This resulted in the focus shifting to the parts of the economy where trade unionism and collective bargaining were growing but which remained excluded from the scope of labour legislation.

2.7. Trade Unions since 1993

As a result of pressure exerted by the growing labour movement three statutes were adopted: the Education Labour Relations Act, 1993, the Public Service Labour Relations Act, 1993 and the Agricultural Labour Act, 1993. The main purpose behind their introduction was to extend collective bargaining in the respective sectors. These Acts were, however, repealed by the introduction of the LRA which now provides a unified basis for the

⁸² In terms of this system, a trade union recruited members in a workplace and once it had a significant number of members it would approach the employer and demand 'recognition'. Thereafter the employer would recognise the union as a bargaining agent of the employees or a group of employees working in that workplace. The employer would also extend certain organisational rights to the union for it to be able to fulfil its function as a representative of its members. See Bendix op cit note 19 at 260.

⁸³ The South African Allied Workers' Union was the forerunner of this movement. See Bendix op cit note 19 at 203.

⁸⁴ See Bendix op cit note 19 at 82.

⁸⁵ FOSATU was a federation of trade unions launched in 1979 with affiliates that included the Chemical Workers Union (CWIU) and the Metal and Allied Workers Union (MAWU), amongst others.

regulation of labour relations in all sectors of the economy in South Africa. Political parties which were banned in South Africa were unbanned in the early 1990s and this was the beginning of a new political era. In 1993 and 1994 agricultural and domestic employees were included under the Basic Conditions of Employment Act. In 1994 the ANC supported by COSATU and the SACP took over the government of national unity. COSATU looked to its partner (the ANC) for the satisfaction of its long-standing demands, for example on the issue of centralised bargaining, and its expectations were met through the ANC's pre-election commitment in the form of the RDP.⁸⁶ In 1995, a new tripartite body, NEDLAC, was launched with four chambers: Trade and Industry, Public Finance and Monetary Policy, Labour Market, and Development.⁸⁷ Government, organised labour and organised business have an equal representation in each chamber.

3. THE SOUTH AFRICAN CONSTITUTION AND TRADE UNIONS

In 1990, the then president, FW De Klerk, unbanned the ANC and the SACP together with other political parties.⁸⁸ In 1991, the Convention for a Democratic South Africa (CODESA) took place. The National Party denied COSATU's application to be part of CODESA and, as a result, only political parties were represented. COSATU was, however, able to participate indirectly through the ANC and the SACP. COSATU was treated like a junior partner to the ANC. In 1990 trade unions won a major concession from the NP government in the form of the Laboria Minute.⁸⁹ In 1992 a rolling mass action by COSATU members broke a major deadlock in the CODESA negotiations. COSATU was given the responsibility by the ANC to draft the

⁸⁶ African National Congress: *The Reconstruction and Development Programme: A Policy Framework* at para 4.8.1.

⁸⁷ See s 2 of NEDLAC Act 35 of 1994.

⁸⁸ See Du Toit op cit note 2 at 16.

⁸⁹ This is a document that committed the state to submit all future labour laws to employer and union federations before tabling the legislation in parliament. It helped to establish a mechanism through which organised interests could directly participate in policy decisions affecting them. See Kuje JO & Cedras JP 'Dialogue between the ANC, COSATU and the SACP: The Impact on Leadership, Governance and Public Policy in South Africa' *African Journal of Public Affairs* 4(3) December 2011 at 75.

Alliance's post-transition economic programme which became the RDP.⁹⁰ The ANC also endorsed the Laboria Minute.⁹¹

The political changes of the early 1990s in South Africa brought a new Constitution which entrenches fundamental rights in its Chapter II.⁹² The birth of this Constitution has had an enormous impact on different branches of the law, including labour law.⁹³ When Parliament makes laws, it must respect the fundamental human rights guaranteed in the Constitution. When a provision of a law infringes a right guaranteed in the Constitution, such a provision can be challenged in the courts.⁹⁴ This principle was illustrated by the decision of the Constitutional Court in *SA National Defence Union v Minister of Defence & the Chief of the SA National Defence Force*⁹⁵. The issue dealt with was whether section 126B(1) of the Defence Act 44 of 1957 was unconstitutional, because it prohibited members of the National Defence Force from being members of a trade union. The section was held to be unconstitutional on the grounds that it infringed the provisions of section 23(2) of the Constitution. Section 23 of Chapter II of the Constitution⁹⁶ deals directly with labour rights and provides as follows:

Labour relations

- Everyone has the right to fair labour practices.
- Every worker has the right-
 - to form and join a trade union;
 - to participate in the activities and programmes of a trade union; and
 - to strike.

⁹⁰ Later, after coming into power, the new government adopted GEAR (Growth Employment and Redistribution Strategy) as the foundation for economic and social policy. COSATU has since criticised the government's socio-economic policies (see Bendix op cit note 19 at 87 and 90).

⁹¹ See Kuje & Cedras op cit note 89 at 75.

⁹² First there was the Interim Constitution 200 of 1993 (came into force in 1994) which provided for labour rights in s 27; the final Constitution was came into force in 1997.

⁹³ Which is defined as 'a body of legal rules which regulates relationships between employers and employees, between employers and trade unions, between employers' organisations and trade unions, and relationships between the State, employers, employees, trade unions and employers' organisations' by Basson et al *Essential Labour Law* 5ed (2009) at 2.

⁹⁴ See s 38 of the RSA Constitution.

⁹⁵ 1999 (6) BCLR 615 (CC).

⁹⁶ These rights were initially contained in s 27 of Chapter 3 in the interim RSA Constitution Act 200 of 1993.

- Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

Consequent to political developments and the introduction of the Constitution, the LRA was promulgated as the 'national legislation' referred to in section 23(5) of the Constitution.⁹⁷ The LRA is the main statute that regulates trade unions in South Africa, mainly in Chapter VI.

The South African government committed itself to upholding international labour standards and ratified⁹⁸ the ILO Conventions dealing with freedom of association and collective bargaining.⁹⁹ Convention 87 of 1948 deals with the freedom of association and protection of the right to organise, while Convention 98 of 1949 deals with the application of the principles of the right to organise and to bargain collectively.

The ILO is known as an organisation that protects trade union rights, even among those who know little about it.¹⁰⁰ If a state ratifies a convention, the effect of that convention must be given in municipal laws and practice.¹⁰¹ In South African law, however, an international convention does not become part of municipal law merely upon ratification;¹⁰² it should be incorporated in an Act of Parliament to be effective. One of the purposes of section 1 of the LRA is to give effect to obligations incurred by the Republic as a member state of the ILO.

⁹⁷ This also came about as a result of the findings of the ILO Fact Finding and Conciliation Commission, which investigated the collective bargaining system in South Africa. See Du Toit op cit note 2 at 20.

⁹⁸ Ratification of a convention means that the provisions of these conventions bind South Africa – our law has to comply with these conventions. If a country fails to comply properly with a ratified convention, it might be called upon to answer for its breach of undertaking. See <http://www.ilo.org> visited on 21 August 2015.

⁹⁹ See Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949.

¹⁰⁰ See *Trade Unions and the ILO: A Worker's education Manual* International Labour Office Geneva (1979) at 41.

¹⁰¹ See Erasmus G & Jordaan B 'South Africa and the ILO: Towards a new Relationship' (1993/1994) 19 *SAYIL* 65 at 85.

¹⁰² See *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

4. THE REGULATION OF TRADE UNIONS UNDER THE LABOUR RELATIONS ACT 1995

The LRA gives effect to international law obligations accepted by South Africa in the field of labour law and labour relations, since South Africa is a member of the ILO as discussed above.¹⁰³ The most important of these obligations are contained in Conventions 87 and 98 which relate to the right to freedom of association and collective bargaining respectively. These rights protect the right of employees and employers to form and join trade unions and employers' organisations and the right for these organisations to be active without undue restriction. The LRA provides a simple procedure for the registration of trade unions in section 95.

The promulgation of the LRA marked a major change in South Africa's statutory labour relations system. The Act covers the new government's aims to reconstruct and democratise the economy and society in the labour relations sphere, which as indicated in Chapter 1 refers to the social responsibility role, which can be achieved through the LRA institutions such as trade unions.¹⁰⁴ The drafters of the LRA took into account the labour rights entrenched in section 27 of the interim Constitution and section 23 of the final Constitution. The LRA protects the right to freedom of association,¹⁰⁵ the right to join and form trade unions¹⁰⁶ and the right to strike,¹⁰⁷ picket¹⁰⁸ and to engage in protest action for socio-economic reasons.¹⁰⁹ Section 3 of the LRA goes further to say that this Act must be interpreted in compliance with the provisions of the Constitution.

¹⁰³ See s 1(b) of the LRA.

¹⁰⁴ See para 4.4.2.3 of Ch 1 and the introductory para of s 1 of the LRA.

¹⁰⁵ See Chapter II of the LRA.

¹⁰⁶ See s 4(1)(a) & (b) of the LRA.

¹⁰⁷ See s 64(1) of the LRA.

¹⁰⁸ See s 69(1) of the LRA.

¹⁰⁹ See s 77 of the LRA.

5. CORE RESPONSIBILITIES OF TRADE UNIONS IN SOUTH AFRICA

5.1. Introduction

As discussed in Chapter 1, the principal purpose of trade unions, including South African trade unions, is to regulate relations between employees and their employers.¹¹⁰ This is their core responsibility, mainly regulated through legislation. The roles of trade unions in this regard include that of job regulation which is regulated under the BCEA; job security regulated under the LRA; employment equity regulated under the EEA; health and safety matters regulated mainly under the OHSA; and skills development regulated under the SDA.¹¹¹ These roles and the relevant legislative framework is discussed *seriatim* (one by one) hereunder.

5.2. Job Regulation: Basic Conditions of Employment Act 75 of 1997

In its job regulation function, a trade union is essentially concerned with protecting and enhancing its members' rights and interests in the employment relationship. On the one hand, management wants to retain the liberty of power and decision-making while fully exercising its prerogative, whereas on the other hand, trade unions want to protect employees against the adverse effects of such decisions.¹¹² It is the role of a trade union to (on behalf of its members) limit this prerogative by curbing some of management's powers by subjecting it to joint regulation. As a result, managerial prerogative is to some extent replaced by a system of jointly determined rules regulating different issues within the workplace.¹¹³ Trade unions' job regulation role is mainly regulated by the BCEA. The purpose of the BCEA is, amongst others, to advance economic development and social

¹¹⁰ See para 4.1 of Ch 1.

¹¹¹ See para 1 of Ch 2.

¹¹² See Strydom EML 'The Origin, Nature and Ambit of Employer Prerogative' (part 2) (1999) 11 *SA Merc LJ* 311.

¹¹³ See Salamon M *Industrial Relations Theory and Practice* 3ed (1998) at 108. According to Kahn Freund, '[t]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination' (see Davies PL & Freedland MR *Kahn-Freund's Labour and the Law* (1983) at 18).

justice by fulfilling the primary objects of the Act.¹¹⁴ This indicates a social responsibility purpose.

In terms of section 4 of the BCEA, as well as the LRA through collective bargaining,¹¹⁵ a basic condition of employment constitutes a term of any contract of employment unless another agreement provides a more favourable term or the term has been replaced, varied or excluded in accordance with provisions of the BCEA. The BCEA establishes minimum terms and conditions of employment but at the same time it permits their variation.¹¹⁶ Unlike its predecessor, the current BCEA allows the parties some flexibility as it recognises that employees represented by trade unions are in a position to bargain with their employer on a more equal footing, hence it permits the variation of its minimum standards by means of bargaining council collective agreements¹¹⁷ concluded through the process of collective bargaining.¹¹⁸ The basic conditions of employment may also be changed by means of a collective agreement concluded outside the bargaining council.¹¹⁹ In terms of section 49(1) of the BCEA, a collective agreement¹²⁰ concluded in a bargaining council¹²¹ may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of the BCEA. In most cases, collective agreements contain provisions that are more favourable than those of

¹¹⁴ See s 2 of the BCEA.

¹¹⁵ See s 23 of the LRA.

¹¹⁶ 'Variation' in the context of a bargaining council collective agreement differs from the meaning of variation provided for in other agreements. Variation in terms of the latter, means 'replace or exclude'. Variation in terms of the former means 'alter, replace or exclude'. See Du Toit op cit note 2 at 632.

¹¹⁷ A trade union is a collective bargaining agent which can be a party to a bargaining council. The BCEA provides for variations in terms of s 49.

¹¹⁸ This is discussed in detail in the next chapter. This is a method by which provisions contained in the BCEA may be changed or varied, except the protection of employees in respect of working hours, ordinary hours of work, or night work. However, a bargaining council collective agreement may not reduce an employee's leave to less than two weeks, reduce maternity leave or reduce an employee's sick leave. A bargaining council agreement must also be consistent with the objects of the BCEA before it can change any basic condition of employment. See section 49 of the BCEA.

¹¹⁹ This method is, however, less powerful, as an employer–employee agreement can only vary a statutory basic condition of employment to the extent permitted by the Act.

¹²⁰ A collective agreement is defined in s 213 of the LRA as 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand one or more employers; one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations.

¹²¹ A bargaining council is an organisation established by trade unions and employers' organisations within a particular sector and area. See s 27(10) of the LRA.

common law or legislation. This is mostly due to the strength of the trade union or unions involved in bargaining.

In terms of the BCEA, employees also have the right to complain to a trade union or a trade union representative about the alleged failure of the employer to comply with relevant legislative provisions.¹²² A trade union representative may also be requested by employees to inspect records kept by the employer.¹²³ The Employment Conditions Commission (ECC) has been established to advise the Minister on a wide range of topics related to the BCEA. Trade unions are represented in this commission by one member and one alternate member nominated by the voting members of NEDLAC representing organised labour.¹²⁴

In South Africa, as part of their job regulation role, trade unions have promoted various strategies and arguments to support campaigns for equitable wages and employee benefits. In 1987, COSATU launched a campaign for a living wage, demanding wages linked to price increases. Consequently, in 2002, the Minister of Labour, after consultation with various stakeholders, promulgated a sectoral determination establishing conditions of employment and minimum wages for employees in the domestic worker sector.¹²⁵

It is evident from the above discussion that to a large extent the BCEA supports the trade unions in their job regulation role.

5.3. Job Security: The Labour Relations Act 66 of 1995

Although common law does not recognise that an employment relationship is a relationship of inequality, on closer scrutiny this relationship is indeed

¹²² See s 78 of the BCEA.

¹²³ See s 78 of the BCEA.

¹²⁴ See s 60(2)(a) of the BCEA. The functions of the ECC are, in general, to advise the Minister on making sectoral determinations on any matter concerning basic conditions of employment or the application of the Act; on the effects of government policy on employment and on trends in collective bargaining, etc.

¹²⁵ The employment of domestic workers includes housekeepers, gardeners, nannies, domestic drivers etc. Other sectors with sectoral determinations include farming, private security, taxi, hospitality etc. These sectors are generally not well organised and do not have effective collective bargaining. See <http://www.labour.gov.za/DOL/legislation/sectoral-determinations> visited on 21 August 2015.

unbalanced.¹²⁶ An individual employee is not in a position to bargain with the employer on an equal footing.¹²⁷ Therefore, through the collective voice and muscle of the trade union,¹²⁸ members are protected from retrenchments,¹²⁹ unfair dismissals¹³⁰ and unilateral action by the employer in changing the terms and conditions of employment. Employers are usually challenged on these issues by trade union shopstewards¹³¹ and union officials if employees are victimised.¹³²

Employers usually negotiate grievance procedures and disciplinary codes with a representative trade union in the workplace, but once this is done the code will not be open to challenge by members of that bargaining unit.¹³³ The procedures in these codes are, however, normally in accordance with the statutory requirements for a dismissal.¹³⁴ In dismissal cases based on misconduct and incapacity, the Code of Good Practice: Dismissal provides that employees are entitled to be assisted by a trade union representative.¹³⁵ Also in cases of disciplinary steps against a trade union representative, office-bearer or official the employer should first consult the union.¹³⁶

The purpose of the LRA is 'to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act'.¹³⁷ This indicates a social responsibility purpose.

¹²⁶ See Davies & Freedland op cit note 113 at 18, regarding the imbalance of power between employees and the employer.

¹²⁷ There are, however, some workers who possess specialised skills such that they enjoy better bargaining positions equivalent to that of employers.

¹²⁸ See, generally, *Roffey v Carterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 499.

¹²⁹ Retrenchment is a traditional term used for dismissals on the basis of operational requirements. See s 189(1)(b)(ii) and 189(c) of the LRA.

¹³⁰ Dismissals which are substantively unfair (dismissals not based on misconduct, incapacity or operational requirements) and procedurally unfair.

¹³¹ These are referred to as trade union representatives in terms of s 14 of the LRA. S 14(4) provides for the functions of trade union representatives.

¹³² See Finnemore M *Introduction to Labour Relations in South Africa* 8ed (2002) at 64.

¹³³ However, in *Highveld District Council v CCMA* [2002] 12 BLLR 1158 (LAC), it was held that the fact that a procedure was agreed does not make it fair.

¹³⁴ See s 189 of the LRA.

¹³⁵ See Code of Good Practice: Dismissal Schedule 8 item 4(1); 8(1) and 10(2) of the LRA

¹³⁶ A trade union representative is a member of a trade union who has been duly elected to represent employees at a workplace (s 213). An office-bearer is a person who holds office in terms of a union constitution. A union official is a person employed as a secretary, assistant secretary, organiser or in any other capacity by a union (s 213). See *Adcock Ingram Critical Care v CCMA* [2001] 9 BLLR 979 (LAC); *BIAWU v Mutual & Federal Insurance Co Ltd* [2002] 7 BLLR 609 (LC); *Spoornet v SATAWU obo Mampetlane* (2002) 23 ILJ 1090 (AMSSA).

¹³⁷ See s 1 of the LRA.

The LRA provides that when an employer contemplates¹³⁸ dismissing one or more employees for reasons based on the employer's operational requirements,¹³⁹ the employer must consult any person whom the employer is required to consult in terms of a collective agreement. If there is no such agreement, it must consult a workplace forum if it exists and the registered trade union¹⁴⁰ whose members are to be affected by the proposed dismissals.¹⁴¹ In the absence of a workplace forum, it must consult with any registered trade union whose members are likely to be affected by the dismissals.¹⁴² Consulting directly with employees belonging to a registered trade union, or inducing them to enter into an agreement without the involvement of their union, will amount to a breach of section 189 of the LRA and may render subsequent dismissals unfair.¹⁴³

It is evident from the discussion above that the LRA supports trade unions in ensuring the job security of employees.

5.4. Employment Equity: Employment Equity Act 55 of 1998

According to Du Toit et al,¹⁴⁴ employment equity is an important part of the drive towards socio-economic transformation in South Africa. The EEA prohibits unfair discrimination in the following terms:

No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy¹⁴⁵, marital status, family responsibility, ethnic or social

¹³⁸ This word 'contemplates' indicates that the employer must consult at the stage when the final decision to dismiss has not been reached but the possibility of dismissal has only been foreseen. See also *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC); *Mabaso & others v Universal Product Network (Pty) Ltd* (2003) 24 ILJ 1532 (LC).

¹³⁹ Defined as 'requirements based on the economic, technological, structural or similar needs of an employer' (see s 213 of the LRA).

¹⁴⁰ See s 189(1)(b) of the LRA. In the previous dispensation, in the absence of an agreement to this effect, there was no duty to consult separately with a minority union where consultation took place with a majority union. See, for example *Ngiba v Van Dyck Carpets (Pty) Ltd* (1988) 9 ILJ 453 (IC); *Cakile v Winkelhaak Mines Ltd* (1994) 15 ILJ 824 (IC).

¹⁴¹ See s 189(1) of the LRA.

¹⁴² See s 189(1)(c) of the LRA.

¹⁴³ See also *FAWU v National Sorghum Breweries* [1997] 11 BLLR 1410 (LC); *Van der Merwe v McDuling Motors* [1998] 3 BLLR 332 (LC); *Sikhosana v Sasol Synthetic Fuels* [2000] 1 BLLR 101 (LC); *Strauss v Plessely (Pty) Ltd* [2002] 1 BLLR 105 (LC) at para 32; *Delpont v Parts Incorporated Africa of Genuine Parts (Pty) Ltd* [2002] 8 BLLR 755 (LC) at para 9; *Fry's Metal (Pty) Ltd v NUMSA* [2003] 2 BLLR 140 (LAC) at paras 23-24, 27-33.

¹⁴⁴ See Du Toit et al op cit note 2 at 725.

¹⁴⁵ See *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC).

origin, colour, sexual orientation, age¹⁴⁶, disability, religion, HIV status¹⁴⁷, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.¹⁴⁸

The protection in this regard is offered to employees¹⁴⁹ and is confined to conduct occurring within the scope of an 'employment policy' or 'practice'.¹⁵⁰ However, disputes about the unfairness of dismissals are excluded from the EEA, and must still be dealt with in terms of the LRA, but dismissal procedures are still subject to the requirements of the EEA which are applicable to employment policies and practices.¹⁵¹ There are also agreements entered into with trade unions that explicitly prohibit employers from discriminating against employees on the grounds mentioned in section 6 of the EEA.¹⁵² In implementing affirmative action, the EEA requires every designated employer¹⁵³ 'to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce'.¹⁵⁴ Such employer must enter into consultation¹⁵⁵ about the design and implementation of an employment equity plan with a representative trade union as well as employees or their representatives.

When the employer reports to the Department of Labour, the contents of the report are also subject to consultation with the employer's consulting

¹⁴⁶ See *Swart v Mr Video (Pty) Ltd* [1997] 2 BLLR 249 (CCMA).

¹⁴⁷ It was in *Hoffman v South African Airways* [2000] 12 BLLR 1365 (CC) that the CC found discrimination on the basis of HIV status to be unfair. See also s 85 of the Labour Relations Act.

¹⁴⁸ See s 6(1) of the EEA. This list is similar to that of item 2(1)(a) of Schedule 7 to the LRA, with the addition of 'pregnancy', 'HIV status' and 'birth'. These provisions must be interpreted in compliance with the Constitution with particular reference to the right to equality and the ILO Convention 111 of 1958 (Discrimination in Respect of Employment and Occupation).

¹⁴⁹ The definition of employee in this regard is similar to the definition contained in the LRA, which defines an employee as 'any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer'. See section 1 of the EEA.

¹⁵⁰ See also s 1 of the EEA. Employment policy or 'practice' encompasses every aspect of the employment relationship. For example, s 19 of the EEA.

¹⁵² The Women's Forum of COSATU has demanded an end to discrimination against women obtaining housing loans (see 'Women Raise their Voices' (1992) 4(4) *South African Labour News* 1). The Department of Education agreed to do away with salary disparities for married women in education as from 1 July 1992 (see 'Women Teachers Gain Salary Parity' (1992) 3(18) *South African Labour News* 10).

¹⁵³ S 1 of the EEA defines a designated employer as 'an employer who employs 50 or more employees; an employer who employs fewer than 50 employees but whose annual turnover in any given year exceeds a certain level (as laid down in Schedule 4 of the EEA), municipalities, organs of state and an employer appointed as a designated employer in terms of a collective agreement.

¹⁵⁴ See s 20(1) of the EEA.

¹⁵⁵ In *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A), the Appellate Division defined 'consultation' as a 'joint problem-solving exercise' aimed, like collective bargaining, at reaching consensus.

partners, as mentioned above.¹⁵⁶ There is also a commission called the Commission for Employment Equity established in terms of the EEA, which advises the Minister of Labour on different aspects of employment equity matters.¹⁵⁷ The Commission is composed of representatives that include two people nominated by voting members of NEDLAC who represent organised labour.¹⁵⁸ The EEA further provides for two channels to ensure compliance with Chapter III of the Act, that is, administrative procedure and legal action.¹⁵⁹ The former may be set in motion by a trade union representative. Furthermore, a trade union representative may bring 'an alleged contravention of the EEA to the attention of an employer, a trade union, a workplace forum, a labour inspector, a Director-General of Labour, or Commission for Employment Equity'.¹⁶⁰

Again, it is evident from the discussion above that the EEA supports the role of trade unions in discrimination and employment equity matters.

5.5. Health and Safety: Occupational Health and Safety Act 85 of 1993

Common law recognises a duty of employers to take reasonable care for the safety and health of their employees.¹⁶¹ The related legislation in force in South Africa for employees in general is the OHSA and in cases where employers and trade unions have negotiated agreements on health and safety, such agreements normally incorporate the provisions of the OHSA.¹⁶² There are also those agreements which require employers to allow trade union officials and office-bearers to form part of investigations into accidents involving workers at the workplace.¹⁶³ Such agreements often afford employees more than the employers' common law and statutory duties of

¹⁵⁶ See s 17(c) of the EEA.

¹⁵⁷ See ss 28 and 30 of the EEA.

¹⁵⁸ See s 29 of the EEA.

¹⁵⁹ See Du Toit et al op cit note 2 at 760.

¹⁶⁰ See s 34 of the EEA.

¹⁶¹ See also Basson op cit note 93 at 47.

¹⁶² See Clause 28 of the Building Industry (Transvaal): Main Agreement published as Notice R 1994 in *Government Gazette* 16095 of 19 November 1994. The OHSA applies to employees in general, while the Mine Health and Safety Act 26 of 1996 applies only to the mining industry.

¹⁶³ See the agreement between Premier Food Industries and FAWU (see 'Epic Explosion Investigation' (1992) 3(23) *South African Labour News* 6). This is in line with the provisions of s 24 of the OHSA.

care. Trade unions have made demands in the past to the employers to provide adequate protection to employees.¹⁶⁴ OHSA also establishes the Advisory Council for Occupational Health and Safety to provide expert advice to the Minister of Labour. The council is made up of different representatives, including those nominated by trade unions or their federations.¹⁶⁵

Furthermore, in terms of section 24 of the Constitution, everyone has the right to a safe working environment which promotes personal health and well-being. This includes the fact that employees who are injured or who contract diseases in the course of their employment should be compensated. Compensation in this regard is offered under the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA). The purpose of COIDA is to provide a system of 'no-fault' compensation for such employees. In relation thereto, trade unions must ensure that employers make contributions to the Compensation Fund, so that employees who are injured or who contract diseases while at work may be compensated. The basis for this is the employer's common law duty to provide employees with safe working conditions. Benefits under the COIDA include disability benefits, medical benefits and benefits payable to dependents of employees who died as a result of a work-related accident or disease.

Again it is evident from the discussion above that the OHSA supports the role of trade unions with regard to the health and safety of employees.

5.6. Skills Development: Skills Development Act 97 of 1998

A trade union is a collective body comprising individuals whose moral, physical and intellectual being it must promote.¹⁶⁶ Trade unions ensure the development of workers by their employers and the state by, for example, overseeing compliance with development legislation such as the SDA. The

¹⁶⁴ For example, the South African Railways and Harbour Workers Union has demanded adequate security at all stations and on all trains for its employees (see 'Spoornet Sit-in Follows March' (1992) 3(21) *South African Labour News* 4).

¹⁶⁵ See s 4 of the OHSA.

¹⁶⁶ See Du Toit et al op cit note 2 at 218.

SDA establishes the Skills Authority,¹⁶⁷ which consists of, among others, five voting members nominated by NEDLAC and appointed by the Minister to represent organised labour.¹⁶⁸ The role of the Skills Authority is to advise the Minister on matters relating to skills development.¹⁶⁹ The Act also establishes institutions called the Sectoral Education and Training Authorities (SETAs),¹⁷⁰ which consist of members of organised labour, organised employers and relevant government departments.¹⁷¹ It is part of the functions of SETAs to supervise skills development in the sector in which they function. Each SETA must also monitor education and training within its sector and approve the workplace skills programmes adopted by employers.¹⁷²

It is evident from the discussion above that the SDA supports the role of trade unions in the skills development of employees.

6. SOCIAL RESPONSIBILITIES FOR SOUTH AFRICAN TRADE UNIONS

Historically, South African unions have placed themselves at the centre of the country's social-change movements, but the nature of these movements has varied over time. The social-movement unionism of the 1980s was more socio-political ...whereas the social-movement unionism of today is more socio-economic.¹⁷³

6.1. Introduction

The apartheid system had a negative effect on the way trade unions operated at the time. The approach taken by the unions was generally to oppose the system by building political alliances in order to bring about change. Accordingly, workers' federations such as COSATU joined hands with political parties (ANC and SACP).

¹⁶⁷ See s 4 of the SDA.

¹⁶⁸ See s 6 of the SDA.

¹⁶⁹ See s 5 of the SDA.

¹⁷⁰ Established in terms of s 9 of the SDA.

¹⁷¹ See s 11 of the SDA.

¹⁷² See s 10 of the SDA.

¹⁷³ See Naidoo R Social Movement Unionism in South Africa: A Strategy for Working Class Solidarity (August 2001). Article from US left publication, *Dollar and Sense* at 5-6.

South Africa is now a democratic country and some of the challenges experienced earlier have now changed and the interests of members and trade union objectives have somehow been affected.¹⁷⁴ The challenge facing post-apartheid trade unions is therefore to adopt a cooperative stance and formulate their objectives so as satisfy these interests and needs, while at the same time implementing appropriate strategies for their accomplishment. One such challenge is for trade unions to play a social responsibility role.¹⁷⁵

Over and above the core responsibilities of trade unions as discussed above, there are broader social responsibilities which trade unions can pursue beyond workplace issues. Often trade unions involve themselves in issues without a direct bearing on the employment relationship, but which are critical to their functioning as modern organisations. These roles include issues relating to the economy; politics; HIV/AIDS; the environment; poverty alleviation; education and training; legal and financial assistance; job creation; and social protection, among others.¹⁷⁶

As discussed in Chapter 1, the United Nations (UN) adopted the Millennium Declaration which included the Millennium Development Goals (MDGs),¹⁷⁷ with a statement of values, principles and objectives for the international agenda in the twenty-first century.¹⁷⁸ As a member state of the UN, South Africa is bound by the MDGs which include, amongst others, the eradication poverty; combating HIV/AIDS; and environmental sustainability. As discussed in Chapter 1, South Africa is also part of the New Partnership for Africa's Development (NEPAD),¹⁷⁹ whose primary objectives are to eradicate poverty; promote sustainable growth and development, integrate Africa in

¹⁷⁴ See Bendix op cit note 19 at 229.

¹⁷⁵ See 'COSATU Mass Action Programme' 1992 4(7) *South African Labour News* at 3. COSATU played an important political role by challenging the apartheid regime and forcing employers to put pressure on the government to introduce political changes. Although the political role of trade unions still remains, the new challenge is to redress issues of gender, discrimination etc.

¹⁷⁶ See para 4.4.2.6 of Ch 1.

¹⁷⁷ Ibid.

¹⁷⁸ See <http://www.un.org/en/development/devagenda/millennium.shtml> visited on 21 May 2013.

¹⁷⁹ Its broad approach was initially agreed at the 36th Heads of State and Government Assembly of the Organisation of African Unity (OAU) held in Algeria in 2000.

the world economy; and accelerate the empowerment of women.¹⁸⁰ The National Development Plan (NDP), also discussed in Chapter 1, is aimed at ensuring that all South Africans attain a decent standard of living by eliminating poverty and reducing inequality. The focus of this Plan falls, amongst other things, on employment, education and skills development, social protection and the environment.¹⁸¹ South Africa's endorsement of the ILO's Decent Work Country Programme, mentioned in Chapter 1, is also an important motivation for trade unions to bring positive change into workers' lives.

Trade unions are a way for workers to improve their living and working conditions and those of society at large. They are vehicles of development and a means by which workers become actors in society to fight for social justice in the global economy and for the eradication of poverty. South African trade unions have a role to play in achieving these goals as part of their social responsibility.

6.2. The Economy

In its report, the Wiehahn Commission proposed the establishment of a national coordinating and advisory body that would afford a more dynamic role to the state in the formulation and planning of labour policy without interfering in the relationship between employer and employee.¹⁸² Subsequently, in 1979, the National Manpower Commission (NMC) was formed, comprising of representatives of the state, employers and trade unions.

South African trade unions have also contributed to the general improvement of the economy by participating in the national economic policy-making structures.¹⁸³ This was evident when trade unions became

¹⁸⁰ See <http://www.nepad.org> visited on 28 January 2013.

¹⁸¹ See para 4.4.2.6 of Ch 1.

¹⁸² See Wiehahn Commission Report 1.2.18 & 1.2.22.

¹⁸³ Trade unions deem it necessary to be involved in the promotion of economic growth and job creation because of the extent of unemployment (see in this regard Patel E 'New Institutions of Decision-Making: The Case of the National Economic Forum' in Patel Ebrahim (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 3).

involved in the establishment of a joint forum on economic policy¹⁸⁴ known as the Joint Economic Forum (JEF). The main objective of the JEF is set out in clause 1 of its founding documents¹⁸⁵ as follows:

In recognition of the economic challenges facing South Africa, we believe that major economic stakeholders need to develop co-operative mechanisms for addressing South Africa's economic challenges. Organised labour, organised business and the governing authority have a central role in developing strategies geared towards the generation of sustained economic growth, the addressing of distortions in the economy, stability and the addressing of social needs.

However, in May 1995, the JEF and the NMC amalgamated to form the National Economic Development and Labour Council (NEDLAC).¹⁸⁶ The major union federations, COSATU, National Council of Trade Unions (NACTU) and Federation of Unions of South Africa (FEDUSA), represent labour,¹⁸⁷ while business is represented by Business South Africa within NEDLAC.¹⁸⁸ The purpose of NEDLAC is to bring together labour, business, government and development actors in order to 'ensure consensus on all matters relating to economic policy' and to consider all proposed labour legislation.¹⁸⁹ Buhlungu and Psoulis state that because NEDLAC is

¹⁸⁴ See 'Joint Economic Forum Takes Shape' (1992) 3(15) *South African Labour News* 9. See also Patel op cit note 183 at 2-5.

¹⁸⁵ See Patel op cit note 183 at 62-68.

¹⁸⁶ This body was formed in terms of the National Economic, Development and Labour Council Act 35 of 1994, which came into operation on 5 May 1995 in terms of Proclamation No R 48, 1995, published in *Government Gazette* 16403 of 3 May 1995. NEDLAC consists of four chambers: the Labour Market Chamber, the Trade and Industry Chamber, the Public Finance and Monetary Policy Chamber and the Development Chamber.

¹⁸⁷ See Bendix op cit note 19 at 105.

¹⁸⁸ Other role players include government, politicians, community delegates representing women, disabled persons, etc.

¹⁸⁹ See s 5(1)(b) and (c) of the National Economic, Development and Labour Council Act 35 of 1994. Through its platform at NEDLAC, COSATU has criticised the strategy for various reasons. Amongst others, the federation indicated that black economic empowerment did not adequately take forward the RDP perspective of empowering the mass of ordinary people who have been excluded from the economic mainstream by apartheid. Further, that the strategy document attempted to justify the sale of state assets in the name of black economic empowerment. COSATU proposed that there should instead be initiatives for ensuring broader overall ownership reflected in a more equitable access to assets (addressing poverty & inequality) and that substantial points on the scorecard in the strategy should be awarded for areas such as employment creation and support for cooperatives (see Labour Comments on the Broad-Based Black Empowerment Bill, 2003 at 2 available on <http://www.nedlac.gov.za>). COSATU also criticised the definition of BEE in the strategy document as being vague, because it had failed to rigorously capture the socio-economic demographic, gender and geographic disparities among black people, as a factor determining their differentiated access to assets, resources and opportunities (see COSATU's Submission on the Broad-based Black economic Empowerment (BEE) bill and comments on the Department of Trade and Industry's Broad-based BEE Strategy Document: Submitted to the Portfolio Committee on Trade and Industry on 25 June 2003). Some of these proposals and comments have indeed been considered in finalising the BBBEEA. Already in the year 2000, about 20 trade unions had started investment arms, the first of which was established in 1995. Such companies are usually owned by a union-controlled trust into which dividends are paid and they have become the sought-after partners for

‘empowered to discuss and reach consensus on all pieces of socio-economic legislation before they are tabled in Parliament’; it gives labour ‘a very powerful voice to influence policy on a very wide range of issues for the benefit of their members’.¹⁹⁰

Through their involvement in NEDLAC,¹⁹¹ trade unions are able to table formal responses to the draft negotiating documents and become involved in negotiations with other stakeholders.¹⁹² Trade unions ensured that sections which promote social and economic development of the South African workforce have been included in the LRA.¹⁹³ NEDLAC still stands as the most effective route for trade unions to influence policy. The economic goals of trade unions have remained the same since the demise of apartheid, and dealing with the economic disparities of the past remains an ongoing campaign for trade unions.¹⁹⁴

COSATU has also organised campaigns and stayaways against the introduction of e-tolling in Gauteng Province arguing that it will burden the

black empowerment deals (see Haffajee F ‘Trade Union Investment Companies Cutting through the Rhetoric to a New Capital Base’ *Financial Mail* September 15 (2000) at 36). Several affiliates (trade unions involved were National Union of Mineworkers, South African Railways and Harbours Workers’ Union) of COSATU have combined with black business interest groups to form the National Empowerment Consortium and in 1996 this consortium secured shares in Anglo’s investment company, Johnnic. Although black economic empowerment has generally been accepted by trade unions, COSATU and its affiliates have argued that black economic empowerment is not broad-based. Consequently, the federation has been challenging some of the black empowerment deals. Food and Allied Workers Union (FAWU), one of the COSATU affiliates, has contested the wine company KVV’s black economic empowerment deal with the Phetogo consortium on the grounds that the deal was not broad-based and would benefit only a few at the expense of KVV employees. The union sought to review the deal by Agriculture and Land Affairs Minister ThokoDidiza, alleging that there was a discrepancy in the price Phetogo was charged for the KVV shares (see, in this regard, Van Gass C ‘COSATU Refuses to Toast KVV Equity Deal’ *Business Day* 08 July 2004 at 1). COSATU demanded that the Minister should ensure that the deal was ‘about employment and land ownership’ (see, in this regard, ‘COSATU Sour Over BEE Wine Deal’ *Citizen* 14 June 2004 at 4).

¹⁹⁰ See Buhlungu S & Psoulis C ‘Enduring Solidarities: Accounting for the Continuity of Support for the Alliance amongst Cosatu Members. *Society in Transition* (1999) 30(2) at 120-130.

¹⁹¹ Their involvement covers making suggestions, or submitting proposals, or commenting on these matters in an attempt to reach consensus

¹⁹² See, for example, a response published in Notice 97 of 1995 in *Government Gazette* 16259 of 10 February 1995. See also the Explanatory Memorandum published in Cheadle H, Le Roux PAK, Thompson C & Van Niekerk A *Current Labour Law 1995: Review of Recent Developments in Key Areas of Labour Law* (1995) 214.

¹⁹³ See Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D & Christie S *The Labour Relations Act of 1995* (1996) at 21-32. Trade unions tabled formal responses to the draft negotiating document in the form of a Labour Relations Bill and took part in negotiations with the state and employers concerning the Bill. NEDLAC tabled a report recommending the adoption of the Bill, subject to certain amendments occasioned by agreements reached by the negotiating parties on 21 July 1995. Unions also fought for the inclusion in the EEA of clauses which compel employers to address unfair discrimination in general and in relation to income differentials and ensuring gender equality.

¹⁹⁴ See Bendix op cit note 19 at 89-90.

poor.¹⁹⁵ As a result of pressure from COSATU regarding the use of labour brokers, the LRA has been amended to improve the way labour brokers are regulated. In terms of section 198 of the LRA, an employee provided by a labour broker may now hold the employer (labour broker) and the client jointly and severally liable if the labour broker were, for example, to contravene a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, a binding arbitration award, the BCEA, or a determination made in terms of the BCEA.

6.3. Politics

In 1966, Davies said the following about the involvement of trade unions in politics:

At every turn African trade unions find themselves deeply involved in politics-a fact as true today as it was under the imperial administrators.¹⁹⁶

In 2007, Webster said the following about trade unions and politics:

Trade unions in Africa have a long tradition of political engagement, beginning with their involvement in the anti-colonial movements through present day struggles for democracy.¹⁹⁷

It is trite that African trade unions, including those in South Africa, played a wide political role by ensuring state support for worker's lives, not only in the workplace but also in their communities and in society as a whole.¹⁹⁸ The general policy of trade unions in South Africa can be linked directly or indirectly to some political ideology, although some may not necessarily be affiliated to any political party.¹⁹⁹ Throughout history, political reasons²⁰⁰ for

¹⁹⁵ See <http://www.sowetanlive.co.za/news/2013/05/22/cosatu-toll-fight-gets-wide-support> visited on 21 May 2013. Other organisations such as the South African Council of Churches; the Congress of South African Students; the SA National Civic Organisation; the United Association of Taxis Forum; the Treatment Action Campaign; support this campaign.

¹⁹⁶ See Davies I *African Trade Unions* (1966) at 11-12.

¹⁹⁷ See Webster E *Trade Unions and Political Parties in Africa: New Alliances, Strategies and Partnerships* Briefing Papers, No 3, 2007 at <http://www.fes.de/gewerkschaften> visited on 15 October 2012.

¹⁹⁸ See Hepple B 'The Role of Trade Unions in a Democratic Society' (1990) 11 *ILJ* 645 at 649-650.

¹⁹⁹ See Finnemore M & Van Rensburg R *Contemporary Labour Relations* 2ed (2002) at 135. 'COSATU Mass Action Programme' (1992) 4(7) *South African Labour News* 3 and 'Programme of Action: Adopted by Cosatu Campaigns Conference: 11-13 September 1992' (1992) *South African Labour News: Special Document*.

joining trade unions have served as a strong mobilising force for the working class experiencing deprivation and lack of influence over legislatures.²⁰¹ Political power, as a tool used by trade unions to achieve some of their goals, is enforced where like-minded trade unions form federations such as COSATU and FEDUSA in order to promote their common interests.²⁰² Trade unions and their federations, especially COSATU, played an important political role in South Africa by challenging the apartheid regime and forced employers to put pressure on the government to introduce political changes.²⁰³ In their persuasions for change, trade unions used protests and stayaways.²⁰⁴

Part of the political role is to fight for human rights. South African trade unions have been and should continue to be at the forefront of the struggle for human rights.²⁰⁵ Workers everywhere want fair treatment at work and in society and trade unions must be there to ensure that it happens. Trade union social responsibility involves stopping human rights abuse and ensuring human rights observance.

However, since the change in the political landscape, this role has somehow been affected. COSATU has moved from being a structure against government to the one in alliance with government (COSATU is in an alliance with the ANC and the South African Communist Party (SACP)) and is now mainly doing the persuading in the corridors of NEDLAC.²⁰⁶ Although the political role of trade unions remains, the focus has changed, thus the new challenge is to ensure that the new government addresses issues of discrimination, skills development and equal opportunities.

²⁰⁰ Political reasons for joining unions were predominant during the 1980s and early 1990s especially among black workers, as they perceived the union as a vehicle for their political aspirations. A trade union was an avenue open to black workers to be politically active. Not only black workers were motivated by politics to join trade unions, however, it also happened with white workers. See Finnemore & Van Rensburg op cit note 199 at 138.

²⁰¹ See Du Toit op cit note 2 at 87.

²⁰² See Finnemore & Van Rensburg op cit note 199 at 139.

²⁰³ Ibid at 64.

²⁰⁴ See 'COSATU Mass Action Programme' (1992) 4(7) *South African Labour News* 3.

²⁰⁵ See Finnemore & Van Rensburg op cit note 199 at 30.

²⁰⁶ See Patel op cit note 183 at 4-6.

6.4. HIV/AIDS

HIV/AIDS is one of the challenges South Africa and the world at large is confronted with. It is one of the central issues facing trade unions as it affects most people of working age.²⁰⁷ The economic development of many countries, including South Africa, is under threat because a large proportion of the working population is affected by HIV/AIDS. The higher the mortality rate among workers, the more orphans and the elderly who are left without support.²⁰⁸ Trade unions therefore have a crucial role to play in educating workers about HIV/AIDS because the more workers that die of HIV/AIDS, the more trade unions lose their members. Education on this pandemic will increase workers' knowledge and understanding of the disease and help in changing their attitudes and behaviour.²⁰⁹

One of the Millennium Development Goals,²¹⁰ which are supported by the international trade union movement, is to combat the HIV/AIDS pandemic. Trade unions in South Africa, including the South African Clothing and Textile Workers Union (SACTWU), have started projects for combating HIV/AIDS.²¹¹ COSATU is also involved as a key partner in the Treatment Action Campaign (TAC).²¹² In 1998, COSATU passed a resolution to campaign for treatment and it has been calling for the roll-out of comprehensive public access to antiretroviral drugs.²¹³ This pandemic is undermining the economy and social progress; it is threatening livelihoods and reducing productivity. As the situation deteriorates, it has become increasingly important to explore the role of trade unions in this regard, as they are able to greatly contribute in the fight against HIV/AIDS because of their operating capabilities and access to employees and surrounding

²⁰⁷ See <http://apheda.labor.net.au/projects/pacific> visited on 08 March 2010. This is one of the eight Millennium Development Goals.

²⁰⁸ See Munro R & Smit N in MP Olivier at al *Social Security Law General Principles* (1999) 494-5.

²⁰⁹ It has been estimated that, by the end of 2007, 5.7 million people in South Africa were living with HIV/AIDS and 601 033 had died as a result of HIV/AIDS (see <http://www.aidstruth.org> visited on 25 March 2015).

²¹⁰ See para 6.2.1 of this chapter.

²¹¹ The union has an AIDS Project which was established in 1998. Through this project, the union offers training on HIV/AIDS, to members. It also offers counselling and voluntary tests to those who want to be tested (see <http://www.sactwu.org> visited on 21 August 2015).

²¹² See <http://en.wikipedia.org/wiki/COSATU> visited on 14 July 2015. The TAC is an organisation working towards educating and promoting understanding about HIV/AIDS.

²¹³ See 'World Aids Day Work Stoppage' (28/11/2008) at <http://www.cosatu.org.za> visited on 21 July 2015.

communities. Many of the people affected by this pandemic are within the working age as will be seen from the table below.

Table 2.1: HIV statistics²¹⁴

Age	Male prevalence %	Female prevalence %
2-14	3.0	2.0
15-19	2.5	6.7
20-24	5.1	21.1
25-29	15.7	32.7
30-34	25.8	29.1
35-39	18.5	24.8
40-44	19.2	16.3
45-49	6.4	14.1
50-54	10.4	10.2
55-59	6.2	7.7
60+	3.5	1.8
TOTAL	7.9	13.6

HIV/AIDS threatens the capacity of trade unions to organise and represent the interests of members, promote decent wages, and maintain experienced leaders and organisers. The workplace represents an ideal forum for tackling the epidemic through social dialogue between employers and employees represented by trade unions. Trade union leaders can also play an important role in building the confidence of their members in HIV/AIDS policies and programmes and by being involved in their implementation.

6.5. The Environment

Another Millennium Development Goal supported by the international trade union movement is environment sustainability.²¹⁵ The environment is everyone's concern;²¹⁶ however, trade unions must be at the forefront of

²¹⁴ See <http://www.avert.org/south-africa-hiv-aids-statistics.htm> visited on 26 October 2012.

²¹⁵ The ILO has also produced the following materials on the environment: 'Workers' Education and the Environment; Trade Unions and Environmentally Sustainable Development' and 'Using ILO Standards for the Promotion of Environmentally Sustainable Development'.

²¹⁶ In 1972, world leaders gathered in Stockholm for the United Nations Conference on the Human Environment. This meeting resulted in agreement 'on an urgent need to respond to the problem of environmental deterioration' (see Johannesburg Declaration on Sustainable Development (2002) paras 27 and 29). After a second Conference on the

understanding the need for protecting the environment²¹⁷ and start recognising environmental issues as items of great importance.²¹⁸ Trade unions first have a critical role to play in changing employers' and workers' attitudes in taking 'greening' the workplace seriously. They may also reach agreements with employers about companies' environmental policies and assist workers in the implementation of such agreements at the workplace level.²¹⁹

Trade unions may also assist in the development of alternative production methods which do not damage or pollute the environment. They must develop policies leading to a healthy environment and the manufacturing of environment friendly long-lasting products. It is important for trade unions to begin to look at wider links between the workplace, protection of the environment and sustainable economic and social development. They can raise awareness of environmental issues through publications and discussions targeted at union members and community members in general. Minor efforts such as encouraging workers to recycle paper can make a great difference. Accordingly, South African trade unions have taken up environmental issues since the 1990s and union federations such as COSATU have been involved in criticising and formulating environmental policies at the national level.²²⁰

Human Environment in 1982, the UN established the World Commission on Environment and Development. In 1987 the Commission published *Our Common Future (Report of the World Commission on Development and the Environment, Our Common Future, 1987, ch. 1(1987) para 8)*, which was a sweeping treatise that coined the popular definition of 'sustainable development' (sustainable development is 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs').

²¹⁷ This is one of the eight Millennium Development Goals.

²¹⁸ Trade unions in Netherlands have paid increasing attention to environmental issues since 1987 when the FNV (Federation of Dutch Trade Unions, the main trade union confederation in the Netherlands) co-published a policy document entitled *Investing in the Environment* (see Leisink P, Van Leemput J & Vilrocx J (eds) 'The Wavering Innovation of Trade Union Policy: The Case of Ecological and Occupational Issues' in *The Challenges to Trade Unions in Europe* (1996) at 125).

²¹⁹ See Leisink P op cit note 218 at 127. In 1991 one-third of all collective agreements in the Netherlands had already been changed to include regulations concerning the environment. Trade unions have also developed training programmes and instruction materials to assist work council members in dealing with environmental issues.

²²⁰ In 1993, the tripartite alliance (ANC; SACP and COSATU) arranged an environmental policy mission with the assistance of the Canadian International Development Research Centre. The mission produced a report on environmental policy in South Africa which influenced the content of subsequent policy documents, for example the environment Green Paper. The trade union also became more involved in environmental policy through the Consultative National Environmental Policy Process (CONNPEP), which became the key mechanism for the consultation and formulation of environmental policy (see An Environmental Policy for South Africa at <http://www.polity.org.za/polity/govdocs/green-papers/enviro0.html>).

6.6. Poverty Alleviation

The eradication of extreme poverty²²¹ and hunger is another Millennium Development Goal supported by the international trade union movement.²²² It is also part of the NEPAD objectives. As modern organisations, trade unions play an important role in contributing towards the alleviation of poverty.²²³ Collective bargaining for productivity-related wage increases is the most direct contribution of trade unions to poverty reduction. By pushing for decent work and securing better conditions for their members, trade unions help tackle the conditions in which poverty thrives. Through capacity building programmes, trade unions become involved in national development programmes which serve to reduce poverty.²²⁴ In South Africa trade unions perform this role through the NEDLAC forum. Trade unions also fight poverty by ensuring decent work for all, including women and young people.

Trade unions get involved in other poverty alleviation activities such as helping the needy with food parcels and clothes. In South Africa trade unions such as Solidarity through its Helping Hand Trust are leading examples in such programmes and other unions could do likewise.²²⁵ Promotion of adult learning and the development of skills by trade unions will also help to alleviate poverty.

South Africa has a high level of poverty as there are many people without a regular source of income and who are not covered by unemployment insurance. In 2000 the Taylor Committee was tasked to investigate the

²²¹ Poverty is defined by Budlender et al as the 'inability to attain a minimal standard of living, measured in terms of basic consumption needs or the income required to satisfy them. It includes alienation from the community, food insecurity, crowded homes, usage of unsafe and inefficient forms of energy, lack of adequately paid and secure jobs' (Budlender D *Poverty and Inequality in South Africa* Summary Report (1998) 1). It is characterised by the inability of individuals, households, or entire communities, to command sufficient resources to satisfy their basic needs.

²²² See para 6.2.1 in this chapter.

²²³ Although it has been reported that poverty levels dropped in South Africa between 2006 and 2011, reaching 20,2% for extreme poverty and 45,5% for moderate poverty, these numbers are still high. The decrease has been attributed to the combination of a growing social safety net, income growth, above inflation wage increases amongst others things (see *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011: Statistics South Africa, 2014 Report No. 03-10-06* at <http://www.beta2.statssa.gov.za/publications> visited on 26 August 2015).

²²⁴ See Mohammed M 'Poverty Alleviation and the Role of Workers' organisations in Africa' *DPMN Bulletin* IX(2) May 2002 at <http://www.dpmf.org/images/poverty-alleviation-mohammed.html> visited on 26 August 2015 .

²²⁵ See <https://www.solidariteit.co.za/en/union-benefits> visited on 21 August 2015.

social security system in this country.²²⁶ One of the findings of the Committee was that the existing social security programmes do not adequately address the problem of poverty. Among other things, the Committee recommended the introduction of a Basic Income Grant (BIG).²²⁷ An independent coalition of different organisations, including trade unions and non-government organisations, was formed to promote the implementation of the grant.²²⁸

6.7. Job creation

Unemployment is one of the key economic challenges in South Africa.²²⁹ Trade unions contribute towards reducing unemployment by training their members in new skills in case they lose their employment.²³⁰ In South Africa the National Union of Mineworkers (NUM) formed the Mining Development Agency (MDA) in 1987, which serves to ensure that there is skills development and training for both current and retrenched mine, energy and construction workers. The agency also offers social development and educational support to members of the union.²³¹

²²⁶ By 2001, around 3.5 million of the total population of 41 million received state assistance (Taylor, 2002).

²²⁷ The grant was to amount to R100 per month and would be paid to individuals. The grant was expected to close the poverty gap by 74 per cent (see Samson et al 'Research Review on Social Security and the Basic Income Grant for South Africa' Report for the International Labor Organization compiled by the Economic Policy Research Institute, Cape Town, South Africa).

²²⁸ COSATU which has been opposed to increases in sales taxes has recommended that a 'solidarity tax' be imposed on high-income earners (see Congress of South African Trade Unions (2002) 'Coalition Endorses Revolutionary Report's BIG Anti-Poverty Plan'; Press statement issued by the Congress of South African Trade Unions (16 May 2002) and Duncan S 'Life Line for the Poor' *Land and Rural Digest*, November/December (2001)).

²²⁹ According to Global Employment Trends 2014, global unemployment increased by 5 million people in 2013 and almost 202 million people were unemployed in 2013 and, based on trends then, it has been projected to rise by a further 13 million people by 2018. Most people to be affected by these trends are young people (see <http://www.ilo.org/wcmsp5/public/dgreports> visited on 26 August 2015). The unemployment rate in South Africa decreased in the second quarter of 2015 from a ten-year high of 26.40% in the first quarter of 2015 (it averaged 25,275% from 2000 until 2015, which is high) (see <http://tradingeconomics.com/south-africa/unemployment-rate> visited on 27 August 2015).

²³⁰ In 1998, a Job Summit was held in South Africa in order to address the unemployment crisis and the constituencies of NEDLAC, including organised labour, all of whom participated in the summit with the objective of finding solutions to the unemployment crisis in the country (see <http://www.polity.org.za/./summit.html> visited on 21 August 2015). COSATU called for a mining indaba to deal with the creation of jobs in the platinum belt and has also campaigned against retrenchments in the mining sector and other sectors (see <http://www.cosatu.org.za> visited on 25 August 2015).

²³¹ The MDA was established in 1987 as a development wing of NUM, its purpose being to minimise the negative socio-economic effects of downsizing and retrenchments in the mining construction and energy industries by initiating and supporting job creation initiatives for ex-mineworkers, their families and communities through a national network of Development Centres in South Africa and an office of development in Maseru,

Trade unions such as SACTWU have also initiated jobs campaigns, for example the 'buy local campaign'. The union is also involved with the Proudly South African and the Label of Origin campaigns in an effort to fight job losses.²³² The union, Solidarity, also helps members who have lost their jobs to look for employment. Given the number of employees who have been retrenched in recent years, trade unions should make this their priority.²³³ In this regard, South African business and labour established the Millennium Labour Council tasked with, among other things, looking into unemployment in the country.²³⁴

In 2003, social partners (government, organised labour and business) in South Africa came together during the Growth and Development Summit to discuss the best strategies not only for employment creation and poverty alleviation, but also for increasing economic growth and investment in South Africa. At this summit a number of agreements were reached, but the important one entailed the implementation of an Expanded Public Works Programme (EPWP). The EPWP is an important instrument for addressing unemployment and poverty in South Africa²³⁵ and it aims to draw significant numbers of the unemployed into productive employment, to impart skills to the workers while they are employed, and to increase their capacity to continue working elsewhere once they leave the programme. Examples of projects under the EPWP are school cleaning and renovation, establishing community gardens, erosion control and land rehabilitation, removal of alien vegetation, establishing community irrigation schemes, fencing of national roads and tree planting. This programme has absorbed many independent poverty alleviation programmes such as the Community Based Public Works Programme (CBPWP), which is a job creation and poverty alleviation programme targeted primarily at the rural poor, and Working for Water

Lesotho.http://www.mda.org.za/mineworkers_development_agency_about_us.asp visited on 25 October 2012.

²³² See <http://www.sactwu.org.za/jobcamp.asp> visited on 27 August 2015.

²³³ In 2005 COSATU called hundreds of thousands of workers to take part in a national one-day protest action against unemployment and poverty (see Talbot Chris 'South African strike against unemployment and poverty' at <http://www.wsws.org/articles/2005> visited on 27 August 2015).

²³⁴ See <http://www.mlc.org.za> visited on 25 October 2012.

²³⁵ See National Treasury Budget 2005 – National Medium Term Expenditure Estimates at 93.

(WfW), established in 1995, which uses labour-intensive methods to remove alien vegetation that reduces water availability.

Trade unions can facilitate job creation through skills development as demonstrated by their role in the SETAs provided for by the Skills Development legislation. One of the SETAs in which trade unions play an important role is the Education, Training and Development Practices SETA which seeks to improve the skills level of workers.²³⁶ The skilling of workers will ensure both the improvement of incomes and career advancement.

Trade unions can also respond to the challenge of unemployment by influencing national economic and social policies. They can do so through the NEDLAC forum where they are represented by federations such as COSATU, FEDUSA and NACTU. Their main policy intervention at NEDLAC has been to articulate a labour-based or employment creating growth path. NEDLAC provides trade unions with a platform to participate in the socio-economic issues of the country. In 1998 the trade unions through NEDLAC participated in the Presidential Jobs Summit. The summit agreed on the implementation of the following projects: sector summits; the Proudly South African campaign; small business promotion; labour intensive housing projects; comprehensive social security, among others, in order to create employment.²³⁷

6.8. Education and Training

The achievement of universal primary education is another Millennium Development Goal supported by the international trade union movement. This is seen as an important instrument for the eradication of child labour. Trade unions must become more concerned about the individual growth of their members and their children²³⁸ and more involved in the establishment of education and training programmes in the workplace. This can be done

²³⁶ See <http://www.etdpseta.org.za> visited on 21 August 2015.

²³⁷ See <http://www.polity.org.za/./summit.html> visited on 21 August 2015.

²³⁸ One of COSATU's aims and objectives is to facilitate and coordinate the education and training of all workers so as to further the interests of the working class. This is important in South Africa owing the deliberately inferior and non-compulsory education system for blacks devised under the policy of apartheid. See <http://www.cosatu.org.za> visited on 21 August 2015.

through their involvement in the social responsibility programmes of the companies within which they operate.²³⁹ The restructuring of industries makes it clear that the interests of members and the companies in which they work are best served by increasing labour productivity through investment in the skills and qualifications of the workforce (especially for unskilled workers). Vocational training is very important and trade unions should be involved in it.

Trade unions can also establish bursary funds through which they fund their members and their children who want to study or undergo training in certain fields. Trade unions like Solidarity,²⁴⁰ NUM²⁴¹ and SACTWU²⁴² have bursaries which are offered to members and their dependants. Preference is however given to children of needy widows and pensioners. NUM also has a training centre called the Elijah Barayi Memorial Training Centre, which is used as a training facility for NUM leadership and its members. SACTWU also has an education leg called Edupeg, which works with disadvantaged primary schools in the areas of numeracy and literacy. The union also organises winter schools in order to assist pupils who are in Grade 12. Trade unions must ensure that their members receive training in order to secure better employment opportunities. Training should not only be enterprise-specific; general training to enhance external labour market mobility is important and trade unions must promote and facilitate such training as it ensures the long-term employability of employees.²⁴³

6.9. Financial and Legal Assistance

Trade unions began as mutual insurance societies to provide benefits to their members.²⁴⁴ This is an important social responsibility role which

²³⁹ See Bendix op cit note 19 at 174.

²⁴⁰ See <https://www.solidariteit.co.za> visited on 21 August 2015.

²⁴¹ See <http://www.num.org> visited on 21 August 2015. It is called the JB Marks Education Trust.

²⁴² See <http://www.sactwu.org.za> visited on 21 August 2015. There is also a special bursary for learners with disabilities. These bursaries are supported by the members themselves, companies and through SACTWU's investment company.

²⁴³ See Olney L Shauna *Unions in a Changing World: Problems and Prospects in Selected Industrialised Countries* (ILO) (1996) at 44.

²⁴⁴ See Taylor R *The Future of the Trade Unions* (1994) at 146 and Ewing KD *The Functions of Trade Unions* *Industrial Law Journal* 34(1) March (2005) 1.

should remain on the agenda of trade unions. In order to further this role, trade unions can start investment companies through which they can make investments for the benefit of their members.²⁴⁵ Negotiations can be entered into with banks so that trade union members can be offered financial deals at better rates, for example member benefit package relating to personal loans, mortgages, pension services, life insurance policies and funeral policies.²⁴⁶ NEHAWU has the so-called NEHAWU Savings and Credit Co-operative (SACCO) which provides financial services to members and improves their economic and social well-being.²⁴⁷

Trade unions can also assist their members with legal services by providing lawyers for different legal issues that are not necessarily related to their jobs. This could involve professional advice and representation, which individual members cannot afford, but which trade unions can provide through collective resources. Trade union members may also be assisted by trade union representatives during disciplinary hearings and at the CCMA.²⁴⁸ Without trade unions offering this service, employers will make an effort to avoid the consequences of their unfair actions by appealing to higher courts in every case, thus exploiting employees' ability to afford further legal proceedings.²⁴⁹ Solidarity is one of the trade unions in South Africa which offers legal aid for labour-related matters to its members.²⁵⁰

6.10. Social Protection

In terms of section 27(2) of the Constitution the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights mention in subsection (1). However, the

²⁴⁵ See Finnemore & Van Rensburg op cit note 199 at 146.

²⁴⁶ Some trade unions already have funeral benefits; for example SACTWU provides funeral cover for members and dependants to help them meet the costs of funerals (see <http://www.sactwu.org.za/benefitfuneral.asp> visited on 21 August 2015).

²⁴⁷ See <http://www.nehawu.org.za/links/sacco.asp> visited on 10 September 2012.

²⁴⁸ See para 6.1.3 of this chapter. See also item 4(1; 8(1)(h)) of Code of Good Practice: Dismissal.

²⁴⁹ See Taylor op cit note 244 at 147.

²⁵⁰ See <http://www.solidariteit.co.za> and <http://www.samwu.org.za> visited on 21 August 2015.

state may not always be able to adequately provide for social security.²⁵¹ The two main components of social security are social assistance and social insurance. Social assistance refers to the system through which the state provides for payments to the poor by way of, for example, the old-age grant, child grant, etc. This system is not linked to the employment relationship. However social insurance is linked to the employment relationship.²⁵² In terms of this system a scheme or fund is created to which employers and employees make contributions. This system protects people against certain risks, for example unemployment, workplace injuries and illness. The South African social security system cannot provide protection to everyone in the country, however. Most workers in the informal economy cannot join a company-based pension scheme or medical aid.²⁵³

Trade unions in South Africa played an important role in bringing about amendments to the Pension Fund Act²⁵⁴ and subsequently employees were accorded the right to appoint employee representatives as trustees on pension and provident fund boards. While some trade unions have initiated their own funds for the benefit of members,²⁵⁵ others have done so through bargaining councils to which they are party.²⁵⁶ Trade unions must therefore also assist their members and communities. As indicated above, trade unions began as mutual insurance societies which provided benefits to their members.²⁵⁷ Solidarity has established a retirement plan called the

²⁵¹ Social security refers to the set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies or risks (see Olivier MP, Okpaluba MC, Smit N and Thompson M *Social Security Law General Principles* (1999) at 7).

²⁵² See Strydom et al *Essential Social Security Law* 2ed (2006) at 6-11.

²⁵³ They are often not even catered for by COIDA and UIA. See also footnote 17 in this chapter.

²⁵⁴ Act of 24 1956.

²⁵⁵ For example, the South African Municipal Workers Union (SAMWU) has its national Provident Fund which offers benefits such as retirement benefits to its members (see <http://www.snppfund.org.za> visited on 21 August 2015).

²⁵⁶ For example, the Metal and Engineering Industries Bargaining Council has funds such as the Engineering Industries Pension Fund; a Provident Fund and a Sick Pay Fund. Some of its trade union parties are the Metal and Electrical Workers Union of South Africa, NUMSA, etc (see <http://www.meibc.co.za> visited on 21 August 2015). See, for example, the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry Sick Pay Fund Agreement published as notice R 1804 in *Government Gazette* 17548 of 8 November 1996, which makes provision for the payment of sick pay benefits in clause 5(1), benefits for injury on duty in clause 5(2), etc; the Iron, Steel, Engineering and Metallurgical Industry: Engineering Industries Pension Fund Agreement published as Notice R 627 in *Government Gazette* 17109 of 19 April 1996; and the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry: Steelmed-Agreement published as Notice R 230 in *Government Gazette* 16266 of 17 February 1995.

²⁵⁷ See Taylor op cit note 244 at 146.

‘Solidarity Retirement Plan’, to which its members contribute a minimum of R150 per month, which assists them to save for their retirement. In addition, Solidarity and the South African Municipal Workers Union (SAMWU) both have a funeral benefit for members and their dependants.²⁵⁸ Solidarity also has a sickness benefit and a maternity benefit for those employees who fall sick and those who go on maternity leave. Furthermore, trade unions should offer their members access to medical aids which are affordable because the cost of medical aids for employees has escalated in the past few years. SAMWU has a member-controlled medical scheme called SAMWUMED.²⁵⁹

In 1992, COSATU and NACTU registered a unit trust called Community Growth Fund (CGF), which gives workers a say in the investment of their provident fund monies. Ordinary union members are also allowed to invest in the CGF.²⁶⁰ Furthermore, trade unions can make a provision for death benefits and disability benefits for their members.²⁶¹

Trade unions generally focus on employment related matters and not welfare matters. There are, however trade unions which have started working towards this role such as Solidarity union through its Helping Hand Trust. The trust helps some communities through feeding schemes for primary schools. It also supports orphanages, retirement homes and a home for persons with mental disabilities.²⁶² Trade unions generally do not have funds; however they have negotiating powers which they can use to mobilise businesses and government to make donations to funds which are used for social responsibility. Where trade unions cannot establish funds of their own they should continue campaigning for the improvement of the pension and provident fund benefits offered by employers. As part of their social

²⁵⁸ A surviving spouse gets R3000 from this benefit.

²⁵⁹ See <http://www.samwumed.org.za/> visited on 21 August 2015.

²⁶⁰ Trade union federations COSATU and NACTU have established an investment company called Unity Incorporation which has created a Community Growth Fund with Old Mutual. The CGF has a number of investment vehicles which include the Community Growth Equity Fund which aims at job creation, skills development, sound environmental practices and effective corporate governance. There is also the Community Growth Gilt Fund which focuses on reconstruction and development (see <http://www.communitygrowthfunds.co.za/offering/>).

²⁶¹ See Robbins B Rainard Trade Union Benefits and Our Social Insurance Problems at 15 visited at <http://www.casact.org/pubs/proceed> on 21 August 2015.

²⁶² See <http://www.solidariteit.co.za> visited on 21 August 2015.

responsibility, trade unions should also ensure that employees who are injured or who contract diseases in the course of their employment get the benefits provided in terms of COIDA. The focus of trade unions in this role should also move towards the reintegration, rehabilitation and return to work of employees who are injured or contract diseases.

7. CHALLENGES FACING SOUTH AFRICAN TRADE UNIONS

The old South African economy was built on apartheid and trade unions emerged in the struggle against apartheid. Initially, union strategy was based on building a political alliance for socio-economic transformation. Consequently, COSATU formed an alliance with the ANC and the SACP to bring about democracy and transform the economy. Firstly, this was based on a common Reconstruction and Development Programme (RDP) which emphasised growth through redistribution.²⁶³ Secondly, it was based on forcing the government and capital to negotiate with labour and this was formalised in the NEDLAC. Thirdly, it was based on the promotion of militant labour struggles and joint worker–community mobilisations.

Since democracy, South Africa has shifted from standard employment relations to informal forms of employment in the form of casual workers, subcontractors and self-employment.²⁶⁴ Other factors such as leaner staffing, outsourcing, the use of technology and the upskilling of the labour force have also had an impact.²⁶⁵ This has resulted in trade unions losing absolute membership in workplaces where there once were well-established shop floor structures for union democracy and representation.²⁶⁶ This is partly due to the fact that the South African economy is under pressure to compete in the global market in the context of a new work paradigm.²⁶⁷ This restructuring of the labour market has led to a multiplicity of precarious work arrangements that threaten traditional union organisation. Moreover,

²⁶³ See Naidoo op cit note 173 at 2.

²⁶⁴ In South Africa part-time work increased by 31% between 1998 and 2001 and in the same period full-time work fell by 8% (Naidoo op cit note 173).

²⁶⁵ See Finnemore & Van Rensburg op cit note 199 at 59-60.

²⁶⁶ See Wood G & Dibben P 'Broadening Internal Democracy with a Diverse Workforce: Challenges and Opportunities' at 53 in *Trade Unions and Democracy: Cosatu Workers' Political Attitudes in South Africa* edited by S Buhlungu.

²⁶⁷ See Finnemore & Van Rensburg op cit note 199 at 58.

the generational gap between older workers and the post-apartheid generation may also undermine the basis of solidarity.²⁶⁸

As a result of these changes and the effects of globalisation, the interests of members and trade union objectives have somehow been affected. The challenge facing post-apartheid trade unions is therefore to adopt a cooperative stance and formulate their objectives such as to satisfy these interests and needs, while at the same time implementing appropriate strategies for their accomplishment. This is possible if trade unions recognise and pursue a social responsibility role.²⁶⁹

8. CONCLUSION

The discussion in this chapter has indicated that in South Africa, trade unions, especially those for black workers, were established under very difficult circumstances. Different pieces of legislation such as the Industrial Act of 1924 and 1956 were used to hamper trade union operations, especially for black workers. However, recommendations made by the Weihahn Commission in 1979 brought positive changes to the regulation of trade unions in South Africa.

Subsequently, South Africa, by committing itself to upholding international labour standards and ratifying conventions relating to freedom of association and collective bargaining gave more protection to trade unions.²⁷⁰ The political changes of the early 1990s in South Africa brought a new Constitution which in Chapter 2 entrenches fundamental rights, including labour rights.²⁷¹ In addition, the LRA was promulgated to give effect to international law obligations incurred by South Africa in the field of

²⁶⁸ See Wood & Dibben op cit note 179 at 677. See also Allvin M & Sverke M 'Do Generations Imply the End of Solidarity?' *Economic and Industrial Democracy* 21(1) 71-95.

²⁶⁹ See 'COSATU Mass Action Programme' 1992 4(7) *South African Labour News* at 3. COSATU played an important political role by challenging the apartheid regime and forcing employers to put pressure on the government to introduce political changes. Although the political role of trade unions still remains, the new challenge is to redress issues of gender, discrimination and such like.

²⁷⁰ Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949.

²⁷¹ Firstly, an Interim Constitution 200 of 1993 (came into force in 1994) provided for labour rights in s 27 and the final Constitution came into force in 1997.

labour law and labour relations and to regulate the labour rights contained in the Constitution.²⁷² All of these developments improved conditions for trade unions in South Africa.

South African trade unions emerged as a militant and progressive movement that simultaneously worked for an improvement in the working conditions of their members.²⁷³ They generally adopted a 'social movement unionism' approach, connecting the 'worker' and 'community' struggles. South African trade unions must continue to build on this history in order to meet the interests of their members as they relate to both core responsibilities and social responsibilities. In the LRA, the BCEA, the EEA, the OHSA and the SDA, South Africa has a legislative framework that assists trade unions in fulfilling their core responsibilities. This is evident in the core roles of trade unions which include job regulation, job security, employment equity, health and safety, and skills development.

Beyond these employment-related and workplace-based issues, trade unions have also been able to deal with other non-core responsibilities including economic matters, politics, environmental issues, combating of HIV/AIDS, among others; however this has been done with little assistance from legislation, as became evident from the discussion.

²⁷² See s 1(b) of the LRA.

²⁷³ See Adler G & Webster E *Trade Unions and Democratisation, 1985-1997* (2000).

CHAPTER 3: THE FORMAL FRAMEWORK OF REGISTRATION; COLLECTIVE BARGAINING AND INDUSTRIAL ACTION – SUPPORT AND/OR HURDLES FOR TRADE UNIONS IN SOUTH AFRICA?

1. INTRODUCTION

In this chapter, support and/or hurdles for trade union social responsibility in South Africa will be examined. The following three factors, namely, registration,¹ collective bargaining² and industrial action,³ are associated with trade unions and will be investigated in order to determine how they influence the functioning of trade unions in South Africa. The discussion will show that these factors can serve as a support for and/or hurdles to trade unions in performing core responsibilities and social responsibilities.

The registration of trade unions is an important factor for trade unions because the LRA encourages them to register.⁴ This is done by granting registered trade unions certain benefits such as organisational rights,⁵ the ability to conclude collective agreements,⁶ including union security arrangements,⁷ and also to become parties to bargaining councils.⁸

Collective bargaining is important for this discussion because trade unions are important collective bargaining agents for employees. The right to collective bargaining is entrenched in the Bill of Rights⁹ and, hence, the LRA encourages collective bargaining.¹⁰ The LRA adopts a pluralist¹¹ approach to

¹ This is discussed under para 2 in this chapter.

² This is discussed under para 3 in this chapter.

³ This is discussed under para 3 in this chapter.

⁴ See s 95 of the LRA.

⁵ See ss 12-16 of the LRA.

⁶ See s 213 for definition of collective agreement.

⁷ See s 23(6) of the Constitution and ss 25 and 26 of the LRA.

⁸ See s 27 of the LRA.

⁹ See s 23(5) of the Constitution.

¹⁰ See s 1 of the LRA.

¹¹ See Finnemore M & Van Rensburg R *Contemporary Labour Relations* 2ed (2002) at 8, where the crux of pluralism was explained as follows: 'conflict is accepted as natural and a fundamental part of the relationship between employer and employee. Trade unions and employer organisations are seen as legitimate and functional organisations through which workers and employers protect and further their interests, within a framework of rules provided by the state.'

labour relations and strongly supports trade unions and collective bargaining at a central level.¹²

Lastly, industrial action is important for this discussion because the rights of workers to engage in industrial action, such as strike action, pickets and protest action, are entrenched in the Bill of Rights¹³ and given effect by the LRA.¹⁴ These rights serve to bring a balance between employees and their employers as they enable employees through trade unions to back their demands in the workplace and beyond.¹⁵

In the following sections, the influence of each of the above factors on the functioning of trade unions is discussed¹⁶ and later in the discussion the influence of these factors will be measured against specific aspects relating to the core responsibilities and social responsibilities of trade unions¹⁷.

2. REGISTRATION: SUPPORT OR HURDLE FOR TRADE UNIONS?

2.1. Historical Background

Prior the Wiehahn Commission, the legal status of trade unions in South Africa displayed a duality.¹⁸ There was a racial bar, in terms of which some trade unions registered under the law on labour relations and others did not. In certain instances, as indicated in Chapter 2 of this study, black trade unions, were not permitted to register under the then applicable statute¹⁹ or could register in terms of legislation separately designed only for them as

¹² See s 1(d)(ii) of the LRA.

¹³ See s 23(2)(c) of the Constitution.

¹⁴ See s 64 of the LRA.

¹⁵ See the definition of 'protest action' under para 5 of this chapter.

¹⁶ These are discussed under paras 2-5 of this chapter.

¹⁷ These are discussed under para 6 of this chapter.

¹⁸ This was the case even under the Industrial Conciliation Act 11 of 1924, where African workers were marginalised from the mainstream of industrial relations. These workers were also employed on terms that were inferior to those set by industrial councils or through conciliation board agreements (see in this regard the Report of the Industrial Legislation Commission (UG 37 –1935) at para 441). When the Labour Relations Act of 1956 was promulgated, it further entrenched the racial division of workers by prohibiting the registration of new unions that had both white and coloured members (see s 4(6) of this Act). A 'coloured person' was defined as a person who was neither white nor African (see s 1 of the Act).

¹⁹ Some of the trade unions whose membership was open to coloured persons, were registered in terms of the Industrial Conciliation Act 1934 and were not required to deregister when blacks were excluded from the Industrial Conciliation Act 28 of 1956, later renamed the Labour Relations Act (see Lewis D 'Registered Trade Unions and Western Cape Workers' in Webster E *Essays in Southern African Labour History* (Ravan 3rd impression 1983) at 232-248).

distinct from white workers.²⁰ Even under the Labour Relations Act, 1956²¹ (the 1956 Act), most black trade unions were wary of registering because registration was viewed as an act of collusion.²² Registration therefore on the one hand served as support for white trade unions while, on the other hand, it acted as a hurdle to black trade unions before and under the 1956 Act because black trade unions were restricted in their functioning. The racial bar was later lifted, however, as a result of the recommendations made by the Wiehahn Commission²³ and consequently various legislative amendments were effected.²⁴ Nevertheless, some trade unions still chose not to register under the 1956 Act.²⁵

South Africa rejoined the International Labour Organisation (the ILO) in 1994.²⁶ Later it ratified, amongst others, the Convention on Freedom of Association which grants workers the right to form and join unions.²⁷ Around this time labour legislation was reviewed and the LRA, which repealed the 1956 Act, was drafted.²⁸ The LRA now gives effect to the constitutional right to freedom of association and ensures its protection through its Chapter II.²⁹ The Act provides for the registration of new trade

²⁰ See Lewis op cit note 19 at 232-248. An example of legislation designed for blacks is the Black Labour Relations Regulation Act of 1953 which was passed after the National Party rose to power. This Act created separate industrial relations machinery for black African workers in the form of workers' committees.

²¹ Act 28 of 1956.

²² See Grogan J *Collective Labour Law* 1ed (2010) at 35.

²³ A number of recommendations made by the Commission were accepted by government in the White Paper on Part 1 (WP s -79). In 1980 and 1981 Parts 2; 3; 4 and 6 of the report were published. Part 5 was released in September 1981.

²⁴ See in this regard Industrial Conciliation Amendment Act 94 of 1979 and Industrial Conciliation Amendment Act 95 of 1980.

²⁵ See in this regard Maree J *The independent Trade Unions 1974-1984* (1987) at 191-207; MacShane D *Power! Black Workers, Their Unions and the Struggle for Freedom in South Africa* (South End Press 1984) at 53-63, Baskin J *Striking Back: A History of COSATU* (Ravan 1991) at 26-28 and 37-38. See also Grogan op cit note 22 at 31.

²⁶ South Africa was one of the founding members of the ILO in 1919, but it withdrew in 1964 and rejoined on 26 May 1994 (see <http://www.nationsencyclopedia.com/United-Nations-Related-Agencies/The-International-Labour-Organization-ILO-MEMBERSHIP.html> visited on 13 June 2013).

²⁷ See Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

²⁸ The urgency of the government to review labour legislation was to a large extent influenced by the role played by organised labour (especially COSATU) in the struggle against apartheid. See Du Toit D ; Godfrey S ; Cooper C ; Giles G ; Cohen T; Conradie B & Steenkamp *Labour Relations Law: A Comprehensive Guide 6ed* (2015) at 20; See also Haysom N 'Negotiating a Political Settlement in South Africa' in Moss & Obey (eds) *South African Review 6: From 'Red Friday' to CODESA* (1992) 27-28; *The Innes Labour Brief* (1994) 6(1) 58-62.

²⁹ There was a need also to comply with the Constitution, as the 1956 Act did not comply with the international standards in this regard. The investigation made by the Fact-Finding and Commission of the International Labour Organisation (ILO) in February 1992 revealed a number of problems, including excessive powers of the Industrial Registrar and the executive to interfere in the governance of trade unions, etc (see in this regard *Prelude to Change:*

unions³⁰ and the reregistration³¹ of trade unions which were registered under the 1956 Act at the time the LRA was promulgated.

The discussion below will look at the ILO standards,³² the Constitution³³ and the registration of trade unions. It will also cover the registration of trade unions under the LRA to determine its influence on the functioning of trade unions.³⁴

2.2. The ILO and the Registration of Trade Unions

In the Freedom of Association Convention, the ILO provides that

... workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.³⁵

As a result of ratifying this Convention, South Africa now has a system of optional registration by employee and employer organisations regulated by the LRA under its Chapter VI. Worldwide, organisations that opt for registration often receive some benefits and South Africa is not an exception.³⁶ This was also made clear by the Fact-Finding and Conciliation Commission appointed by the ILO to investigate a complaint by COSATU regarding the infringement of the principles of freedom of association in South Africa. The Commission's report in 'Prelude to Change Industrial Relations Reform in South Africa'³⁷ stated the following regarding the benefits of registration for trade unions:

Industrial relations reform in South Africa: Report of the Fact-Finding and Conciliation Committee on the Freedom of Association concerning the Republic of South Africa Chapter 13, reproduced in (1992) 13 ILJ 739).

³⁰ See s 95 of the LRA.

³¹ See Schedule 7 (Transitional Arrangements) item 5(1) of the LRA.

³² See para 2.2 of this chapter.

³³ See para 2.3 of this chapter.

³⁴ See para 2.4 of this chapter.

³⁵ This is provided for in Article 2 of the Freedom of Association and Protection of the Right to Organize Convention 87 of 1948. See Article 9 of the same Convention for exceptions.

³⁶ Benefits such as the right to have recourse to dispute settlement machinery; legal personality separate from that of members; the right to organisational rights; the freedom to form and join bargaining or statutory councils; the right to picket; etc.

³⁷ Chapter 13 of the report is published in (1992) 13 ILJ 739-91. See also Saley S & Benjamin P 'The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa' (1992) 13 ILJ 731-738.

Registration is not compulsory under the LRA. An unregistered union, provided it complies with certain requirements, is able to carry on a wide range of trade unions activities. It must provide the Registrar with a copy of its constitution, its head office address and the names of its office-bearers and officials. It must maintain a register of members and audited accounts. It does not however, enjoy *certain important benefits* (my emphasis) which are conferred on registered unions. In particular, it does not *acquire legal personality, it cannot become a party to an industrial council, its members, office-bearers and officials are not protected against civil liability for legal strike action, and it can enter into stop-order agreements with employers only if the Minister has given approval.*³⁸

Conferring *specific benefits or advantages* (my emphasis) on registered trade unions is not necessarily incompatible with the right of workers to form the union of their choice as long as the requirements for registration are themselves compatible with the principles of freedom of association and as long as unions which comply with them have a right in law to be registered.³⁹

The Commission did not, however, make any recommendations regarding the legislative treatment of unregistered trade unions.⁴⁰ Since this report, the LRA has been promulgated as was mentioned above and it now regulates the registration of trade unions and grants registered trade unions certain benefits, as is discussed in this chapter.⁴¹

The above discussion demonstrated that registration serves as support for the functioning of trade unions and that registered trade unions receive certain benefits which enhance their effectiveness.

2.3. The South African Constitution and the Registration of Trade Unions

The interim Constitution,⁴² which was implemented in 1994, addressed the subject of labour relations and even made provision for labour rights.⁴³ The final RSA Constitution⁴⁴ (the Constitution), which came into effect in 1997,

³⁸ Ibid para 584.

³⁹ Ibid para 585.

⁴⁰ See Landman AA 'The Registration of Trade Unions: The Divide Narrows' (1997) 18 *ILJ* 1183 at 1186-7.

⁴¹ See para 2.7 of this chapter.

⁴² Act 200 of 1993.

⁴³ See s 27 of the Interim Constitution.

⁴⁴ The Constitution of the Republic of South Africa, 1996.

guarantees the right to freedom of association in the Bill of Rights.⁴⁵ The content of this right is elaborated in the ILO Conventions and Recommendations as discussed above.⁴⁶ The Constitution generally entrenches the right to freedom of association, but also just like the interim Constitution, specifically provides for this right in the employment context.⁴⁷ Section 23 of the Constitution provides that:

Every worker has the right⁴⁸–

- to form and join a trade union;
- to participate in the activities and programmes of a trade union; and

Every trade union ... has the right –

- to determine its own administration, programmes and activities;
- to organise; and
- to form and join a federation

Every trade union ... has the right to engage in collective bargaining.

It should be noted that in the above provisions there is no mention of registration. This implies that nothing stops unregistered trade unions from existing and functioning. Consequently, unregistered trade unions have an unrestricted right to exist, function and pursue their activities, as the Constitution itself does not require trade unions to register in order to carry out their activities. The Constitution therefore supports trade unions and their functioning without imposing any restrictions or hurdles; however, national legislation, such as the LRA may impose restrictions on unregistered trade unions as is discussed below.

⁴⁵ See s 17 of the interim Constitution Act 200 of 1993 and s 18 of the the Constitution of the Republic of South Africa, 1996. It was until 1979 that the Labour Relations Act contained only two provisions protecting employees' right to freedom of association. In terms of s 78(1), employers could not prevent employees from belonging to a union and in terms of s 66(1), employers could not dismiss employees for belonging to a trade union or victimise them in certain other ways. However, the protection was offered only to whites, coloureds, and Asians until 1979, when the Labour Relations Act was extended to employees of all racial groups. See in this regard Theron J 'Trade Unions and the law: Victimisation and self-help remedies *Law Democracy and Development* (1997) 1 at 11.

⁴⁶ See para 2.2 of this chapter.

⁴⁷ Regarding the difference between the provisions of s 23 of the Constitution and the corresponding provisions of the interim Constitution, see Du Toit D 'Labour and the Bill of Rights' in *Bill of Rights Compendium* (1997) at para 4B9.

⁴⁸ In *SANDU v Minister of Defence* [1999] 6 BLCR 615 (CC), the Constitutional Court held that the provisions of the Defence Act 44 of 1957, prohibiting permanent force members from joining trade unions and participating in strikes and protests, were unconstitutional.

2.4. Registration of Trade Unions under the LRA

The LRA encourages trade unions to register; however, registration is a mere formality, provided the applicant trade union complies with the basic requirements set out in the Act.⁴⁹ As the LRA sets measurable criteria for registration, the role of the Registrar is merely to ascertain in a factual manner whether the criteria have been met.⁵⁰ If the Registrar is satisfied, the applicant will be registered.⁵¹ If the registrar is not satisfied, the applicant must be notified about the defect identified and be given 30 days to correct it.⁵²

The requirement in terms of the 1956 Act that a trade union should be sufficiently representative of an industry before registration has been removed. Although this change resulted in the registration of predominantly small trade unions, it nevertheless increased the number of trade unions in sectors that were previously avoided by trade unions.⁵³

The LRA provides that a trade union may not be registered unless the Registrar is satisfied that the applicant is a genuine trade union.⁵⁴ Guidelines to assist the Registrar in determining whether a trade union is genuine have been published in terms of section 95(8) of the LRA.⁵⁵ It was said in *WUSA v Crouse NO & Another*⁵⁶ that these guidelines should be interpreted with reference to the mischief⁵⁷ that the amendment sought to

⁴⁹ See Van Jaarsveld SR, Fourie JD & Olivier MP *Principles and Practice of Labour Law* (2001) at paras 350-353, 388-390; Finnemore M & Van der Merwe R *Introduction to Labour Relations in South Africa* (1996) 69-129; Mitchell in Van Rensburg (ed) *Participation and Progress: Labour Relations in South Africa* (1998) 3-1 to 4-16; Grogan op cit note 22 at 31. See also Manamela ME 'The Role of the Registrar of Labour Relations in the Registration of Trade Unions' (2006) (18) *SA Merc LJ* 518.

⁵⁰ See *National Employers Forum v Minister of Labour* [2003] 5 BLLR 460 (LC). See also Manamela ME 'The Role of the Registrar of Labour Relations in the Registration of Trade Unions' (2006) (18) *SA Merc LJ* 518.

⁵¹ S 96(3)(b) of the LRA.

⁵² See s 96(4)(c) of the LRA.

⁵³ See Du Toit op cit note 28 at 50.

⁵⁴ This provision was inserted by the Labour Relations Amendment Act 12 of 2002.

⁵⁵ Published in GNR 1446 of 10 October 2003.

⁵⁶ [2005] 11 BLLR 1156 (LC) at para 27. See also Manamela ME 'The Role of the Registrar of Labour Relations in the Registration of Trade Unions' (2006) (18) *SA Merc LJ* 518.

⁵⁷ Examples of mischief include labour consultancies disguising themselves as trade unions, organisations registering for the sole purpose of gaining appearance rights at the CCMA and the Labour Court; trade unions coercing members into signing agreements entitling the union to the benefits due to the members. See *Workers Union of South Africa v Crouse* (C491/04) [2005] ZALC 87 (29 July 2005).

address, such as fraudulent practices and exploitation of members, which are some of the signs that an organisation is not genuine.

2.4.1. Procedural Requirements for Registration

A trade union may apply for registration if its purpose meets the one contained in the definition of trade union in section 213 of the LRA (discussed in Chapter 1); has adopted a name or abbreviation of a name which is not close to the name of another organisation or abbreviation of a name that it is likely to cause confusion;⁵⁸ it has adopted a constitution that complies with section 95(5) and (6) of the LRA; has an address in South Africa;⁵⁹ and is independent,⁶⁰ that is, free from any direct or indirect control, interference or influence by an employer or employers' organisation.⁶¹

The above discussion demonstrated that the registration of trade unions may be a hurdle in that in order for a trade union to be registered it must meet certain requirements, for example its purpose must be in line with the one contained in the definition and its constitution must meet set requirements.

The discussion that follows will not focus on all the requirements since some of them are merely formal in nature.

2.4.1.1. *The Purpose of the Organisation*

The onus is on the Registrar to determine whether the applicant meets the definition of a trade union⁶² as provided for in the LRA. The enquiry in this

⁵⁸ See s 95(1)(a) of the LRA. In *Motor Industry Staff Association v Registrar of Labour Relations* [1998] 10 BLLR 1027 (LC), it was held that 'Staff Association for the Motor and Related Industries' was too similar to 'Motor Industry Staff Association' and would therefore cause confusion. The court rejected the argument that the names were sufficiently different because their acronyms were different and their full names differed in length; see also *SAMRI v Motor Industry Staff Association* (1999) 20 ILJ 2552 (LAC). See also Manamela ME 'Interpretation and Application of section 95(4) of the Labour Relations Act 66 of 1995 (2005) (17) SA Merc LJ 348.

⁵⁹ See s 95(1)(c) of the LRA.

⁶⁰ See s 95(1)(d) of the LRA.

⁶¹ See s 95(2) of the LRA.

⁶² See s 213 of the LRA for the definition of a trade union. The object or purpose of registration under the old dispensation was to formalise the position of employee organisations as bargaining partners in the industrial relations system and to protect members of trade unions vis-à-vis the management of organisations (see Landman AA 'The Registration of Trade Unions – The Divide Narrows' (1997) 18 ILJ 1183 at 1184). However, according to the Wiehahn

regard will be whether its main purpose is to regulate relations between employers and employees.⁶³ In addition, since the 2002 Labour Relations Act amendments, the Registrar also has to determine whether that trade union is a genuine organisation.⁶⁴ In determining this, the Registrar must first consider the union's constitution⁶⁵ and the guidelines published by the Minister in consultation with NEDLAC.⁶⁶ Trade unions must be non-profit organisations.⁶⁷ If they operate for the benefit of some individuals then this is a clear indication that they are bogus.⁶⁸ In *WUSA v Crouse* supra, the Registrar refused to register a trade union because two members of its interim executive committee were not employees as defined by the LRA. Their involvement with the union was only due to their experience in trade-union organisation and their previous positions as shop stewards. This restriction may also be a hurdle to trade unions because it puts a limitation in terms of who should or should not be part of the executive committee. Trade unions seeking registration will not be able to include in their committees non-employees with knowledge, expertise and skills that could help trade unions to become more effective.

2.4.1.2. Trade Union Independence

Section 95(1)(d) of the LRA requires a trade union to be independent. This means that the union must not be under the direct or indirect control,

Commission the main purpose of registration was the protection of the interests of members of trade unions and more particularly the protection of their funds (See Wiehahn Report para 4.34.18 at 486). According to Southall (see Southall R *Imperialism or Solidarity? International Labour and South African Trade Unions* (UCT Press 1995) at 65-66), the commission regarded a purpose of requiring unregistered trade unions to register as to control overseas funding and the lack of restrictions which unregistered trade unions enjoyed regarding the freedom to be involved in politics.

⁶³ See s 213 of the LRA. See also *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries* [1995] 5 BLLR 74 (IC); *Nomabunga v Daily Dispatch* [1997] 11 BLLR 1519 (CCMA); *National Manufactured Fibres Employers Association v Bikwani* (1999) 20 ILJ 2637 (LC).

⁶⁴ See s 95(7) of the LRA. This was inserted by the Labour Relations Amendment Act 12 of 2002.

⁶⁵ The registrar is not limited to the constitution of a trade union, even if the purpose as stated in the constitution matches the terminology in the Labour Relations Act, word for word. See *Dadoo Ltd v Krugersdorp Municipality Council* 1920 AD 530 at 547. See also the *Vidar Rubber Products (Pty) Ltd v CCMA* [1998] 6 BLLR 634 at para 19 (regard is not only given to form, but to substance).

⁶⁶ See s 95(6) of the LRA.

⁶⁷ See s 95(5)(a) of the LRA.

⁶⁸ The Minister suggested the following as indicators that unions have a profit motive: unrealistically high salaries and allowances for officials, office-bearers or employees; interest free or low interest loans and nepotism. However, the Minister also pointed out that this does not mean that unions cannot pay competitive salaries or grant loans in deserving cases (see Grogan op cit note 22 at 32). What is important is that a trade union must be an 'association' of employees. This means that there must be some form of organisation and involvement of members.

under the influence of, or subject to interference by any employer or employers' organisation. This is to prevent the registration of 'sweetheart' unions, which function to do their masters' (employers) bidding. The fact that there is an imbalance of power between employees and employers increases the possibility that the employer may control or influence a trade union. The ILO Convention 98 defines employer interference in trade unions as follows:

Acts which are designed to promote the establishment of workers' organisations under the domination of employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations.⁶⁹

There are, nevertheless, other forms of support by employers which will fall outside the above definition of interference, an example of which would be the organisational rights granted by employers in terms of the LRA⁷⁰ and the provision of office space and other facilities for trade union representatives within the workplace.

2.4.2. The Purpose of Registration under the LRA

The purpose of registration under the LRA is 'to promote the observance of democratic principles in the internal operation and governance of unions and to ensure proper financial control over funds in line with public policy'.⁷¹ This may again be seen as a hurdle in that registered trade unions will not be free to use the money as they deem fit because there are checks and balances. The LRA created a simple procedure for the registration of trade unions⁷² as compared to the 1956 Act.⁷³ It provides for the voluntary registration of trade unions, but at the same time acknowledges the existence of unregistered trade unions, as will be seen later in the discussion. Nevertheless, the legislature still prefers the registration of trade unions. This assumption is evident from the way the LRA encourages and

⁶⁹ See Article 2(2) of the Right to Organise and Collective Bargaining Convention 98 of 1949.

⁷⁰ See ss 12-16 of the LRA.

⁷¹ See the Explanatory Memorandum to the Draft Labour Relations Bill GN 97 of 10 February 1995 at 146.

⁷² See s 95 of the LRA.

⁷³ See also Du Toit et al op cit note 28 at 49; Grogan op cit note 22 at 31.

rewards the registration of trade unions by granting them benefits such as organisational rights.⁷⁴

The registration of trade unions is encouraged because it allows the state and employers to know with whom they are dealing, to have access to the constitution of trade unions, to secure the protection of union members and also to know the financial circumstances of trade unions.⁷⁵ The discussion below will look at some of the effects of registration to determine its importance in the functioning of trade unions.

2.4.3. The Legal Status of Registered Trade Unions

In South Africa, once a trade union is registered it acquires legal personality and becomes a body corporate.⁷⁶ In order to function and participate in legal processes it must have organs consisting of natural persons. A body corporate is an independent legal entity and the actions of its organs are its actions.⁷⁷ As a legal person it may acquire assets, debts, rights and obligations, as well as movable and immovable property.⁷⁸ However, these assets are owned by the body and not by individuals. Accordingly, a trade union may only sell its assets if it is in the interests of the union and the members.⁷⁹

The liabilities of a body corporate belong to it; its members cannot be charged with any debts incurred in discharging its obligations.⁸⁰ Registration in this regard offers support to trade unions as their legal status will assist them in their functioning; for example being recognised by employers, the state and other institutions such as banks. Such recognition may even help them get donors and certain special services from other institutions for the members. Registration is important especially for the

⁷⁴ This, however, resulted in the establishment of bogus unions by labour consultants, who wanted to provide employees with representation at dispute hearings. In 1998 and 1999 the Department of Labour reported that it had received a large number of applications for registration of unions with fewer than 100 members: see Department of Labour Annual Report 1997 (RP 61/1998) 22 and Department of Labour Annual Report 1998 (RP 65/1999) 62.

⁷⁵ See Landman AA 'The Registration of Trade Unions: The Divide Narrows' (1997) 18 *ILJ* 1183 at 1188.

⁷⁶ See s 97(1) of the LRA. See also *FAWU v Wilmark (Pty) Ltd* (1998) 19 *ILJ* 928 (CCMA).

⁷⁷ See *Mbobo v Randfontein Estate Gold Mining Co* (1992) 13 *ILJ* 1485 (IC).

⁷⁸ See *NUFASWA v PWAWU* (1984) 5 *ILJ* 161 (W).

⁷⁹ See *Amalgamated Union of Building Trade Workers of SA v SA Operative Mason's Society* 1957 (1) SA 440 (A).

⁸⁰ See s 97(2) of the LRA.

office-bearers, officials and members of the union, as it implies that they will not incur liabilities on behalf of the trade union.

2.4.4. Benefits of Registration under the LRA

There are a number of benefits that registered trade unions are entitled to in terms of the LRA. These include the following: organisational rights; union security arrangements; ability to conclude collective agreements and to be parties to bargaining councils; ability to take part in certain forms of industrial action and also to start workplace forums. All these different benefits are discussed below.

2.4.4.1. *Organisational Rights*

Registered trade unions which are sufficiently representative are entitled to organisational rights in terms of the LRA.⁸¹ Organisational rights in terms of Chapter III of the LRA refer to the right of access to employers' premises;⁸² collection and payment of union subscriptions through stop orders;⁸³ the right to election of shop stewards;⁸⁴ the right of union office-bearers to time off for union activities;⁸⁵ and the right to information for collective bargaining purposes.⁸⁶ Organisational rights provided for in the LRA can be acquired only by a registered trade union which is sufficiently representative within a workplace.⁸⁷ Trade unions can also acquire such rights by a collective agreement⁸⁸ and by being party to a bargaining council.⁸⁹ Organisational rights may also be acquired by a registered trade union through the section 21 procedure.⁹⁰ Although an unregistered trade union may not acquire rights through the above-mentioned methods, it may use

⁸¹ Ss 11-16 of the LRA.

⁸² S 12 of the LRA.

⁸³ S 13 of the LRA.

⁸⁴ S 14 of the LRA.

⁸⁵ S 15 of the LRA.

⁸⁶ S 16 of the LRA.

⁸⁷ See the definition of workplace in s 213 of the LRA. See also *Speciality Stores v CCAWU* (1997) ILJ 992 (LC); *SACCAWU v The Hub* (1999) ILJ 479 (CCMA); *OGAWU and Volkswagen SA (Pty) Ltd* (2002) ILJ 220 (CCMA); *NUMSA v Bader Bop (Pty) Ltd* (2003) ILJ 305 (CC).

⁸⁸ In terms s 20 of the LRA, collective bargaining parties are entitled to conclude a collective agreement which regulates organisational rights.

⁸⁹ See s 19 of the LRA. A registered trade union automatically acquires the right of access to the workplace and to trade union subscriptions by virtue of being a party to a bargaining council.

⁹⁰ See s 21(7) of the LRA.

collective bargaining⁹¹ backed up by the right to strike to persuade an employer to agree to grant it on a contractual basis the equivalent of the statutory organisational rights.⁹²

According to Du Toit et al, these rights are regarded as a corollary to a voluntarist collective bargaining regime and, because employers are generally in a position of relative socio-economic strength, these rights are extended to trade unions as a counterbalance.⁹³ Under the 1956 LRA, a general duty to bargain in good faith was imposed to bring about this balance.

Registered trade unions have an advantage as they can acquire organisational rights through processes set by the LRA and thus become more effective in their functioning.

2.4.4.2. *Union Security Arrangements*

In terms of the LRA, only registered trade unions with majority representation in the workplace may conclude agency shop and closed shop agreements with employers. Section 26 of the LRA defines a closed shop agreement as

... a collective agreement concluded between a representative trade union and an employer or employers' organisation, which requires all employees covered by the agreement to be members of that union.⁹⁴

Section 25 of the LRA defines an agency shop agreement as

... a collective agreement which requires the employer to deduct an agency fee from employees who are not members of the trade union, but are eligible to join the union and provides for payment of such fees to the union.⁹⁵

⁹¹ See s 23(5) of the 1996 Constitution.

⁹² See Landman AA 'The Registration of Trade Unions: The Divide Narrows' (1997) 18 *ILJ* 1183 at 1191.

⁹³ See Du Toit et al op cit note 28 at 250.

⁹⁴ See s 26(1) of the Labour Relations Act, 1995. See also *Veldspun (Pty) Ltd v ACTWUSA* (1991) *ILJ* 62 (SE) and *ACTWUSA v Veldspun (Pty) Ltd* (1993) *ILJ* 1431 9A).

⁹⁵ See s 25(1) of the LRA. It was decided in *National Manufactured Fibres Employer's Association v Bikwani* [1999] 10 BLLR 1076 (LC), that an agency shop agreement would apply to all identified employees who are not members of a majority union, regardless of whether they belong to other unions. See also *Public Service Bargaining Council v Maseko NO* [2001] 2 BLLR 228 (LC).

A closed shop agreement entered into between an unregistered union and an employer would therefore infringe the freedom of non-association of employees, since it is in the nature of a closed shop to compel non-union members to join the union that is party to a closed shop agreement.⁹⁶ Unregistered trade unions will also face the free rider problems that the agency shop agreement seeks to prevent.⁹⁷ These two agreements can only be entered into by majority registered trade unions and employers.

Again, registered trade unions have an advantage because they can use union security arrangement benefits, whereas unregistered trade unions cannot. Union security arrangements build workers' solidarity and increase trade union stability. There are, however, restrictions on the use of money that is deducted from employees' salaries in terms of the two agreements, as no part of such money may be paid to a political party as an affiliation or be contributed to a political party or a person standing for election to a political office.⁹⁸

2.4.4.3. Collective Agreements, Bargaining Councils and Statutory Councils

Only a registered trade union may conclude a collective agreement as defined by the LRA. However, there is nothing to prevent an unregistered trade union from entering into a common law contract that is capable of enforcement in the civil courts. Problems may, however, arise when attempting to bring individual employment contracts in line with that agreement.⁹⁹ The LRA defines a collective agreement as follows:

[A]written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand:

- one or more employers;

⁹⁶ See the discussion on the common law closed shop in Landman AA 'Freedom of Association in South African Law' 1990 *Acta Juridica* 97-98.

⁹⁷ See Landman AA 'The Registration of Trade Unions: The Divide Narrows' (1997) 18 *ILJ* 1183 at 1190-1191.

⁹⁸ See ss 25(3)(d) and 26(3)(d) of the LRA.

⁹⁹ For a discussion of this problem see Piron J *Recognising Trade Unions* (1990) (Halfway House, Southern Books) at 41-5. An unregistered union cannot enter into a collective agreement that is enforceable in terms of the Labour Relations Act, but an agreement between an employer and an unregistered union may be enforceable in terms of the common law.

- one or more registered employers' organisations; or
- one or more employers and one or more employers' organisations.¹⁰⁰

The LRA provides that only one or more registered trade unions and one or more registered employers' organisation(s) may establish or be parties to bargaining councils and statutory councils.¹⁰¹ The reason for including both structures is mainly for collective bargaining purposes.

Registration serves as support to trade unions, as only registered trade unions can conclude collective agreements and be party to bargaining councils or statutory councils.

2.4.4.4. *Industrial Action*

Section 23 of the Constitution provides that every worker has a right to strike. The LRA accepts this right and regulates it in terms of its Chapter IV. The use of the word 'worker' instead of 'employee' indicates that this right is not restricted to common law employees.¹⁰² Accordingly, registered and unregistered trade unions enjoy immunity against legal action for initiating or assisting in a protected strike because the right to strike vests in employees and not in trade unions.¹⁰³ However, it has been held that where damage occurs during a strike, a trade union may be held jointly and severally liable together with any other person who unlawfully caused or contributed to the damage.¹⁰⁴

The Constitution further grants every worker a right to picket;¹⁰⁵ however, again in terms of the LRA, only registered trade unions may authorise a picket.¹⁰⁶ The purpose of a picket is to peacefully encourage non-striking

¹⁰⁰ See s 213 of the LRA.

¹⁰¹ See s 27 and 39 of the LRA.

¹⁰² The word 'worker' must also be viewed in the light of ILO Conventions to include members of the armed forces. See also *SANDU v Minister of Defence and others* [2006] 11 BLLR 1043 (SCA).

¹⁰³ See s 67(2) of the LRA.

¹⁰⁴ See *SATAWU v Garvis & others* (2011) 6 SA 382 (SCA).

¹⁰⁵ See s 17 of the Constitution.

¹⁰⁶ See s 69(1) of the LRA.

employees and members of the public to oppose a lockout or to support a protected strike.¹⁰⁷

The LRA permits registered trade unions or federations of trade unions to call for protest action, although an unregistered trade union still has the right to protest, which is conferred on it by sections 16 and 17 of the Constitution.¹⁰⁸ The purpose of a protest action is to promote or defend the socio-economic interests of workers.¹⁰⁹

Registration serves as support for trade unions as only registered trade unions can authorise a picket and call a protest action regarding socio-economic rights.

2.4.4.5. *Workplace Forums*

A workplace forum may be established only by a representative trade union in workplaces in which more than 100 employees¹¹⁰ are employed.¹¹¹ A representative trade union is defined as a registered trade union (or two or more registered trade unions acting together) that represents the majority of the employees employed in a workplace.¹¹² The establishment of a workplace forum is effected by a trade union and employers have no say in the initial decision.¹¹³ The reason for this was to alleviate trade unions' fears that workplace forums would undermine them.¹¹⁴ Workplace forums have a duty to seek to promote the interests of all employees in the workplace whether or not they are trade union members.¹¹⁵ They must also seek to enhance efficiency in the workplace.¹¹⁶ Workplace forums are entitled to be consulted by the employer with a view to reaching consensus on matters mentioned in

¹⁰⁷ See item 3(1) of the Code of Good Practice.

¹⁰⁸ See s 77 of the LRA.

¹⁰⁹ See s 213 of the LRA.

¹¹⁰ In the context of workplace forums, 'employee' means any person who is employed in a workplace except a senior managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace. See section 78(a) of the LRA.

¹¹¹ See s 80(1) of the LRA.

¹¹² See s 78(b) of the LRA.

¹¹³ See s 80(2) of the LRA.

¹¹⁴ See the Explanatory Memorandum of the Ministerial Task Team published as Notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 137.

¹¹⁵ See s 79(a) of the LRA.

¹¹⁶ See s 79(b) of the LRA.

section 84 of the LRA. However, section 84(1) of the LRA states that ‘unless the matters for consultation are regulated by a collective agreement with the representative trade union’, a workplace forum is entitled to be consulted about matters listed in the section. This may mean that unless the matters listed in section 84 have been collectively bargained about by the representative trade union and the employer and regulated in a collective agreement, they are subject to consultation.¹¹⁷ Alternatively, it could mean that unless the trade union and the employer have determined which matters will be fit for consultation with a workplace forum in a collective agreement, the workplace forum will be entitled to consult about such matters.¹¹⁸

Workplace forums are also entitled to participate in joint decision-making about matters mentioned in section 86 of the LRA. However, again in terms of section 86(1), ‘unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to jointly decide the matters listed therein’. Again this may be interpreted in two different ways. It may imply that unless matters listed in section 86 have been collectively bargained by the employer and a representative trade union and regulated in a collective agreement, they are subject to joint decision-making. Alternatively, it may mean that unless the trade union and the employer have determined which matters will be fit for joint decision-making by a workplace forum in a collective agreement, the

¹¹⁷ See Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D & Christie S *The Labour Relations Act of 1995* (1996) 254.

¹¹⁸ Quite a number of matters listed in s 84(1) relate to the economic or business component of an enterprise. The section requires the employer to consult about the restructuring of the workplace, including the introduction of new technology, new work methods, partial or total plant closures, mergers and transfers of ownership in so far as they impact on the employees. In addition, the section requires the employer to consult about product development plans and export promotion. S 84(1) also mentions a number of matters directly related to employees and the day-to-day running of the business, like the dismissal of employees based on the operational requirements of a business. This affects the employees’ job security even though the employees are not at fault. The section also mentions changes in the organisation of work, which may also affect the job security of employees. Furthermore the section lists job grading, criteria for merit increases or payment of discretionary bonuses, education and training as matters for consultation with the workplace forum. S 84(5) of the LRA provides that subject to occupational health and safety legislation such as the OHSA and the Mine Health and Safety Act, a representative trade union and an employer may agree that the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work. The list is not exhaustive, as the matters for consultation may be varied by a bargaining council agreement which may include additional matters for consultation in respect of workplaces that fall within its registered scope.

workplace forum will be entitled to decide jointly the matters listed in the section.¹¹⁹

It should be noted that workplace forums have not really been a success story in South Africa.¹²⁰

2.5. The Position of Unregistered Trade Unions

The non-registration of a trade union does not necessarily mean its non-existence. An unregistered trade union is a voluntary association¹²¹ and, in terms of the common law, it is possible for unregistered trade unions to acquire legal personality as voluntary associations.¹²² The fact that the definition of trade union does not mention anything about registration¹²³ implies that reference to a trade union, unless specifically stated, is to both registered and unregistered trade unions.

Under South African law, a voluntary association can bestow upon itself a legal personality distinct from its members.¹²⁴ This is done through a voluntary association having perpetual succession, a separate legal persona and the requirement that no member must have by reason of membership any rights to the property of the association, nor may the association carry

¹¹⁹ S 86(1)(a) provides that parties must jointly decide about disciplinary codes and procedures. Subsec (b) provides that employers and workplace forums must jointly decide about rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees. Subsec (c) provides that the employer and the workplace forum must jointly decide measures designed to protect and advance persons disadvantaged by unfair discrimination. Subsec (d) states that employers and workplace forums must jointly decide on changes by the employer, or by the employer-appointed representatives on trusts boards of employer-controlled schemes, to the rules regulating social benefit schemes such as pension and provident funds.

¹²⁰ See Manamela ME 'Regulating Workplace Forums in South Africa' (2002) 14 *SA Merc LJ* 728. See also Wood G & Mahabir P 'South Africa's Workplace Forum System: A Stillborn Experiment in the Democratization of Work?' *Industrial Relations Journal* 32(3) <http://onlinelibrary.wiley.com> visited on 09 July 2013.

¹²¹ It was held in *PE Bosman Transport Works Committee v Piet Bosman Transport* 1980 (4) SA 801 (T) that an unregistered trade union is an ordinary voluntary association. Bamford B *The Law of Partnership and Voluntary Association in South Africa* 3ed (1982) at 117 defines a voluntary association as 'a legal relationship which arises from an agreement among three or more persons to achieve a common object, primarily other than the making and division of profits'.

¹²² See for example, *Morrison v Standard Building Society* 1932 AD 229. On the consequences and effects of legal personality see Van Jaarsveld SR, Fourie JD & Olivier MP *Principles and Practice of Labour Law* (2001) at paras 394-395.

¹²³ See, s 213 of the LRA for the definition of trade union.

¹²⁴ See Bamford op cit note 121.

on any business for gain. A member of an association that has a legal persona is not liable for the debts of that association.¹²⁵

The Constitution is the main instrument protecting unregistered trade unions.¹²⁶ The LRA too does not entirely ignore unregistered trade unions as they still enjoy protection against violations of their rights to freedom of association in terms of its sections 4(1) and 8. They also have collective bargaining rights, the right to represent members in proceedings under the LRA in terms of section 134 read with section 135. They also have the right to call their members out on strike.

It is also the right of every trade union to determine its own constitution and rules and also to hold elections for its office-bearers, officials and representatives, irrespective of whether it is registered or not.¹²⁷ A registered trade union will therefore be restricted in the manner in which its constitution may be formulated, as it must comply with certain prescribed provisions of the LRA.¹²⁸ A trade union may participate in forming a federation of trade unions or may join one¹²⁹ and it may affiliate with or participate in the affairs of any international workers' organisation or the ILO, and contribute to or receive financial assistance from those organisations¹³⁰ without necessarily being restricted because it is not registered.

As discussed above even though at times registration becomes a hurdle for trade unions its support for trade unions outweighs its disadvantages. It brings a number of benefits to the functioning of trade unions,¹³¹ especially with regard to employment and workplace-related matters.

¹²⁵ See also s 97(2) of the LRA.

¹²⁶ See s 23 of the Constitution.

¹²⁷ See s 8(a) of the LRA.

¹²⁸ The constitution of a registered trade union must be in line with the provisions of s 95(5) and (6) of the LRA.

¹²⁹ See s 8(c) and (d) of the LRA.

¹³⁰ See s 8(e) of the LRA.

¹³¹ See para 2.7 of this chapter.

3. COLLECTIVE BARGAINING: SUPPORT OR HURDLE FOR TRADE UNIONS?

3.1. Introduction and Historical Background

Worldwide, collective bargaining is the most important reason for the existence of trade unions.¹³² One of the principal functions of trade unions is to secure better working conditions for their members,¹³³ and this is done through the process of collective bargaining, which is the most effective way of serving the interests of members in the workplace. Collective bargaining is an old concept which was formulated around 1890 by the British labour movement pioneer, Beatrice Webb.¹³⁴ Although the common law does not promote collective bargaining, it does promote freedom of association.¹³⁵ South Africa has for a long time subscribed to the principles of voluntarism, freedom of association and collective bargaining; however, until 1979 these principles were not equally applicable to all members of the working population as black people were sidelined.¹³⁶ This position changed as a result of recommendations made by the Wiehahn Commission,¹³⁷ which were considered during the drafting of the LRA. Again in 1992, the ILO's Fact-Finding and Conciliation Commission investigated the functioning of the collective bargaining system in South Africa¹³⁸ and this resulted in further improvements to the collective bargaining system. Consequently, the

¹³² See Du Toit MA *South African Trade Unions: History, Legislation and Policy* (1976) at 97. It is through trade unions that workers can negotiate with an employer as a group, not only in respect of wages but also with regard to all matters concerning the relationship between employers and employees.

¹³³ See Van Jaarsveld et al op cit note 122 para 354-355.

¹³⁴ In Potter [Webb] *The Cooperative Movement in Great Britain* (Swan Sonnenschein & Co 1891). See also Du Toit D 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 *ILJ* 1405.

¹³⁵ The common law brands the exercising of collective rights such as the right to bargain, to strike and picket as breaches of employees' individual contracts of employment, requiring the settlement of disputes by ordinary courts of law. See Basson et al *Essential Labour Law* 5ed (2009) at 327.

¹³⁶ See Bendix S *Industrial Relations in South Africa* 5ed (2010) at 76-77.

¹³⁷ See the Report of the Commission of Inquiry into Labour Legislation (RP 47/1979).

¹³⁸ The Report was published by the ILO as 'Prelude to Change: Industrial Relations Reform in South Africa' *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa* (1992). See also Saley S & Benjamin P 'The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa' (1992) 13 *ILJ* 731-738.

promotion of collective bargaining at the sectoral level has been included as one of the main purposes of the LRA.¹³⁹

The discussion below will look at the ILO standards,¹⁴⁰ the Constitution¹⁴¹ and collective bargaining. It will also cover aspects relating to the regulation of collective bargaining under the LRA to determine its influence on the functioning of trade unions.¹⁴²

3.2. The ILO and Collective Bargaining

As a member state of the ILO, South Africa has incurred certain obligations relating to collective bargaining. The relevant ILO Convention on collective bargaining is the Right to Organize and Collective Bargaining Convention.¹⁴³ This Convention requires member states to take measures ‘to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, so that employment conditions can be determined by means of collective agreements’.¹⁴⁴ The Convention furthermore emphasises the promotion of collective bargaining and encourages member states to refrain from hampering the ‘freedom of collective bargaining’.¹⁴⁵

Collective bargaining has been described by the ILO¹⁴⁶ as

...a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association

¹³⁹ See s 1(d)(i)-(ii) of the LRA. In *NUM v East Rand Gold & Uranium Co Ltd* (1991) 1221 (A) at 1236J-1237A and *Perskorporasie van SA Bpk v MWASA* (1993) ILJ 938 (LAC) it was stated that the basic philosophy of the Act is that collective bargaining is the prescribed and acceptable procedure to promote peaceful labour relations.

¹⁴⁰ See para 3.2 of this chapter.

¹⁴¹ See para 3.3 of this chapter.

¹⁴² See para 3.4 of this chapter.

¹⁴³ See the Right to Organise and Collective Bargaining Convention 98 of 1949. See also *Mbobu v Randfontein Estate Gold Mining Co* (1992) ILJ 1485 (IC).

¹⁴⁴ See Article 4 of the Convention.

¹⁴⁵ See Articles 5 and 8 of the Convention.

¹⁴⁶ See ILO ‘Organizing for social justice – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work’ (2004). See also the definition by Du Toit op cit note 132 at 97.

enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.¹⁴⁷

Collective bargaining strives to ensure that there is a balance of power between negotiating parties. Accordingly, the ILO Committee on Freedom of Association states the following regarding collective bargaining:

Collective bargaining, if it is to be effective, must assume a voluntary quality and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.¹⁴⁸

It is evident from the above that the ILO did not envisage the duty to bargain. International jurisprudence¹⁴⁹ also indicates that there is in general a freedom to bargain collectively and not a duty to bargain. The objectives of collective bargaining may be described as follows:

- the setting of working conditions and other matters of mutual interest between employer and employees in a structured environment
- the promotion of employee participation in managerial decision-making and
- dispute resolution in an institutionalised manner.

From the above discussion it is evident that collective bargaining serves as support for trade unions because they are able to negotiate terms and conditions of employment for their members which will apply to all employees within the bargaining unit.

3.3. The South African Constitution and Collective Bargaining

Section 23 of the Constitution¹⁵⁰ makes provision for labour rights and this section affords every worker the right to form and join a trade union and to participate in its activities.¹⁵¹ In terms of this section, trade unions are also

¹⁴⁷ See also Basson et al op cit note 135 at 276-277 and Du Toit op cit note 132 at 97 for a description of collective bargaining.

¹⁴⁸ See *Freedom of Association Digest* 1996 at para 96.

¹⁴⁹ In *Wilson v United Kingdom* [2002] IRLR 568, the European Court of Human Rights held that there need not be a duty to bargain where a trade union has the right to strike.

¹⁵⁰ The Constitution of the Republic of South Africa, 1996.

¹⁵¹ See s 23(2), (3) and (5) of the Constitution. The right of employees to bargain collectively means in practice that employees are entitled through trade unions to negotiate with their employers with regard to conditions of employment and that such negotiation may result in agreement between the parties. See *Mutual and Federal Insurance Co Ltd v BIFAWU* (1996) ILJ 241 and *IMATU v Rustenburg Transitional Council* [1999] 12 BLLR 1299 (LC).

afforded the right to organise and engage in collective bargaining with employers or employers' organisations.¹⁵² In *NUMSA v Bader Bop (Pty) Ltd*,¹⁵³ the Constitutional Court held that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.¹⁵⁴ The Constitution does not, however, provide the content for the right to collective bargaining and there has been debate on whether section 23(5) also imposes a duty to bargain.¹⁵⁵ Vettori is of the view that the constitutional duty to engage in collective bargaining does not entail a correlative duty to bargain.¹⁵⁶ The right to collective bargaining is given effect by the LRA, as is discussed below.¹⁵⁷

3.4. Collective Bargaining under the LRA

One of the objectives of the LRA is

... to provide a framework within which employees and their trade unions, employers and employers' organizations can – (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.¹⁵⁸

Terms and conditions of employment mainly relate to matters that are the core responsibilities of trade unions. The LRA promotes orderly collective bargaining and collective bargaining at sector levels¹⁵⁹ which is the preferred means of securing labour peace, social justice, economic development and employment equity. Since the LRA does not impose a duty to bargain, it promotes collective bargaining in different ways,¹⁶⁰ including by affording

¹⁵² See s 23(4)(b) and 23(5) of the Constitution. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*, 1996 (1996) ILJ 821.

¹⁵³ [2003] 2 BLLR 103 (CC) at 111.

¹⁵⁴ See s 23(5) of the Constitution, which provides for the right to engage in collective bargaining.

¹⁵⁵ This debate arose in connection with members of the National Defence Force in various court cases. See *SANDU & Others v Minister of Defence and Others* 2003 (9) BCLR 103 (CC) at 111 and *SANDU & Others v Minister of Defence and Others: In re SANDU v Minister of Defence and Others* (2003) 24 ILJ 1495 (T).

¹⁵⁶ See Vettori S'A Judicially Enforceable Duty to Bargain' *De Jure* (2005) 382. See also Cheadle's view in Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) at 388-398.

¹⁵⁷ See s 1(b) of the LRA, which provides that one of the primary objects of this Act is to 'give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'.

¹⁵⁸ See s 1(c) of the LRA.

¹⁵⁹ See s 1(d) of the LRA.

¹⁶⁰ See the Explanatory Memorandum at 292. The Memorandum notes that: A notable feature of the draft Bill is the absence of a statutory duty to bargain. In its deliberations on a revised system of collective bargaining, the Task Team gave consideration to three competing models. The first is a system of statutory compulsion, in which a duty to

protection to the right of employees and employers to freedom of association;¹⁶¹ providing statutory organisational rights to trade unions, union security arrangements, the establishment of collective bargaining structures, conclusion and enforcement of collective agreements¹⁶² and making provision for the right to strike in order to enforce these rights.¹⁶³ All of these factors are important when making it possible for a trade union to establish a collective bargaining relationship with an employer.

The LRA does not provide a definition of collective bargaining, mainly because it does not impose a legal duty to bargain on employers and trade unions, as discussed above.¹⁶⁴ Employers and trade unions are free to agree to their own collective bargaining forums and procedures in terms of which they will bargain with each other.¹⁶⁵ The purpose of collective bargaining has been described as the regulation of terms and conditions of employment and

bargain is underpinned by a statutory determination of the levels at which bargaining should take place and the issues over which parties are compelled to bargain. The second model is not dissimilar though more flexible. It relies on intervention by the judiciary to determine appropriate levels of bargaining and bargaining topics. The third model, unanimously adopted by the Task Team, is one that allows the parties, through the exercise of power, or indeed persuasion, is given statutory impetus by the draft Bill's provision for organisational rights and a protected right to strike. See also *NPSU & others v National Negotiating Forum & others* (1999) 20 ILJ 1081 (LC), where the court referred to the 'unashamedly voluntarist' approach of the Act to collective bargaining. See also *SANDU v Minister of Defence & others, Minister of Defence & others v SA National Defence Union & others* [2006] 11 BLLR 1043 (SCA) where it was stated that the LRA emphasises the virtues of collective bargaining but nowhere suggests that the process should be other than voluntary.

¹⁶¹ See ss 4(1)-(3) and 5(1)-(3) of the LRA.

¹⁶² See s 23 of the LRA which deals with the legal effect of collective agreements; s 31 and 32 which respectively deal with the binding nature of collective agreements concluded in bargaining councils and their extensions.

¹⁶³ See s 64 of the LRA.

¹⁶⁴ Employers and trade unions are free to agree to their own collective bargaining forums and procedures in terms of which they will bargain with each other. See the Explanatory Memorandum annexed to the Draft Negotiating Document in the Form of a Labour Relations Bill published as general notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 121. See Davies DM 'Voluntarism and South African Labour Law-Are the Queensbury Rules an Anachronism?' in TW Bennet, DJ Devine, DB Hutchison, I Leeman, CM Murray & D van Zyl Smit (eds) *Labour Law* (1991) 50 in which it was suggested that the Labour Relations Act, 1956 was underpinned by a form of voluntarist philosophy. However, this was changed by the industrial court through its creation of a duty to bargain (see *SA Clothing & Textile Workers Union v Maroc Carpets & Textile Mills (Pty) Ltd* (1990) 11 ILJ (IC) 1101 at 1104E where the court stated that 'Let it at once be said that, despite some earlier decisions to the contrary, it is clear that this court today unequivocally recognizes the existence of an enforceable duty upon all employers to bargain with trade unions representative of their employees, in respect of all matters concerning their relationship with those employees'). See also *SA Woodworks Union v Besaans Du Plessis (Pretoria Foundries) (Pty) Ltd* (1990) 11 ILJ 359 (IC) at 367G and *Steel Engineering & Allied Workers Union v BRC Weldmesh* (1991) 12 ILJ 1304 (IC) at 1307C.

¹⁶⁵ See the Explanatory Memorandum annexed to the Draft Negotiating Document in the Form of a Labour Relations Bill published as general notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 121 See Davies op cit note 164 at 50 in which it was suggested that the Labour Relations Act, 1956 was underpinned by a form of voluntarist philosophy.

other 'matters of mutual interest'.¹⁶⁶ An essential element of collective bargaining is that it is collective. The parties to collective bargaining are employers or employers' organisations on the one hand and trade unions on the other hand. According to Grogan, collective bargaining can be viewed as a process by which employers and organised groups of employees in the form of trade unions seek to reconcile their conflicting interests and goals through mutual accommodation.¹⁶⁷

The process of bargaining takes place when two opposing parties exchange demands and make counterdemands where they may propose compromises, where they negotiate and where one party places pressure on the other to give in to its demands.¹⁶⁸ The result of successful collective bargaining is a collective agreement.¹⁶⁹ If bargaining fails the employer may resort to a lockout and employees or trade unions may resort to strike action.¹⁷⁰ Davies and Freedland¹⁷¹ have explained trade unions' main objective with collective bargaining as follows:

By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.

Collective bargaining provides support to trade unions as it affords them a platform to freely present employment related needs and demands of their members.

¹⁶⁶ See s 1 of the LRA which states that the determining of wages, terms and conditions of employment and other matters of mutual interest is the objective or purpose of collective bargaining. See also *East Rand Gold & Uranium Co Ltd v NUM* (1989) ILJ 683 (LAC) and *NUM v Buffelsfontein Gold Mining Co* (1991) ILJ 346 (IC).

¹⁶⁷ See Grogan op cit note 22 at 86.

¹⁶⁸ See Basson et al op cit note 135 at 277.

¹⁶⁹ See s 213 of the LRA for the definition of a collective agreement.

¹⁷⁰ These aspects are discussed in detail later in this chapter.

¹⁷¹ See Davies PL & Freedland MR *Kahn-Freund's Labour and the Law* 3ed (1983).

3.4.1. Collective Agreements

Collective agreements¹⁷² are products of collective bargaining and play an important role in regulating the rights and obligations between employers and trade unions.¹⁷³ The subject matter of a collective agreement is the terms and conditions of employment¹⁷⁴ or any matter of mutual interest¹⁷⁵ between a registered trade union and an employer or employers' organisation.¹⁷⁶ The phrase 'matters of mutual interest' has been given a wide meaning by the courts. It was accepted in *Rand Tyres & Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal)*¹⁷⁷ that the interpretation of the phrase should not be restricted to conditions of employment. Other subsequent cases were decided similarly under both the 1956 Act and the LRA.¹⁷⁸ An interest is mutual if the interests of each party are implicated in the outcome of the matter.¹⁷⁹ In *SANDU v Minister of Defence & Others*¹⁸⁰ it was noted that the constitutional right to engage in collective bargaining does not entitle a trade union to engage in collective bargaining on any issue at large, but guarantees the right to engage in bargaining on legitimate labour issues. Unlike section 24 of the 1956 Act, there is no provision in the LRA which lists the matters for possible inclusion in a collective agreement. Nevertheless, sections 28 and 43 of the LRA which provide for functions of bargaining councils and statutory councils may be of assistance. In addition, matters listed in sections 84¹⁸¹ and 86¹⁸² of the LRA for consultation and joint decision-making between

¹⁷² See s 213 for the definition of trade union.

¹⁷³ See *Photocircuit SA (Pty) Ltd v NIC Iron, Steel, Engineering & Metallurgical Industry* 1996 ILJ 479 (A). See also Du Toit D et al op cit note 28 at 309.

¹⁷⁴ The phrase 'terms and conditions of employment' refers only to express or implied terms of the employment contract rather than 'work practices'. See in this regard *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA* [1995] 4 BLLR 11 (LAC).

¹⁷⁵ See *Sithole v Nogwaza NO & others* (1999) 20 ILJ 2710 (LC) and *HOSPERSA & another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at para [12] for a discussion of this term.

¹⁷⁶ See s 213 of the LRA.

¹⁷⁷ 1941 TPD 108.

¹⁷⁸ See *SASBO v Bank of Lisbon International Ltd* (1993) 14 ILJ 394 (IC). In *De Beers Consolidated Mines Ltd v CCMA* [2000] 5 BLLR 578 (LC), it was held that the phrase must be 'interpreted literally to mean any issue concerning employment (at paras 16-17).

¹⁷⁹ See Mischke 'What are matters of mutual interest?' (2001) *Contemporary Labour Law* Vol 10(9) 88-89.

¹⁸⁰ [2006] SCA 91 (RSA) at para 11.

¹⁸¹ S 84(1) of the LRA and para 2.4.4.5 in this chapter.

¹⁸² In terms of s 86(1) 'unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to jointly decide the matters listed therein'. Again this may be

employers and workplace forums could become subjects of collective bargaining. Matters of mutual interest are mainly matters that are deemed to be core responsibilities of trade unions.

The restriction on matters that may be bargained about may be seen as a hurdle to trade unions because not just any issue may be brought to the table of negotiations.

3.4.2. Organisational Rights and Collective Bargaining

Since employers generally have a superior socio-economic strength than employees, the LRA gives trade unions organisational rights as discussed above.¹⁸³ These rights serve to counter employers' strength and to make trade unions effective in collective bargaining.¹⁸⁴ In the old dispensation the Industrial Court imposed a duty to bargain in good faith¹⁸⁵ between the parties in an attempt to bring this balance. In relation to this, Rycroft and Jordan¹⁸⁶ argue that:

Certain requirements are essential for the proper functioning of the collective bargaining process. Those requirements, in our submission, all relate to the process of collective bargaining and to the rights of the collective parties. As such, they constitute the basic elements one may expect from a legal policy designed to facilitate and encourage the collective bargaining process.

interpreted in two different ways. It may imply that unless matters listed in s 86 have been collectively bargained by the employer and a representative trade union and regulated in a collective agreement, they are subject to joint decision-making. Alternatively it may mean that unless the trade union and the employer have determined which matters will be fit for joint decision-making by a workplace forum in a collective agreement, the workplace forum will be entitled to jointly decide the matters listed in the s. S 86(1)(a) provides that parties must jointly decide about disciplinary codes and procedures. Subsec (b) provides that employers and workplace forums must jointly decide about rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees. Subsec (c) provides that the employer and the workplace forum must jointly decide measures designed to protect and advance persons disadvantaged by unfair discrimination. Subsec (d) states that employers and workplace forums must jointly decide on changes by the employer, or by the employer-appointed representatives on trusts boards of employer-controlled schemes, to the rules regulating social benefit schemes, such as pension and provident funds.

¹⁸³ See para 2.7.1 of this chapter.

¹⁸⁴ The preamble to the LRA states the regulation of organisational rights of trade unions as one of the aims of the Act.

¹⁸⁵ See *NUM v East Rand Gold & Uranium Co Ltd* (1991) ILJ 1221 (A) 1237E and *SAEWA v Goedehoop Colliery (Amcoal)* (1991) ILJ 856 (IC).

¹⁸⁶ See Rycroft AJ & Jordaan B *A Guide to South African Law* 2ed Cape Town Juta (1992) at 126-127.

Through organisational rights, trade unions are able to amass sufficient bargaining power to negotiate with employers.¹⁸⁷ Section 23(4) of the Constitution protects the right to organise; however, in order for this right to be effective, trade unions need organisational rights. Different organisational rights and their importance for collective bargaining will now be briefly discussed. The LRA requires that a trade union should be registered in order to acquire organisational rights as discussed above.¹⁸⁸ Furthermore, a registered trade union must enjoy a certain level of representativeness in the workplace where it wants to exercise the rights. A trade union can either have a majority representation¹⁸⁹ or be sufficiently representative.¹⁹⁰ This limitation may also be seen as a hurdle to trade unions, because only trade unions meeting set requirements will be able to acquire and exercise these rights.

3.4.2.1. *Right of Access to the Workplace*

Trade unions may acquire a right of access to the workplace for the purposes of recruiting employees and to have contact with members.¹⁹¹ The exercise of this right is, however, subject to ‘conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work’.¹⁹² In the domestic sector,¹⁹³ this right does not include the right to enter the home of the employer without consent.¹⁹⁴

¹⁸⁷ See Du Toit et al op cit note 28 at 250.

¹⁸⁸ See para 2.4.4.1 of this chapter.

¹⁸⁹ A trade union represents the majority of employees in a specific workplace. Two of the organisational rights depend on majority representation: the right to elect trade union representatives (s 14) and the right to disclosure of information (s 16).

¹⁹⁰ The LRA does not state what degree of representivity will be deemed sufficiently representative. Each dispute will have to be decided on a case-by-case basis. Three of the organisational rights require a trade union to have sufficient representation in the workplace.

¹⁹¹ See s 12 of the LRA. The 1956 Act did not provide for such an explicit right of access to the workplace. It was only developed by the Industrial Court through its unfair labour practice jurisdiction (See *National Union of Mineworkers & others v Buffelsfontein Gold Mining Co* (1991) 12 ILJ 346 (IC) at 351. Under the 1956 Act, gaining access to workplaces was made difficult by the Trespass Act 6 of 1959 which made it a criminal offence to enter land without the permission of the owner or lawful occupier except for a lawful reason. ‘Lawful occupier’ was defined to exclude ‘servants’. See for example *R v Mcunu* 1960 (4) SA 544 (N). This is the law that was often used to exclude union officials from the workplace.

¹⁹² See s 12(4) of the LRA. See *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 BLLR 662 (CCMA) for examples of limitations that may be set on the right to access to the workplace. See also *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others* (1994) 15 ILJ 527 (LAC) at 542.

¹⁹³ In terms of s 17(1) of the LRA ‘domestic sector’ means ‘employment of employees engaged in domestic work in their employer’s homes or on the property on which the home is situated’.

¹⁹⁴ See s 17(2)(a) of the LRA.

The manner in which this right is exercised should depend on the nature of the employer. The Extension of Security of Tenure Act¹⁹⁵ affords a general right of access to persons visiting lawful occupiers of the land in rural and peri-urban areas and this would definitely include union officials.

3.4.2.2. *Right to Stop Order Facilities*

Trade unions cannot function effectively without adequate finances. Monthly contributions made by members serve as an important source of a trade union's income. In this regard, the LRA offers assistance to unions in collecting their contributions by providing that 'members of a sufficiently representative trade union may authorise the employer in writing to deduct subscriptions or levies from their wages, which must be paid to the trade union'.¹⁹⁶ The employer must furnish the union with a list of names of the members from whom the deductions were made; details of the amounts deducted and remitted and the periods to which they relate, and copies of notices of revocation by employees.¹⁹⁷

3.4.2.3. *Right to Elect Trade Union Representatives*

Trade union representatives,¹⁹⁸ generally referred to as 'shop stewards', perform the day-to-day functions of serving members of a trade union within workplaces. Trade union representatives are employees of the employer but represent the interests of the union and its members in the workplace. Members of a registered trade union that represents the majority of employees in the workplace are entitled to elect trade union representatives if the union has ten members in the workplace.¹⁹⁹ These representatives are important role players in the functioning of trade unions, as discussed in Chapter 1.²⁰⁰

¹⁹⁵ Act 62 of 1997.

¹⁹⁶ See *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA) and *SACTWU v Marley (SA) (Pty) Ltd* (2000) ILJ 425 (CCMA) and *Adams v Coin Security Group (Pty) Ltd* (1999) ILJ 1192 (LC).

¹⁹⁷ See s 13(1) and (5) of the LRA.

¹⁹⁸ 'Trade union representative' is defined in s 213 of the LRA as 'a member of a trade union who is elected to represent employees in a workplace'. See also *SANAWU v Maluti Crushers* [1997] 7 BLLR 955 (CCMA).

¹⁹⁹ See s 14 of the LRA. See also *SACCAWU v Woolworths (Pty) Ltd* (1998) ILJ 57 (LC).

²⁰⁰ See para 4.3 of Ch 1.

3.4.2.4. *Right to Leave for Trade Union Activities*

Office-bearers of a registered trade union which is sufficiently representative are entitled to take 'reasonable' time off from work to perform official functions.²⁰¹ The LRA does not state the meaning of 'reasonable', but if a dispute arises the matter may be referred to the CCMA. In *Chemical Workers Industrial Union & others v Sanachem*²⁰² ten days per annum was accepted as reasonable.

3.4.2.5. *Right to Disclosure of Information*

In order for trade unions to discharge their functions; and bargain effectively, they need certain information that the employer possesses. For this reason, section 16 of the LRA affords registered trade unions with majority membership in the workplace the right to disclosure of information.²⁰³ Davies and Freedland²⁰⁴ explain the necessity for such information as follows:

Negotiations do not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant to the agreements.

The information to be disclosed by the employer must however be 'relevant information'²⁰⁵ that will allow trade union representatives to engage effectively in consultation and collective bargaining.²⁰⁶ Once the union has

²⁰¹ See s 15(1) of the LRA. See also *NACTWUSA v Waverley Blankets Ltd* (2000) ILJ 1910 (CCMA). The leave need not be paid leave; however, the employer and the union may agree on the number of days' leave, including days of paid leave, and any other conditions. Shop stewards are also entitled to paid leave to undergo training relevant to the performance of their functions (see also *NUMSA v Exacto Craft (Pty) Ltd* (2000) ILJ 2760 (CCMA)). However, shop stewards cannot just abandon their normal work to attend to union functions. They must do so with management's permission, which may not be unreasonably withheld (This issue came before the CCMA in *NACTWUSA v Waverley Blankets* (2000) 21 ILJ 1910 (CCMA)).

²⁰² (1998) 19 ILJ 1638 (CCMA).

²⁰³ See s 16(1) of the LRA. See also in this regard *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) ILJ 1247 (A) and *Kgethe v LMK Manufacturing (Pty) Ltd* [1998] 3 BLLR 248 (LAC). See also Landman AA 'Labour's Right to Employer Information' 1996 CLL 21 and also s 32(1) of the Promotion of Access to Information Act 2 of 2000.

²⁰⁴ See Davies & Freedland op cit note 171 at 210. See also *SA Commercial Catering & Allied Workers Union v Southern Sun Hotel Corporation (Pty) Ltd & others* (1992) 13 ILJ 132 (IC) at 151A-C.

²⁰⁵ Examples of potentially relevant information may include financial information, details of how the employer's funds are distributed, etc.

²⁰⁶ See s 16(3) of the LRA. The following information need not be disclosed by the employer: information which is legally privileged; information which cannot be disclosed without contravening a prohibition imposed by a law or court order; information which is confidential and, if disclosed, may cause substantial harm to an employee or to the employer; or information which is private and personal relating to an employee unless the employee consents to its disclosure.

acquired the right to disclosure of information the onus is on the employer to disclose the required information. In justifying a refusal to disclose information requested by a trade union, an employer must prove that it is likely that harm will occur as a result and that the harm will be substantial. An example of harm contemplated by the legislature in section 16(5)(c) is 'threat to the company's security'.²⁰⁷

3.4.3. Union Security Arrangements and Collective Bargaining

Union security arrangements, as discussed above,²⁰⁸ are important in that they help in avoiding 'free-riders' and in improving workers' solidarity and union stability.²⁰⁹ However, these arrangements may be seen as hurdles, especially to minority trade unions. Closed shop agreements were found to be in line with common law as early as 1933²¹⁰ and later, in 1993, the Appellate Division ruled that closed shop agreements were in principle not contrary to public policy.²¹¹ However, these two agreements appear to be infringing the right to freedom of association, especially in the case of closed shop agreements, since the employee is no longer free not to associate as employees as they must belong to a specified trade union. It is somewhat different with agency shop agreements, as the employee is still free to choose whether to join or not to join a trade union.²¹²

In order to ensure constitutional compliance and to prevent abuse, the LRA provides for some checks and balances for these agreements.²¹³ Firstly, closed shop agreements may only be concluded by majority registered trade

²⁰⁷ If there is a dispute as to whether information must be disclosed, an aggrieved party may refer it in writing to the CCMA and must serve a copy of the referral on all other parties. The CCMA must attempt to resolve the dispute through conciliation, however if it fails any party may request arbitration. The commissioner must start by deciding whether the information concerned is relevant. If it is, the commissioner must 'balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to effectively perform his or her functions referred to in s 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining'.

²⁰⁸ See para 2.7.2 of this chapter.

²⁰⁹ See Cavallizo 'Freedom of Association: Its Effect upon Collective Bargaining and Trade Unions' (1998) 13 *Queens LJ* 267 at 287-288.

²¹⁰ See *R v Daleski* 1933 TPD 47.

²¹¹ See *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* (1993) 14 ILJ 1431 (A).

²¹² See Basson et al op cit note 135 at 287.

²¹³ See ss 25 and 26 of the LRA.

unions, acting alone or together with other unions.²¹⁴ A closed shop will only be binding if a ballot was conducted of the employees to be covered by the agreement and at least two thirds of the employees who voted, voted in favour of the agreement.²¹⁵ The agreement must not require membership of the union party to the agreement before employment commences.²¹⁶ The agreement must provide that no membership subscription or levy deducted be paid to a political party as an affiliation fee, or be contributed in cash or kind to a political party or a person standing for election to any political office; or be used for any expenditure that 'does not advance or protect the socio-economic interests of employees'.²¹⁷

The LRA stipulates a number of requirements for a valid and binding agency shop agreement: The agreement must state that non-members of unions are not compelled to become members of the union party to the agency shop;²¹⁸ the agency fee to be paid by affected employees must be equal to or less than the applicable union subscriptions;²¹⁹ the agency fee must be paid into a separate account administered by the union; and such fees may not be used for any purpose that does not advance or protect the socio-economic interests of employees, or be used for political purposes.²²⁰

Union security arrangements serve as support for bigger trade unions, but may be seen as hurdles for smaller trade unions.

²¹⁴ See s 26(1) of the LRA.

²¹⁵ See s 26(3)(a) and (b) of the LRA.

²¹⁶ See s 26(3)(c) of the LRA.

²¹⁷ The Act further provides that union parties to the closed shop may not refuse an employee membership or expel an employee unless it is done 'in accordance with the trade union's constitution'; and 'the reason for the refusal or expulsion is fair, including, but not limited to conduct that undermines the trade union's collective exercise of its rights'. It will however not be unfair to dismiss employees who refuse to join a trade union party to a closed shop, nor is it unfair to dismiss employees who have been properly refused membership of the union or expelled for valid reasons. A consequence of an employee being refused membership, or being expelled from a trade union party to a closed shop is dismissal. However, employees who are already employed by the employer at the time the closed shop comes into effect, but who refuse to become members of the union, may not in terms of s 26(7), be dismissed. A conscientious objector may also not be dismissed for refusing to join the trade union. See section 26(7)(b) of the LRA.

²¹⁸ See s 25(3)(a) of the LRA.

²¹⁹ S 25(3)(b) of the LRA.

²²⁰ See s 25(3)(c) and (d) of the LRA.

3.4.4. Collective Bargaining Structures

At COSATU's Campaign Conference²²¹ in 1994, it was decided that one of its aims is 'to secure centralized bargaining forums in all sectors by the end of the year'²²² and when the LRA was enacted one of its purposes was stated as to promote collective bargaining at sectoral level.²²³ Although the LRA promotes centralised bargaining,²²⁴ in South Africa the decision whether to bargain at plant or sector level is left up to the parties themselves.²²⁵ As a result, bargaining has continued at both centralised and plant levels.²²⁶ Trade unions and employers can bargain with one another through bargaining councils,²²⁷ statutory councils²²⁸ and the public service coordinating bargaining council.²²⁹ In its promotion of centralised bargaining the LRA even offers some benefits for participation in these structures. Accordingly, trade unions that are party to a bargaining council are automatically entitled to the right of access to the workplace and the right to stop order facilities in all workplaces within the bargaining council's registered scope, irrespective of their level of representation in that workplace.²³⁰ In addition, bargaining council agreements may vary the minimum conditions of employment.²³¹ Councils also have powers to determine which matters are dealt with at which level.²³² Each of the collective bargaining structures mentioned above is discussed below.

²²¹ COSATU, the ANC and SACP formed an electoral alliance.

²²² It was acknowledged that this might entail 'enacting a law which would compel centralised bargaining (see Baskin Centralised Bargaining and COSATU: A Discussion Paper (1994) para 2.4).

²²³ Draft Negotiating Document in the Form of a Labour Relations Bill GG 16259, 10, February 1995 at 110-111.

²²⁴ See s 1(d)(ii) of the LRA. When bargaining in other jurisdictions moved towards de-centralisation, the LRA promoted centralisation (see Bruun N 'The Autonomy of Collective Agreements' in Blanpain (Ed) *Collective Bargaining, Discrimination, Social Security and European Integration* (2003) at 11-14.

²²⁵ See *SACCAWU v Elite Industrial Cleaning (Pty) Ltd* (CCMA GA 7877, 29 July 1997), in which the commissioner, in an advisory award, declined to recommend that the company bargain at plant level because it negotiated wages and working conditions at a centralised bargaining forum.

²²⁶ At the plant level bargaining is normally regulated by recognition agreements (see Du Toit op cit note 28 at 297).

²²⁷ See s 27(1) of the LRA. A single employer cannot be a party to a bargaining council it must be part of an employers' organisation in order to do so, however the State as an employer is an exception to the rule.

²²⁸ See s 39(1) of the LRA.

²²⁹ See s 35 of the LRA.

²³⁰ See s 19 of the LRA.

²³¹ See s 49 of the BCEA.

²³² See s 28(1)(i) and (1)(j) of the LRA.

3.4.4.1. Bargaining councils

Under the LRA, industrial councils have been changed to bargaining councils.²³³ This change indicates the fact that the provisions of the LRA apply beyond the industrial sectors to include the public sector.²³⁴ Bargaining councils are voluntarily established for a sector and area by one or more registered trade unions and one or more registered employers' organisations.²³⁵ They are primary vehicles for promoting collective bargaining at the sector level.²³⁶ The core functions of bargaining councils are to

- conclude collective agreements²³⁷
- enforce those agreements;²³⁸ and
- prevent and resolve labour disputes.²³⁹

Besides these functions, bargaining councils have the following non-core functions:

- to promote and establish training and education schemes²⁴⁰

²³³ A bargaining council may be defined as a corporate body established by mutual agreement between employers or employers' organisations on the one hand and by a registered trade union or trade unions on the other hand for the purpose of practising self-government over the sector in which the parties represent the interests of the employer(s) and employees respectively regarding the determination of conditions of employment. In terms of Schedule 7 item 7(1), those industrial councils that were in existence when the LRA, came into existence were deemed to be bargaining councils.

²³⁴ Prior to the promulgation of the LRA, various statutes (see for example, the Public Service Labour Relations Act (Proc 105 of 1994 and the Education Labour Relations Act 146 of 1993 – all of which were repealed in terms of Schedule 6 of the LRA) governed employment relations in the public sector. The LRA is now applicable to employees and employers in all sectors other than those excluded in terms of s 2. The PSCBC, can perform all the functions of a bargaining council in respect of matters regulated by uniform rules, norms and standards that apply across the public service; relating to terms and conditions of service that apply to two or more sectors; or assigned to the state as employer in respect of the public service, as opposed to those assigned to the state as employer in any sector.

²³⁵ See s 27(1) of the LRA, 1995.

²³⁶ See Godfrey S, Maree J & Theron J 'Regulating the Labour Market: The Role of Bargaining Councils' (2006) 27 *ILJ* 731.

²³⁷ See s 28(1)(a) of the LRA. See also *Consolidated Wool-washing & Processing Mill Ltd v President, Industrial Court* (1987) *ILJ* 79 (D) and *MIBC v Wolseley Panel Beaters* (2000) *ILJ* 2132 (BCA).

²³⁸ See s 28(1)(b) of the LRA. See also *Consolidated Wool-washing & Processing Mill Ltd v President, Industrial Court* (1987) *ILJ* 79 (D) 87; *BCCI, KwaZulu-Natal v Sewtech CC* (1997) *ILJ* 1355 (LC); *BC Hairdressing & Cosmetology Trade (Pretoria) v Smit* (2003) *ILJ* 388 (LC).

²³⁹ See s 28(1)(c) of the LRA. 'Disputes' refer to disputes about matters of mutual interest between trade unions and/or employees on the one side and employers' organisations and/or employers on the other side (see s 51(1) of the LRA). These disputes may be of two types: disputes between council parties (see s 51 of the LRA) and a council may apply to the CCMA for accreditation to resolve disputes involving non-parties as well as parties or appoint an accredited agency to resolve such disputes on its behalf (see s 52 of the Labour Relations Act, 1995). See *BAWU v Prestige Hotels CC* (1993) *ILJ* 963 (LAC) and *Softex Mattress (Pty) Ltd v PPWAPU* [2000]12 BLLR 1402 (LAC).

²⁴⁰ See s 28(1)(f) of the LRA.

- to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment or similar schemes and funds²⁴¹
- to develop proposals for consideration by NEDLAC or any other policy-making or legislative forum relevant to the sector or area²⁴²
- to determine by collective agreement matters which are excluded from industrial action at the workplace level²⁴³
- to confer on workplace forums additional matters for consultation²⁴⁴
- to provide industrial support services within the sector and to extend the services²⁴⁵ and functions of the bargaining council to workers in the informal sector and home workers.²⁴⁶

The above shows that bargaining councils play an important role in the functioning of trade unions. Bargaining councils play an important supporting role for trade unions, especially with regard to employment or work-related matters.

3.4.4.2. *Statutory councils*

A statutory council can be established on application by a ‘representative’ trade union or employer’s organisation.²⁴⁷ Statutory councils have the following three core functions:

- to perform dispute resolution functions in respect of disputes arising within their area of jurisdiction²⁴⁸

²⁴¹ See s 28(1)(g) of the LRA.

²⁴² See s 28(1)(h) of the LRA.

²⁴³ See s 28(1)(i) of the LRA.

²⁴⁴ See s 28(1)(j) of the LRA.

²⁴⁵ See s 28(1)(k) of the LRA.

²⁴⁶ See s 28(1)(l) of the LRA.

²⁴⁷ See s 39(2) of the LRA. A representative trade union is defined as a registered trade union, or two or more acting jointly, and whose members constitute at least 30% of the employees in a sector and area. A representative employers’ organisation is defined as a registered employers’ organisation or two or more acting jointly, and whose members constitute at least 30% of the employees in a sector and area (see s 39(1)(b) of the LRA). Either party may apply unilaterally for the establishment of a statutory council. The registration procedure and requirements applicable to bargaining councils are also applicable to statutory councils (see s 39(3) of the LRA). The process of establishing a statutory council is more complicated than for a bargaining council. The process is initiated by the Registrar, after receiving a valid application (see s 40(1)).

- to promote and establish training and education schemes²⁴⁹
- to establish and administer pension, provident, medical aid, sick pay, leave, unemployment or similar schemes or funds.²⁵⁰

Unlike with bargaining councils, the functions of statutory councils are limited. Parties to the statutory council are not required to engage in collective bargaining about terms and conditions of employment or matters of mutual interest beyond the listed topics. However, a statutory council may in terms of its constitution agree to assume functions of a bargaining council.²⁵¹

The above discussion also demonstrates that statutory councils play an important role in the functioning of trade unions, as well as an important supporting role for trade unions, especially with regard to employment or work-related matters.

3.4.4.3. Advantages of Sector Level Bargaining

The above collective bargaining structures operate at sector level and there are definite advantages under the LRA for using them. Firstly, the collective agreements concluded at sector level dealing with pension, provident and other social security schemes benefit employees in larger numbers as they usually cover all employers and employees within a specific industry.²⁵² Secondly, sector bargaining has the potential to extend the scope of collective bargaining to employees and employers who would not be covered by a collective agreement if collective bargaining had taken place only at workplace or enterprise level.²⁵³ It creates a possibility for collective agreements which bind all employers and employees falling within the sector, irrespective of whether they were represented at the negotiations

²⁴⁸ See s 43(1)(a) of the LRA.

²⁴⁹ See s 43(1)(b) of the LRA.

²⁵⁰ See s 43(1)(c) of the LRA.

²⁵¹ See s 43(2) of the LRA.

²⁵² See s 28(1)(g) of the LRA in terms of which bargaining councils may establish and administer pension, provident, medical aid, sick pay, unemployment and training funds.

²⁵³ See s 32 of the LRA.

which led to the conclusion of the agreement or not,²⁵⁴ which means that more employees will be covered and will therefore enjoy better benefits and better protection.

In *Free Market Foundation v Minister of Labour*²⁵⁵ the North Gauteng High Court had to decide on the constitutionality of section 32(2) of the LRA. In this matter it was argued that sectoral bargaining undermines economic growth and job creation by imposing unaffordable terms and conditions of employment. According to the Free Market Foundation, the extension of council agreements violates the basic rights of non-parties to freedom of association, fair administrative action, dignity and equality. It must be noted that the ILO endorses the extension of collective agreements. In its Collective Agreements Recommendation it is stated as follows:

‘where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all employers and workers included within the industrial and territorial scope of the agreement’.²⁵⁶

Centralised bargaining is important because it creates an opportunity to tackle wage disparities in a context where there is social inequality. According to Sithole²⁵⁷ a socially responsible wage policy can be formulated more effectively at sectoral level. In terms of section 32 of the LRA, employers who are unable to comply with the provisions of an extended agreement may apply for exemption from compliance.

²⁵⁴ This was one of the reasons why bigger trade unions wanted central bargaining at NEDLAC (see Thompson C ‘Collective Bargaining’ in Halton Cheadle, PAK le Roux, Clive Thompson & Andre van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 30 at 31).

²⁵⁵ Case No 13762/2013.

²⁵⁶ Article 5(1) of Recommendation 91 of 1951.

²⁵⁷ Sithole ‘Bargaining for Economic Development: Wage Determination and Implications for Macroeconomic Performance’ (1994) 14 *IRJSA*. See also Du Toit D ‘The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?’ (2014) 35 *ILJ* 2637.

3.4.4.4. *The Legal Effect of Collective Agreements*

A collective agreement binds the parties to the agreement.²⁵⁸ The LRA further provides that a collective agreement binds each party to the agreement and the members of every other party to the agreement in so far as the provisions of the agreement are applicable to them.²⁵⁹ Such an agreement also binds the members of a registered trade union that is party to the agreement and employers who are members of a registered employers' organisation that is party to the agreement if that agreement regulates the terms and conditions of employment, the conduct of employers in relation to their employees or the conduct of employees in relation to their employers.²⁶⁰ It also binds employees who are not members of the registered trade union or trade unions that are party to the agreement if the employees are identified in the agreement and the agreement expressly binds the employees and the trade union representing the majority of employees in the workplace.²⁶¹

Collective bargaining takes place between employers or employers' organisations and trade unions. The fact that the LRA generally supports registered trade unions by granting them certain benefits implies that the trade unions that will benefit greatly from the process of collective bargaining are those registered, as collective bargaining mainly covers matters falling under the core social responsibilities of trade unions.

In general, the discussion demonstrates that collective bargaining serves as support for the functioning of trade unions especially through the bargaining council system and collective agreements, which cover a large number of employees in various industries and this will ensure that

²⁵⁸ See s 23(1)(a) of the LRA. See also *Arnouldus v Rainbow Farms (Pty) Ltd* [1995] 11 BLLR 1 (IC); *Ned v Department of Social Services & Population Development* (2001) ILJ 1039 (BCA).

²⁵⁹ See s 23(1)(b) of the LRA. In *Mhlongo & others v FAWU & another* [2007] 1 BLLR 141 (LC) the members of a trade union contended that they had not mandated their union to conclude a settlement agreement on their behalf. The court held that they were members of FAWU, and therefore bound by the agreement.

²⁶⁰ See s 23(1)(c) of the LRA.

²⁶¹ See s 23(1)(d) of the LRA.

employees generally have reasonable terms and conditions of employment.²⁶²

4. INDUSTRIAL ACTION: SUPPORT OR HURDLE FOR TRADE UNIONS?

4.1. Introduction and Historical Background

Once collective bargaining has been concluded, if parties do not agree employees and trade unions have a variety of options. If they do not think they will succeed in pursuing the matter further they may decide to drop it. Otherwise, they may agree on mediation²⁶³ or arbitration²⁶⁴ if there is an agreement which requires them to do so²⁶⁵ or if arbitration is prescribed in terms of the provisions of the LRA.²⁶⁶ Alternatively, employees or their trade union may decide to exert pressure on the employer through industrial action. This could take place by embarking on strike action²⁶⁷ and later a picket to support the strike if it is protected.

Workers may also engage in protest action where their demand is in relation to their socio-economic interests.²⁶⁸ The ability of employees or trade unions to resort to industrial action and, in particular, strike action, is the main way in which they 'back up' their collective bargaining demands.²⁶⁹ This position was well explained by Davies and Freedland²⁷⁰ as follows:

²⁶² See para 3.4.3 of this chapter.

²⁶³ 'Mediation' is a process whereby where a third party who intervenes in a dispute attempts to assist the parties in reaching a settlement that each party can agree on. See Basson et al op cit note 135 at 360.

²⁶⁴ 'Arbitration' is a compulsory process where a neutral third party hears both parties' versions of events and decides the dispute between them.

²⁶⁵ See s 65 of the LRA.

²⁶⁶ See s 191(5)(b)(i) and (ii) of the LRA where it provides, for example, that automatically unfair dismissals and dismissals based on operational reasons must be referred to the labour court for settlement.

²⁶⁷ South Africa has experienced many strikes, especially in the last few years. A total of 114 strikes were recorded in 2013. This represented an increase of 15.1% between 2012 and 2013. Protected strikes in 2013 amounted to 48% compared to 54% in 2012. Most of the working days lost were in the mining sector (with 515 971 working days lost). In 2013 about R6.7 billion in wages were lost due to participation of workers in strikes compared to R6.6 million in 2012 (Annual Industrial Action Report 2013 in http://www.labour.gov.za/DOL/documents/annual-reports/industrial-action-annual-report/2013_Action_Report_11Aug2014 visited on 28 August 2015).

²⁶⁸ See s 77 of the LRA.

²⁶⁹ See *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 414 (LAC) at 422E-G.

²⁷⁰ See Davies P & Freedland Mop cit note 171 at 291. See also Kahn Freund O and Hepple BA *Laws against Strikes* (1972).

More than 30 years ago Lord Wright said in a leading case: ‘the right of workmen to strike is an essential element in the principle of collective bargaining’. This is obvious. If the workers could not in the last resort, collectively refuse to work, they could not bargain collectively... There can be no equilibrium in industrial relations without freedom to strike.

The purpose of strike action is to inflict economic harm on an employer so that the employer can accede to employees’ demands which are related to collective bargaining.²⁷¹ The common law does not recognise the legitimacy of collective action to enforce employees’ demands²⁷² and employees may incur civil²⁷³ or criminal law liability for engaging in industrial action. However, in many countries including South Africa, legislation has been enacted to ensure that employees who resort to industrial action are protected if correct procedures have been adhered to.²⁷⁴ Protection was first introduced in the Industrial Conciliation Act 11 of 1924.²⁷⁵ The framework of this Act was maintained in the Industrial Conciliation Act, 1937 and in the 1956 Act, except that in the 1956 Act, the requirement of a strike ballot was introduced.²⁷⁶

The discussion below will look at the ILO standards,²⁷⁷ the Constitution²⁷⁸ and industrial action. It will also cover aspects relating to the regulation of

²⁷¹ See *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers’ Union* (2001) 22 ILJ 414 (LAC) at 422E. See also Davies & Freedland op cit note 171 at 291. See also Myburgh JF ‘100 Years of Strike Law’ (2004) 25 ILJ 962-976.

²⁷² See Grogan op cit note 22 at 121.

²⁷³ Civil liability may be incurred in the form of delictual liability or breach of contract and even criminal law. Employees may also be liable for any damages that may be caused by such actions to the employer (see Landman AA ‘Picketing in South Africa’ (1998) 2(3) LLB 17 at 20). They may also be liable for the common law offences. It was held in *SATAWU v Garvis and others Case CCT 112/11 [2012] ZACC* that since the decision to assemble resides with the organisation; the organisation should be responsible for any reasonably foreseeable damage arising from such assembly.

²⁷⁴ For example, the United Kingdom. However in countries like the Netherlands and Belgium, it was done through judicial intervention and in France through the constitution and court decisions (see Blanpain R (ed) *International Encyclopaedia for Labour Law and Industrial Relations* (1987)).

²⁷⁵ See Rycroft & Jordaan op cit note 186 at 114-115 for historical background in South Africa which dealt with the collective aspect of industrial relations.

²⁷⁶ During this period white trade unions were well established, but never really exercised the power to strike. Blacks were largely excluded from the collective bargaining provisions (see Myburgh JF ‘100 Years of Strike Law’ (2004) 962 at 964).

²⁷⁷ See para 4.2 of this chapter.

²⁷⁸ See para 4.3 of this chapter.

industrial action under the LRA to determine its influence on the functioning of trade unions.²⁷⁹

4.2. The ILO and Industrial Action

There is no ILO Convention which directly deals with industrial action per se, however the ILO's Freedom of Association Committee has interpreted article 3 of the Freedom of Association and Protection of the Right to Organise Convention²⁸⁰ to include the right to engage in industrial action. The article provides as follows:

Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and formulate their programmes.

The Committee has over the years considered complaints relating to alleged government infringements of the right to strike and has developed guidelines in that regard. Some of the guidelines are that 'a general prohibition of strikes, unless imposed as a transitory measure in a situation of acute national emergency, is contrary to Convention No. 87; prohibition of purely political strikes is admissible; restrictions aimed at ensuring compliance with statutory safety requirements are normal restrictions, etc'.²⁸¹ The ILO therefore supports the position that workers through their trade unions can resort to industrial action in order to pursue their demands.

4.3. The Constitution and Industrial Action

The Constitution, in line with the above international standards, now provides for the right to picket²⁸² and to strike.²⁸³ It supports the use of industrial action by expressly granting everyone the right to picket and every worker the right to strike. It further states that national legislation may be enacted to regulate collective bargaining provided that, if such legislation

²⁷⁹ See para 4.4 of this chapter.

²⁸⁰ See Convention 87 of 1948.

²⁸¹ See Pankert A 'Freedom of Association' in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (1987) 173 at 190.

²⁸² See s 17 of the Constitution.

²⁸³ See s 23(2)(c) of the Constitution.

limits any fundamental right, it must comply with the limitation clause in terms of its section 36. In view of this, the LRA was introduced to regulate the right to strike, picketing and protest action as forms of industrial action.

4.4. Industrial Action under the LRA

4.4.1. The Right to Strike under the LRA

4.4.1.1. *Definition*

A strike is defined by the LRA as

... the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for *the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee* (my emphasis), and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.²⁸⁴

It is therefore not every form of industrial action that will qualify as strike action and enjoy statutory protection. A strike therefore consists of three elements, namely, a refusal to work, collective action and a specific purpose. The third element requires that the collective action must be for a common purpose. The purpose of a strike action must be 'to remedy a grievance or to resolve a dispute in respect of any matter of mutual interest between the employer and employee'.²⁸⁵ This therefore indicates that, if there is no purpose which is in line with the definition, there can be no strike. Consequently, such action will not enjoy protection in terms of the LRA and cannot be interdicted by the Labour Court as an unprotected strike. In *Floraline v SASTAWU*²⁸⁶ the Labour Court was approached to interdict a refusal to work by employees on the basis that it constituted an unprotected strike. The court concluded that the action by the employees did not constitute a strike because there was no purpose as required. The purpose

²⁸⁴ See also *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC).

²⁸⁵ See s 213 of the LRA. See also *Rand Tyres & Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Tvl)* 1941 TPD 108 and *Mzoku v Volkswagen SA* (2001) 22 ILJ 771 (CCMA).

²⁸⁶ [1997] 9 BLLR 1223 (LC) at 1224. See also *Afrox Ltd v SACWU & others; SACWU & Others v Aprox Ltd* [1997] 4 BLLR 382 (LC) at 386.

must relate to a matter of mutual interest between the employer and employees.²⁸⁷ The LRA again does not provide a definition for ‘mutual interest’; however, the definition used above is relevant for this discussion. Matters of mutual interest are matters which mainly fall under the coresocial responsibilities of trade unions.

4.4.1.2. *The Right to Strike*

The right to strike is an important weapon for employees and trade unions. In *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*²⁸⁸ it was said that

... the right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement.’

In order for a strike to be protected there are two procedural requirements that have to be met. The issue in dispute²⁸⁹ must be referred to a bargaining council or statutory council with jurisdiction over the sector and area in which the dispute arose.²⁹⁰ If there is no bargaining council with jurisdiction, the dispute must be referred²⁹¹ to the Commission for Conciliation, Mediation and Arbitration (CCMA). Once the dispute has been referred to either of the two institutions, it must be resolved through conciliation. A strike will only be protected if conciliation fails and a certificate is issued stating that the dispute has not been settled or 30 days has elapsed since receipt of the referral. If conciliation failed or 30 days has

²⁸⁷ A dispute between two trade unions, or a trade union and its members is not a strikeable matter (see *Volkswagen SA (Pty) Ltd v Brand NO* [2001] 5 BLLR 558 (LC) at para 79).

²⁸⁸ (1993) 14 ILJ 963 (LAC) at 972B and D. See also *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1237F-G and *Brassey MSM ‘The Dismissal of Strikers’* (1990) 11 ILJ 213 at 235.

²⁸⁹ S 213 of the LRA defines ‘issue in dispute’ as ‘the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out’. See also *Fidelity Guards Holdings (Pty) Ltd v PTWU & others* [1997] 9 BLLR 1125 (LAC) and *Court in Adams & others v Coin Security Group (Pty) Ltd* (1999) 20 ILJ 1192 (LC).

²⁹⁰ See s 64(1)(a) of the LRA. If the matter was referred to the council, it must attempt to resolve the dispute in accordance with its constitution’s provisions relating to dispute resolution (see s 64(1)(a) read with s 51(2)(a) of the LRA). Where a party to the dispute is not a party to the council, it must attempt to resolve the dispute through ‘conciliation’ (see s 64(1)(a) read with s 51(3)(a) of the LRA). If it is referred to the CCMA, it must attempt to resolve any dispute referred to it through ‘conciliation’ (see s 64(1)(a) read with s 115(1)(a) of the LRA).

²⁹¹ ‘Referral’ means a referral to conciliation and not merely notification to a council or CCMA of the existence of dispute (see *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* [1997] 10 BLLR 1292 (LC)).

lapsed the LRA prescribes that at least 48 hours written notice be given of the commencement of the strike.²⁹² Strikes will only be protected against the common law consequences mentioned above if they comply with the requirements prescribed in sections 64 and 65 of the LRA.²⁹³ If a strike complies with statutory requirements,²⁹⁴ it will be protected against civil liability.²⁹⁵ Strikers participating in a protected strike may not be interdicted from taking part in such an action;²⁹⁶ however, the protection offered by the LRA is limited and does not apply to any act in contemplation or in furtherance of a strike if that act is an offence.²⁹⁷ The common law again entitles employers to summarily dismiss such employees. However, unlike the 1956 Act,²⁹⁸ the LRA protects employees taking part in a protected strike against dismissal.²⁹⁹ Participation in a protected strike does not on its own constitute misconduct that warrants dismissal,³⁰⁰ and any such dismissal

²⁹² See s 64(1)(b) and (c) of the LRA. Where the state is the employer, at least seven days' notice of the commencement of the strike must be given. The giving of the notice makes it possible for the employer and employees to prepare for the impending strike. During the notice period employers can arrange for replacement labour to do the work of employees who will participate in the strike. However, if the employer has been designated as a maintenance service, the employer will not be able to use replacement labour. In terms of the LRA, employees are exempted from compliance with the procedural requirements where the dispute has been dealt with in accordance with a council's constitution or there has been compliance with the collectively agreed strike procedures. Again they are exempted where the strike is in response to the employer's un-procedural lockout or where the employer refuses to maintain or restore the status quo despite a request from the employees pending the expiry of a statutory conciliation period. The notice must be given to the employer concerned; however, if the dispute relates to a collective agreement to be concluded in a bargaining council or a statutory council, it must be given to the council. If the employer is a member of the employers' organisation that is party to a dispute, notice must be given to the employers' organisation. The LRA does not however stipulate what information must be contained in the notice of commencement of the strike.

²⁹³ See *Afrox Ltd v SA Chemical Workers Union & others* (1997) 18 ILJ 406 (LC) at 410D-E and *Fidelity Guards Holdings (Pty) Ltd v PTWU & others* [1997] 9 BLLR 1125 (LAC) 1132.

²⁹⁴ See ss 64 and 65 of the LRA.

²⁹⁵ See s 67 of the LRA, which provides protection for employees participating in a strike which complies with provisions of the Act, protection.

²⁹⁶ See s 68(1)(a)(i) of the LRA.

²⁹⁷ See s 67(8) of the LRA. An employer can therefore hold strikers liable for acts of assault, malicious damage to property and intimidation committed by strikers participating in a protected strike. Employees who embark on a strike will normally be guilty of a serious breach of contract in that they will be refusing to comply with their basic contractual duty of doing their work.

²⁹⁸ This Act did not provide employees with any protection against dismissal for taking part in strike action. The industrial court sought to remedy this omission by ruling that such dismissal was unfair in certain instances, but the inconsistency of its judgments introduced considerable uncertainty (see Rycroft & Jordaan op cit note 186 at 216-226).

²⁹⁹ See s 67(4) of the LRA. The protection is in line with the recommendations made in the International Labour Organisation in its Report entitled 'Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact Finding and Conciliation Commission on the Freedom of Association Concerning the Republic of South Africa' (1992) 13 ILJ 739 at 760-761. The Labour Relations Act, 1956, did not contain such a provision.

³⁰⁰ In *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) the court endorsed the fact that striking on its own could not justify dismissal.

will constitute an automatically unfair dismissal.³⁰¹ In *Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel*,³⁰² the Labour Appeal Court explained the need for strikers to be protected against dismissal as follows:

If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardize the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against employees concerned.

Strikers do not enjoy absolute protection against dismissal, however, as they may be dismissed for misconduct committed during the strike.³⁰³ Misconduct may take the form of violence and intimidation. This is sometimes caused by employers' refusal to accede to unjustifiable and unreasonable demands by trade unions. The onus therefore rests on trade union officials, office bearers and trade union representatives to ensure that no violence occurs during strikes and that demands by employees are sustainable and do not create a financial burden for employers.³⁰⁴ Where there are acts of violence and damage to property trade unions should be held responsible.³⁰⁵ Strikers may also be dismissed for a reason based on the operational requirements of the business.³⁰⁶ In addition, employers do

³⁰¹ See s 187(1)(a) of the Labour Relations Act, 1995. See also *Adams v Coin Security Group (Pty) Ltd* (1999) 20 ILJ 1192 (LC); *FGWU v Minister of Safety and Security* (1999) 20 ILJ 1258 (LC).

³⁰² (1963) 14 ILJ 963 (LAC) at 972C. See also *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1478I-J.

³⁰³ See s 67(5) of the LRA.

³⁰⁴ Some of the strikes that have taken place in the past few years have been violent and this should be discouraged. In Marikana during the Lonmin mineworkers' strike, 34 mineworkers were killed by police. Employees were demanding salary hikes from about R4000 to R12 500 (see "The Rise and Fall of Trade Unions in South Africa: The Marikana Incident" at <http://www.polity.org.za/article/the-rise-or-fall-of-trade-unions-in-south-africa-the-marikana-incident> visited on 28 August 2015).

³⁰⁵ See *SATAWU v Garvis and others* Case CCT 112/11 [2012] ZACC.

³⁰⁶ See s 67(5) of the LRA. In terms of s 213 of the LRA 'operational requirements' include technological; structural, economic and similar needs of a business. The employer must prove that the harm which it is suffering as the result of the strike is more than it can be expected to suffer and is affecting the economic well-being of the business. The employer must have exceeded its level of tolerance. A test was established in *Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel* by the Labour Appeal Court. The court held that a business will have reached the required level of tolerance where the strike poses a 'threat of extinction' to the enterprise or a threat 'of irreparable harm' to it. The courts have held that the enterprise's financial situation before the strike and the well-being of the trade within which it operates should be taken into consideration in determining whether or not the employer has reached its level of tolerance.

not have to remunerate employees for services not rendered during a protected strike.³⁰⁷ Additional pressure can be exerted on the employer of employees who are on strike by the employees of another employer by embarking on a strike action in support of strikers engaged in a primary strike. Such an action is referred to as a secondary strike.³⁰⁸ Through a secondary strike employees of the secondary employer take action which affects their employer in support of the dispute which employees of the primary employer have with their employer.

There are further limitations to the right to strike in terms of section 65 of the LRA. This section limits employees' right to strike in certain circumstances including where employees are engaged in essential services.³⁰⁹

Strikes serve as great support for trade unions in their functioning because through them trade unions are able to exert pressure on the employer; however, as discussed above there are many hurdles (definition; procedural requirements and limitations) that should be crossed by employees and trade unions before they can engage in a strike action.

4.4.2. The Right to Picket

Picketing was not permitted in terms of the 1956 Act;³¹⁰ however, the LRA provides for it in section 69.³¹¹ A picket takes place when striking employees

³⁰⁷ See s 67(3) of the LRA. See also *Stuttafords Department Store v SACTWU* [2000] 1 BLLR 46 (LAC); *SACCAWU v Rea Sebetsa* (2000) 21 ILJ 1850 (LC). S 67(3) of the LRA confirms the common law rule of 'no work no pay'. However, it must be noted that the term 'remuneration' is wider than the wages or salary an employee is entitled to receive. In terms of the definition provided in the LRA, this term includes 'any payment in money or in kind or both in money and in kind made or owing to a person in return for that person working for any other person'. In view of this there is an exception to the 'no work no pay' rule in cases of protected strikes. If the employees' remuneration includes payment in kind in the form of accommodation, the provision of food and other basic amenities of life, the employer may not stop that type of payment. The employer may therefore be required to continue paying employees who are on strike in kind if they so request.

³⁰⁸ A secondary strike is defined as 'a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand and referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand'.

³⁰⁹ See s 65 of the LRA.

³¹⁰ See *Laursens Division of BTR Ltd v NUMSA* (1992) 13 ILJ 1405. See also Wallis M *Labour and Employment Law* (1995) para 52.

³¹¹ See also *Mondi Paper (A Division of Mondi Ltd) v PPWAWU* (1997) 18 ILJ 84 (D); *Picardi Hotels Ltd v Food & General Workers Union* (1999) 20 ILJ 1915 (LC).

and their supporters station themselves at or near their place of work and attempt to persuade other parties such as non-strikers, customers and suppliers of the employer not to enter the premises, not to work there and not to do business with their employer.³¹² Picketing employees can incur criminal liability because their action amounts to a contravention of traffic laws and municipal by-laws. However, section 17 of the Constitution provides that everyone has the right 'peacefully and unarmed' to assemble, to demonstrate, to picket and to present petitions.³¹³ A picket will only be protected if it is authorised by a registered trade union, it is peaceful³¹⁴ and it is in support of a protected strike or in opposition to any lockout.³¹⁵ Although employees who take part in a protected picket are protected against dismissal, an employer is entitled to exercise disciplinary action against employees who commit acts of intimidation or who are guilty of threatening behaviour during a picket.³¹⁶

A picket is also support for trade unions; however, it benefits only registered trade unions as it can only be authorised by a registered trade union.

4.4.3. Disputes of Right and Interest

Whether employees and their trade unions may strike depends on whether the dispute between the employer and employees is one of right or interest. Accordingly, a dispute of interest is a dispute about the creation of new rights.³¹⁷ Employees or their trade unions seek to further their interests where there are no currently existing rights (e.g. in a contract of employment or in legislation) that they may enforce. In contrast, a dispute of right is a dispute about the interpretation or application of a right that already

³¹² See also item 3(1) of the Code of Good Practice: Picketing for the purpose of a picket. See *Picardi Hotels Ltd v Food & General Workers Union* (1999) 20 ILJ 1915 (LC) at 1921B-F.

³¹³ See also s 16(1) of the Constitution which protects freedom of expression and s 18 which provides for that everyone has the 'right to freedom of association'.

³¹⁴ The object of a picket must be persuasion and not threat. See *Larsens Division of BTR Dunlop Ltd v National Union of Metalworkers of SA & others* (1992) 13 ILJ 1405 (T) for the test for the lawfulness of actions of picketers. The Labour Court has held that chanting, dancing and waving placards are permissible (see *Picardi Hotels Ltd v Food & General Workers Union* (1999) 20 ILJ 1915 (LC)).

³¹⁵ See s 69(1) of the LRA. See also item 1(5)(c) of the Code of Good Practice: Picketing.

³¹⁶ See *National Construction Building & Allied Workers Union v Beta Sanitaryware* (1999) 20 ILJ 1617 (CCMA).

³¹⁷ See Basson et al op cit note 135 at 355.

exists.³¹⁸ Accordingly, parties seek to enforce a right and not to create it. Disputes of interest are left to collective bargaining and disputes of right are usually determined by an independent third party (CCMA) or a labour court judge (arbitration or adjudication).³¹⁹ Labour legislation, the Constitution, the contract of employment and collective agreements are all sources of employment rights.³²⁰

From the definition of strike above, it is clear that the purpose of a strike must be to remedy a grievance or resolve a dispute in respect of a matter of mutual interest between the employer and the employee. Disputes about matters of mutual interest may include both interest and right disputes.³²¹

4.4.4. The Right to Protest Action

In the 1980s and early 1990s, stayaways³²² were resorted to in protest against government policy, as those who could not vote wanted to bring economic pressure on the government and employers.³²³ As social institutions, trade unions have used protests to bring about change in the wider society. This role is now recognised by the LRA, as one of its aims is 'to advance economic development, social justice, labour peace and the democratization of the workplace'.³²⁴

The LRA defines a 'protest action' as

... the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic

³¹⁸ Ibid.

³¹⁹ See Van Jaarsveld SR & Van Eck S *Principles of Labour Law* 3ed (2005) at 341 para 952

³²⁰ See Basson et al op cit note 135 at 356.

³²¹ See *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC) at 581C.

³²² 'Protest action' may be regarded as the successor of stay-away actions (see *Doornfontein Gold Mining Co Ltd v NUM* (1994) 15 ILJ 527 (LAC); *NUMSA v The Benicon Group* (1997) 20 ILJ 123 (LAC); *Business SA v COSATU* [1997] 5 BLLR 511 (LAC); *Benicon v NUMSA* (1999) 20 ILJ 2777 (SCA). Stayaways were seen as 'serving no achieved purpose, apart from disrupting the country's economy and causing employers irreparable financial losses (see *President ACTWUSA v African Hide Trading Corporation* (1989) 10 ILJ 475 (IC) at 478-479A; *NUM v Free State Consolidated Gold Mines (Operations) Ltd* (1992) 13 ILJ 366 (IC); *Mbiyane v Cembad (Pty) Ltd* (1989) 10 ILJ 468 (IC).

³²³ See Du Toit D op cit note 28 at 380. See also Grant B 'Political Stayaways: The dismissal of participants' (1990) 11 ILJ 944 (IC). Protest action take place in the form of marches and demonstrations.

³²⁴ See s 1 of the LRA.

interests of workers, but not for a purpose referred to in the definition of a strike.³²⁵

Unlike a strike, protest action serves to promote or defend the socio-economic interests of workers. A definition of 'socio-economic interests' is not provided in the LRA; however, the term can be interpreted to include matters such as actions against the imposition of taxes, actions relating to employment creation, the provision of housing and privatisation.³²⁶ In *Government of the Western Cape Province v Congress of South African Trade Unions & another*,³²⁷ the Labour Court was prepared to accept that a stayaway in protest against government education policy fell within the ambit of the definition of protest action.³²⁸ Most of these matters fall under the social responsibilities of trade unions, as will be seen in the discussion under paragraph 6 below. Section 77 of the LRA acknowledges that employees and their trade unions may be involved in protest action to achieve such objectives. However, only a registered trade union or registered federation of trade unions may call for protest action.³²⁹ Protest action is support for trade unions in their functioning and in particular where they would like to pursue the socio-economic interests of workers. However, this right to call for protest action benefits only registered trade unions; as such action can only be called by a registered trade union.

The discussion demonstrated that industrial action in general serves as support for trade unions in their functioning because employees are able to put pressure on employers thus forcing them to accede to their demands.

³²⁵ See s 213 of the LRA.

³²⁶ See Bendix op cit note 136 at 685.

³²⁷ (1999) 20 ILJ 151 (LC).

³²⁸ See Grogan J *Workplace Law* 11ed (2014) at 435.

³²⁹ See s 77(1) of the LRA. All employees however acquire the right to join the mass stay-away once notice is given, whether or not they are members of the union which organised the action. A trade union or federation must serve a notice on NEDLAC in which the reasons for and the nature of the protest action are stated (see *Business South Africa v COSATU & Another* (1997) 18 ILJ 474 (LAC) at 481D-G). The purpose of this is to enable parties to attempt to resolve the matter at NEDLAC (Basson et al op cit note 135 at 343). Thereafter the union or federation must at least 14 days before the commencement of a protest action serve notice to NEDLAC of its intention to proceed with the action (see *Business South Africa v COSATU & Another* (1997) 18 ILJ 474 (LAC)).

5. THE EFFECTS OF REGISTRATION, COLLECTIVE BARGAINING AND INDUSTRIAL ACTION ON SPECIFIC ASPECTS RELATING TO THE CORE RESPONSIBILITIES AND SOCIAL RESPONSIBILITIES OF TRADE UNIONS

The effects of registration, collective bargaining and industrial action is discussed in the context of, firstly, a trade union's core responsibilities and, secondly, in the context of a trade union's social responsibilities. The specific aspects which are discussed to illustrate these effects are job regulation, job security, employment equity, health and safety, and skills development.

5.1. Core Responsibilities

5.1.1. Introduction

The discussion above demonstrated that registration, collective bargaining and industrial action, as regulated by legislation, play a role in the functioning of trade unions. The determination which remains is whether, in view of the above discussion, these factors are hurdles in the way of or support for specific trade union core responsibilities such as job regulation, job security, employment equity and discrimination, health and safety matters and skills development.

5.1.2. Job Regulation

Once a trade union is registered, it becomes a body corporate and it is bestowed with the status of a juristic person.³³⁰ Such a trade union also acquires statutory rights conferred by the LRA and other labour legislation.³³¹ A registered trade union can be a party to a bargaining council where collective agreements can be concluded and such agreements may alter, replace or exclude the basic conditions of employment contained in the BCEA.³³² In general, a collective agreement as provided for in the LRA

³³⁰ See s 95 of the LRA.

³³¹ For example, the BCEA, EEA, etc.

³³² See s 49 of the BCEA.

can only be concluded by a registered trade union³³³ on the one hand and employers on the other. Again in terms of the BCEA, complaints with regard to the enforcement of the Act may be lodged with a trade union or a trade union representative. The BCEA defines a trade union representative as ‘a trade union representative who is entitled to exercise the rights contemplated in section 14 of the LRA.’³³⁴ In terms of section 14, a representative trade union means a registered trade union. This therefore limits the role that an unregistered trade union can play in job regulation.

Through collective bargaining, trade unions seek to obtain improved employment conditions for their members.³³⁵ Most aspects of the employment relationship are therefore regulated through collective bargaining. Again, by being parties to bargaining councils, trade unions are able to conclude industry-wide collective agreements with employers to regulate terms and conditions of employment. These agreements can also be extended by the Minister of Labour to non-parties.

Workers and trade unions can use industrial action to put pressure on the employer to meet their demands in respect of matters of mutual interest between employees and employers, unless the matter is a dispute of right and not of interest. Job regulation matters relate to terms and conditions of employment which are matters of mutual interest between employers and employees.

Registration, collective bargaining and industrial action therefore play an important supportive role for trade unions with regard to job regulation as a core responsibility.³³⁶

³³³ In terms of the Labour Relations Act, 1956, certain agreements entered into by unregistered trade unions were declared to be unenforceable. See Wallis op cit note 305 at para 43: 7-8.

³³⁴ See s 1 of the BCEA.

³³⁵ See in *National Union of Mineworkers v Goldfields of SA Ltd & others* (1989) 10 ILJ 86 (IC) at 99F-G, the words of an American writer (see Cox A ‘The Duty to Bargain in Good Faith’ (1958) 71 *Harvard LR* 1401 at 1411): ‘The duty to engage in discussion, listening to the union’s proposals and giving the grounds for any disagreement, extends to each and every topic the union may wish to discuss, provided that it falls within the phrase ‘rates of pay, wages, hours of employment, or other terms and conditions of employment’.

³³⁶ See also the discussion under paras 2; 3 and 4 in this chapter.

5.1.3. Job Security

Ensuring the job security of their members is one of the most important functions of trade unions. It would appear from Schedule 8 of the LRA³³⁷ that both registered and unregistered trade unions can represent their members in dismissal cases based on misconduct and incapacity.³³⁸ However, the position seems to be different with regard to dismissals based on operational requirements, as only a registered trade union has a right to be consulted about contemplated dismissals based on such requirements.³³⁹ Furthermore, only a registered trade union may represent its members in conciliation, arbitration and other proceedings.³⁴⁰

With regard to collective bargaining, once again trade unions can be parties to bargaining councils and one of the main functions of bargaining councils is to prevent and resolve labour disputes.³⁴¹ In terms of the LRA, a bargaining council may also establish and administer a fund to be used to resolve disputes within its area and sector of jurisdiction.³⁴² Parties to a bargaining council often also agree on retrenchment procedures; however, such procedures are mostly in line with statutory requirements for a fair dismissal for operational reasons as provided for in the LRA. In certain instances trade unions demand moratoriums on retrenchments.³⁴³ Through collective bargaining trade unions may demand to have a say in the

³³⁷ In terms of items 4(1), 8(1) and 10(2) of Schedule 8 of the LRA the right of an employee to be assisted by a trade union representative does not appear to be confined to only representatives of registered unions.

³³⁸ See *SANAWU v Maluti Crushers Crushers* [1997] 7 BLLR 955 (CCMA) at 959. It should be noted that the term 'trade union representative' as defined in s 213 of the LRA, makes no distinction between registered and unregistered trade unions.

³³⁹ See s 189(1)(c) of the LRA. A registered trade union must be consulted even if the employees affected belong to an unregistered trade union. However, in terms of s 189(1)(d) of the LRA, if there is no registered trade union in the workplace affected employees may nominate officials of an unregistered trade union to represent them. See also *Reckitt & Colman (SA) (Pty) Ltd v Bales* (1994) 15 ILJ 782 (LAC); *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC); *SATU v Press Corporation of SA Ltd* (1998) 19 ILJ 1553 (LC); *Sikhosana v Sasol Synthetic Fuels* [2000] 1 BLLR 101 (LC); *Singh v Mondi Paper* (2000) 21 ILJ 966 (LC).

³⁴⁰ See ss 135(4); 138(4); 161 and 178 of the LRA. In the past the right of representation also extended to unregistered trade unions (see, for example, *Secunda Supermarket CC t/a Secunda Spar v Dreyer NO* [1998] 10 BLLR 1062 (LAC)). The 1998 Labour Relations Amendment Act restricted the right to registered organisations only.

³⁴¹ See s 28(1)(c) of the LRA. Again in terms of s 28(1)(d) bargaining councils can perform the dispute resolution function in terms of s 51 of the LRA.

³⁴² See s 28(1)(e) of the LRA.

³⁴³ See 'Job Security Key Demand' (1992) 3(20) *South African Labour News* 5; 'Job Security Crucial Issue' (1992) 3(22) *South African Labour News* 10; 'Fawu Seeks Job Security at SAB' (1992) 3(22) *South African Labour News* 11.

establishment of grievance, disciplinary and retrenchment procedures.³⁴⁴ Matters falling under section 84 of the LRA can also be regarded as matters relating to the job security of employees.³⁴⁵

Workers and trade unions can use industrial action to put pressure on the employer to meet their demands in respect of matters of mutual interest. Job security matters also relate to terms and conditions of employment which are matters of mutual interest.

Registration, collective bargaining and industrial action therefore play an important supportive role for trade unions with regard to the job security of their members as their core responsibility.³⁴⁶

5.1.4. Employment Equity and Discrimination

The EEA requires a designated employer to consult a representative trade union about the design and implementation of the employment equity plan. In terms of the EEA, a representative trade union is defined as a registered trade union.³⁴⁷ Furthermore, in order to ensure compliance with the EEA (Chapter III), the Act provides that any trade union representative may bring an alleged contravention of the Act to the attention of an employee, an employer, a trade union, a workplace forum, a labour inspector, a Director-General of Labour, or Commission for the Employment Equity. The definition of trade union in the EEA is the same as the one in the LRA; however, the EEA defines a trade union representative as ‘a member of a registered trade union who is elected to represent employees in the workplace’.³⁴⁸ A representative of an unregistered trade union is thus clearly excluded.

Matters relating to equity and discrimination in the workplace are also matters subject to collective bargaining. Through collective bargaining trade

³⁴⁴ See Bendix op cit note 136 at 169.

³⁴⁵ Such matters include the restructuring of the workplace, plant closures and mergers and transfers of ownership of business and the dismissal of employees based on operational reasons.

³⁴⁶ See also paras 2, 3 and 4 of this chapter. However it must be highlighted that employees may not strike about alleged unfair dismissals and unfair labour practices as such matters are for determination by arbitration or adjudication.

³⁴⁷ See s 1 of the EEA.

³⁴⁸ See s 1 of the EEA.

unions and employers often enter into agreements which prohibit employers from discriminating against employees on the grounds listed in section 6 of the EEA.

Matters relating to employment equity are, however, not subject to industrial action as they are disputes of right and not of interest. If the employer and the workplace forum cannot reach an agreement on such a matter, a dispute must be referred to the CCMA for conciliation and, where conciliation fails, it must be referred to arbitration.³⁴⁹

Registration and collective bargaining, as trade unions' core responsibility, therefore play an important supportive role for trade unions with regard to equity matters in the workplace.³⁵⁰

5.1.5. Health and Safety

In terms of OHSA, trade unions or federations of trade unions can nominate representatives to sit in the Advisory Council for Occupational Health and Safety in order to provide expert advice to the Minister of Labour.³⁵¹ This Act does not specifically state that representatives should be nominated from registered trade unions. Unregistered trade unions may therefore also take part in this advisory council and contribute towards ensuring the health and safety of workers in the workplace. However, the employer may prefer to negotiate with registered trade unions.

Health and safety issues are matters that are subject to collective bargaining and, in most cases, collective agreements incorporate provisions of the OHSA. However, there are also instances where agreements prescribe the parties' own health and safety procedures in addition to those provided in terms of the OHSA. In addition to this, the LRA provides that subject to occupational health and safety legislation such as the OHSA and the Mine Health and Safety Act, a representative trade union and an employer may agree that the employer must consult with the workplace forum with a view

³⁴⁹ See s 86(4)(b) of the LRA.

³⁵⁰ See also paras 2, 3 and 4 of this chapter.

³⁵¹ See s 4 of the OHSA.

to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work.³⁵² A workplace forum will only be consulted in this regard if the matter is not dealt with in a collective agreement between a trade union and an employer.

Health and safety matters are matters of mutual interest between employers and employees and relate to the employment relationship and the workplace; thus, employees and their trade unions may engage in industrial action over them.³⁵³

Registration, collective bargaining and industrial action therefore play an important supportive role for trade unions with regard to health and safety matters as their core responsibility.³⁵⁴

5.1.6. Skills Development

In order for the economy to grow, the workforce must be skilled and trained.³⁵⁵ Likewise trade unions, irrespective of whether they are registered, have a duty to develop their members. Accordingly, any trade union can offer its members practical skills and provide them with opportunities for education and training.³⁵⁶ In addition, registered trade unions may become members of bargaining councils, whose function is among other things, to promote and establish training and education schemes.³⁵⁷ The Skills Development Act (SDA)³⁵⁸ has also established a Skills Authority which consists of five voting members nominated by NEDLAC and appointed by the Minister to represent organised labour. The same provisions regarding the monitoring and enforcement of the BCEA apply to the SDA *mutatis*

³⁵² See s 84(5(a) of the LRA.

³⁵³ See Du Toit op cit note 117 at 178. See also Brassey M et al *The New Labour Law* (1987) 246.

³⁵⁴ See also paras 2; 3 and 4 of this chapter.

³⁵⁵ The government, business and labour are committed to improving the skills and qualifications of the workers. At the Growth and Development Summit held in 2003, it was agreed that in order to achieve this objective, it must be ensured that at least 70% of the workers achieve an NQF level 1 (Grade 9 at school) qualification by March 2005. See the speech by the Minister of Labour delivered at the National Skills Development Conference on 14 October 2003 at http://www.labour.gov.za/does/sp/2003/oct/14_mdladlana.htm visited on 21 January 2013.

³⁵⁶ One of the objectives of NACTU is to arrange seminars and courses to educate affiliates and members on their responsibilities both as trade unionists and as members of communities. See http://www.nactu.org.za/index_files/page804.htm visited on 21 January 2013.

³⁵⁷ See s 28(1)(d) of the LRA. Funds may also be established for this purpose and will benefit both parties to the Council and members of those parties.

³⁵⁸ Act 97 of 1998.

mutandis. This implies that the role of unregistered trade unions in the individual development of members may be limited.

Skills development is also a matter of mutual interest and is subject to collective bargaining between the parties.³⁵⁹ Because it is a matter of mutual interest employees may strike over it.

Registration, collective bargaining and industrial action therefore play an important supportive role for trade unions with regard to the skills development of employees as a core responsibility.³⁶⁰

5.2. Social Responsibilities

5.2.1. The Economy

In South Africa, trade unions represented by their federations form part of NEDLAC, the purpose of which is to bring together labour, business, government and development actors to ‘ensure consensus on all matters relating to economic policy’ and to consider all proposed legislation.³⁶¹ NEDLAC as an institution is the national forum in which bargaining takes place in South Africa, although it is not formally described as a collective bargaining forum but rather as a consensus-seeking body promoting employee participation in socio-economic decision-making.³⁶²

No wage negotiations take place at NEDLAC; nevertheless it does indirectly influence socio-political policy relating to matters such as taxation and social benefits, for example pensions and health care benefits, thus affecting the ‘social wage’ of employees.³⁶³ In terms of section 28 of the LRA, one of the bargaining councils’ functions is the development of proposals for consideration by NEDLAC or any other policy-making or legislative forum

³⁵⁹ See s 28(1)(f) of the LRA.

³⁶⁰ See paras 2, 3 and 4 of this chapter.

³⁶¹ See s 5(1)(b) and (c) of the National Economic, Development and Labour Council Act.

³⁶² See Finnemore & Van Rensburg *op cit* note 11 at 224.

³⁶³ *Ibid.*

relevant to the sector or area.³⁶⁴ Examples of such proposals could be issues relating to privatisation, employment and social policy.³⁶⁵

Employees and their trade unions may therefore engage in industrial action in the form of protest action in pursuit of national economic policies and empowerment.³⁶⁶

Registration and formal collective bargaining do not play a direct role in trade union involvement in the economy. However, industrial action in the form of protest action supports the role played by trade unions in the economy, as may be seen from the definition of protest action.³⁶⁷

5.2.2. Politics

Trade unions in South Africa played an important role in bringing about social and political change in the country.³⁶⁸ Trade unions for black workers became involved in the broader community and political struggles as a result of workers' oppression and segregation.³⁶⁹ This role was mainly played out through the formation of federations of like-minded trade unions, such as COSATU, with the aim of promoting common interests and fighting the apartheid regime. At a meeting of delegations from the African National Congress (ANC), SACTU³⁷⁰ and COSATU in 1986, the prominent part played by the union movement was acknowledged and COSATU was recognised as an essential component of the democratic struggle. However, in 1988, a state of emergency was declared, which restricted COSATU's political

³⁶⁴ See s 28(1)(h) of the LRA.

³⁶⁵ See Du Toit op cit note 28 at 338-339. This blurs the distinction between matters of interest that are strikeable and those that are subject to protest action in terms of s 77 of the LRA. However, a distinguishing factor could be the target of the proposed action.

³⁶⁶ See Bendix op cit note 136 at 684-685.

³⁶⁷ See paras 2, 3 and 4 of this chapter.

³⁶⁸ In South Africa, political reasons for joining trade unions were predominant during the 1980s and early 1990s among black workers. Trade unions were seen as vehicles for political aspirations. Finnemore & Van Rensburg op cit note 11 at 138.

³⁶⁹ See Baskin J *Striking Back: A History of COSATU* (1991) and Friedman S *Building Tomorrow Today: African Workers in Trade Unions 1970-1985* (1987). FOSATU and CUSA campaigned against the tricameral parliament extending political rights in central government to coloureds and Indians but excluding blacks (see Finnemore & Van Rensburg op cit note 11 at 30). Black trade unions supported the political struggle and called for sanctions, boycotts, stay-aways and recognition of holidays such as June 16 and the release of political prisoners.

³⁷⁰ SACTU is the South African Congress of Trade Unions, formed in 1955 as a federation of trade unions opposed to apartheid and joined to the ANC in the 'Congress Alliance'.

activities as well as imposing restrictions on the United Democratic Front (UDF).

Trade unions do not engage in formal collective bargaining about social and political changes; however, many changes relating to these two aspects were brought about through the trade union movement. Prior to the 1994 democratic elections, trade unions forced employers in various ways to put pressure on the government to introduce political change in South Africa.³⁷¹

Although politics and social change may not necessarily be subjects of collective bargaining, in the past, through collective bargaining, trade unions have been able to engage with broader issues and exert political pressure on government.³⁷² Registration is, however, not a requirement for a trade union to be involved in politics or in social change in society. Furthermore, trade unions cannot engage in strike action or protest action over political matters. They can, however, engage in protest action if the issue in dispute is political but relates to the socio-economic interests of workers. Campaigns or stayaways with a purely political objective are, however, excluded.³⁷³ Any trade union whether registered or not can fight for human rights. After all labour rights are also human rights,³⁷⁴ and human rights can be a subject of collective bargaining if the rights pursued have a bearing on the employment. Workers and trade unions may also engage in protest action against the government in order to pursue socio-economic rights.³⁷⁵ In the past, South African trade unions played a very important role in fighting for the rights of citizens using protest action in the form of stayaways.³⁷⁶

Registration, collective bargaining and industrial action do not play a direct role in the involvement of trade unions in politics. However, in the past

³⁷¹ In America, for example, political objectives are subjects of collective bargaining (see Du Toit op cit note 132 at 98).

³⁷² The traditional alliance between the British Trades Union Congress and the Labour Party, and that between the Congress of South African Trade Unions (COSATU) with the SA Communist Party and African National Congress, are but two examples.

³⁷³ See Grogan op cit note 22 at 216.

³⁷⁴ Labour rights are entrenched in s 23 of the Constitution.

³⁷⁵ Rights such as education; health care, food, water and social security.

³⁷⁶ See 'COSATU Mass Action Programme' (1992) 4(7) *South African Labour News* 3.

workers used industrial action in the form of protest action (stayaway) to pursue a political agenda. Today, under the LRA, protest action cannot be used for political reasons.³⁷⁷

5.2.3. HIV/AIDS

Any trade union can get involved in HIV/AIDS matters in general whether it is registered or not. However, it may be difficult for unregistered trade unions to pursue matters that have a direct bearing on the workplace as employers may prefer to deal with trade unions that are recognised and registered.³⁷⁸ HIV/AIDS may be a subject of collective bargaining, especially where it relates to discrimination against employees in the workplace.³⁷⁹ In addition, in terms of section 86 of the LRA,³⁸⁰ this is a matter which, if not regulated in terms of a collective agreement in as far as it relates to employees being disadvantaged by unfair discrimination, can be a matter of joint decision-making with a workplace forum. This is a matter of mutual concern between employees and employers, as it relates to and affects the health and safety of employees in the workplace. HIV/AIDS matters with a bearing on the employment relationship are regulated by the EEA and are therefore disputes of right which employees cannot strike over. Nevertheless, this matter can also be dealt with at NEDLAC where national policies relating to this pandemic may be developed.³⁸¹

Registration, collective bargaining and industrial action do not play a direct role in the involvement of trade unions in matters relating to HIV/AIDS in general unless they have to do with the employment relationship.³⁸²

5.2.4. The Environment

Issues relating to the environment in general may be pursued by any trade union, whether it is registered or not.³⁸³ However, it may again be difficult

³⁷⁷ See also paras 2, 3 and 4 of this chapter.

³⁷⁸ Only registered trade unions are guaranteed organisational rights in terms of the LRA.

³⁷⁹ In terms of s 6 of the EEA no person may discriminate directly or indirectly against an employee on the basis of HIV status. See Todd C *Collective Bargaining Law* (2004) at 55.

³⁸⁰ See s 86(1) of the LRA.

³⁸¹ See s 5 of the NEDLAC Act 35 of 1994.

³⁸² See also paras 2, 3 and 4 of this chapter.

for unregistered trade unions to pursue those matters with a direct bearing on the workplace as employers may prefer to deal with trade unions which are recognised and registered.³⁸⁴ The environment may be a subject of collective bargaining where it has a direct bearing on the workplace or on the employment relationship. However, the LRA does not impose a duty to bargain and the subject matter of collective bargaining is determined by what the parties themselves have agreed on.³⁸⁵ Usually, when parties conclude their agreement to bargain, they stipulate the workplace issues they have agreed to bargain on.³⁸⁶ Parties may in this way agree to bargain on environmental issues that have a bearing on the employment relationship or that have an effect on the workplace. If the environmental issues are general and do not relate to the workplace, trade unions may engage in protest action or other campaigns to pressurise the government into acceding to their demands.³⁸⁷ At its 2009 Congress, COSATU resolved that climate change is a threat to the planet. It noted that it was the working class and the poor, as well as developing countries, that are adversely affected and that the issue should be taken seriously. In 2010, COSATU convened a labour/civil society conference where it was declared that there is a need to move towards sustainable energy, migrating the economy from one based on coal to a low-carbon or carbon-free economy.³⁸⁸

Registration, collective bargaining and industrial action do not play a direct role in trade union involvement in environmental matters in general, except where they have to do with the employment relationship or the workplace.³⁸⁹

³⁸³ S 24 of the RSA Constitution states that everyone has a right to an environment that is not harmful to their health or well-being.

³⁸⁴ Only registered trade unions are guaranteed organisational rights in terms of the LRA.

³⁸⁵ See Todd *op cit* note 379 at 48 and 52.

³⁸⁶ *Ibid.*

³⁸⁷ See s 213 of the LRA for the definition of 'protest action'.

³⁸⁸ See COSATU Policy Framework on Climate Change: Adopted by the COSATU Central Executive Committee, August 2011 (see <http://cosatu.org.za> visited on 25 August 2015). COSATU's Central Committee also adopted a resolution on campaigns in 2011 which endorses the Million Climate Jobs campaign. Its affiliates are also required to develop policies on climate change.

³⁸⁹ See paras 2, 3 and 4 of this chapter.

5.2.5. Poverty Alleviation

Poverty alleviation³⁹⁰ can also be pursued by any trade union whether it is registered or not, as it is more of a societal issue with no direct bearing on the employment relationship. In addition, it is not a direct matter of collective bargaining or a matter of mutual interest between an employer and employee. Employees therefore cannot engage in industrial action against the employer in order to pursue a matter relating to poverty alleviation. However, protest action can be used to persuade the government to come up with poverty alleviation strategies as poverty alleviation is a socio-economic matter.³⁹¹ Trade union federations can also pursue policies that promote poverty alleviation through the NEDLAC forum.³⁹²

Registration and collective bargaining do not play a direct role in trade union involvement in matters relating to poverty alleviation in general, as discussed above. However, trade unions can use protest action to pursue socio-economic matters with a bearing on poverty alleviation.³⁹³

5.2.6. Job Creation

Job creation and the eradication of unemployment can also be pursued by any trade union whether it is registered or not. It should, however, be noted that registered trade unions have the advantage of becoming parties to bargaining councils which can establish industrial or sector unemployment schemes for the benefit of their parties and members of the parties.³⁹⁴ This is also a socio-economic matter which may not necessarily be subject to collective bargaining and trade unions may therefore not engage in industrial action in the form of strikes and pickets about it.³⁹⁵ Employees may nevertheless engage in protest action to persuade the government to

³⁹⁰ Poverty alleviation is defined as any process which seeks to reduce the level of poverty in a community or among a group of people or countries. Examples of methods used to alleviate poverty are education; economic development and income redistribution (see http://en.wikipedia.org/wiki/Poverty_Alleviation).

³⁹¹ This is a socio-economic right which employees can pursue through protest action against the state.

³⁹² See s 5 of the NEDLAC Act 35 of 1994.

³⁹³ See also paras 2, 3 and 4 of this chapter.

³⁹⁴ See s 28(1)(g) of the LRA.

³⁹⁵ The purpose of a strike in terms of s 213 of the LRA is to resolve disputes relating to matters of mutual interest between employers and employees.

create employment.³⁹⁶ Trade union federations can also pursue policies aimed at eradicating or reducing unemployment through the NEDLAC forum.³⁹⁷

Registration and collective bargaining do not play a direct role in trade union involvement in matters relating to employment creation in general, as discussed above, however, trade unions can use protest action to persuade the government in matters relating to job creation.³⁹⁸

5.2.7. Education and Training

Matters relating to education and training in general can be pursued by any trade union whether it is registered or not.³⁹⁹ Registered trade unions will however have an advantage as they can be parties to bargaining councils which have education and training as one of their functions.⁴⁰⁰ This is also one of the matters listed in section 84(1) of the LRA as a matter to be regulated by a workplace forum if it is not regulated by a collective agreement.⁴⁰¹ This implies that education and training can be a subject of collective bargaining in as far as it relates to employers and their employees directly, for example where it relates to skills development within the workplace. In terms of section 29 of the Constitution, education is a right. Therefore trade unions and their members may not engage in industrial action such as strikes over it, but workers can engage in protest action in order to persuade the government to change national educational policies because education and training is also a socio-economic matter. It was held

³⁹⁶ This is also a socio-economic right which employees may pursue by protesting against the state.

³⁹⁷ See s 5 of the NEDLAC Act 35 of 1994.

³⁹⁸ See also paras 2, 3 and 4 of this chapter.

³⁹⁹ First, trade unions were preceded by organisations that were established to assist workers through educational activity and legal advice and which although they recruited members, did not describe themselves as trade unions. In Durban and Pietermaritzburg, the General Factory Workers Benefit Fund (GFWBF) was formed in 1972; the Urban Training Project (UTP) and the Industrial Aid Society (IAS) were established in Johannesburg and the Western Province Workers' Advice Bureau (WPWAB) in Cape Town, also in 1972. It was assumed that the form of these organisations would be seen as less of a threat by the government and employers and would therefore afford some protection from state repression (see Maree *op cit* note 25).

⁴⁰⁰ See s 28(1)(f) of the LRA.

⁴⁰¹ See s 84(1) of the LRA.

in *Government of the Western Cape Province v COSATU*⁴⁰² that matters relating to educational reform are socio-economic matters.

Registration, collective bargaining and industrial action do not play a direct role in trade union involvement in education and training matters in general, unless if they have a bearing on the employment relationship. Trade unions can, however, also engage in protest action to pressurise the government in national educational matters.⁴⁰³

5.2.8. Financial and legal assistance

Any trade union whether registered or not can offer its members financial and legal assistance. Trade unions can do this on their own without the employer's involvement and therefore without the need for collective bargaining or industrial action. The ability to offer this kind of assistance to members and the public will also depend largely on the resources that a trade union has.

Registration, collective bargaining and industrial action do not play a direct role in trade union involvement in offering their members financial or legal advice.⁴⁰⁴

5.2.9. Social Protection

Matters relating to social protection can be pursued by any trade union whether it is registered or not. Registered trade unions will however have an advantage in this regard as they can be parties to bargaining councils, which can establish and administer pension, provident, medical aid; sick pay, holiday schemes or funds for the benefit of parties to the council and their members.⁴⁰⁵ Social protection can therefore be subject to collective bargaining if it has a direct bearing on the employment relationship.⁴⁰⁶ Where it does not have a direct bearing on the employment relationship, for

⁴⁰² [1998] 12 BLLR 1286 (LC).

⁴⁰³ See also paras 2, 3 and 4 of this chapter.

⁴⁰⁴ See also paras 2, 3 and 4 of this chapter.

⁴⁰⁵ See s 28(1)(g) of the LRA.

⁴⁰⁶ See Todd op cit note 374 at 55.

example where it relates to the right of access to social security as a socio-economic right,⁴⁰⁷ trade unions may engage in protest action to back their demands.

Registration, collective bargaining and industrial action do not play a direct role in trade union involvement in the social protection of the members, except where it has a bearing on members as employees. Where it relates to the right of access to social security as a socio-economic right,⁴⁰⁸ trade unions may engage in protest action to back their demands.⁴⁰⁹

6. CONCLUSION

In terms of the definition of trade union in section 213 of the LRA, an association of employees does not have to be registered to qualify as a trade union. In addition, under the common law no registration is required for a trade union to exist and carry out its activities. A trade union may therefore still operate as an unregistered voluntary organisation. South Africa has a system of optional registration as both the RSA Constitution and the LRA recognise unregistered trade unions.⁴¹⁰ All workers have the right to freedom of association and can form trade unions and still not register them. However, trade unions which opt to register are granted certain rights and benefits which are not available to unregistered trade unions. From the discussion in this chapter; it is evident that although trade unions may exist without being registered, registration plays an important role in their overall functioning. Thus it is evident that for trade unions to fulfil their core responsibility effectively, they need to be registered. It was noted that although unregistered trade unions may fulfil their core responsibilities to a limited extent and that they will be recognised, the legislature gives more support for core responsibilities to registered trade unions. Despite the fact that both registered and unregistered trade unions can fulfil their social responsibilities, where employers need to be involved they generally prefer to

⁴⁰⁷ See s 27 of the RSA Constitution.

⁴⁰⁸ See s 27 of the RSA Constitution.

⁴⁰⁹ See also paras 2, 3 and 4 of this chapter.

⁴¹⁰ See paras 2.2 and 2.3 of this chapter.

deal with registered trade unions. In addition, although bargaining councils have a variety of functions that could assist trade unions in their responsibilities, unregistered trade unions will not benefit from them as they are not allowed to form part of bargaining councils. Registration thus serves as an important support for the core responsibilities of trade unions.

The primary function of trade unions is to engage in collective bargaining with employers. In line with the Right to Organise and Collective Bargaining Convention;⁴¹¹ the RSA Constitution and the LRA promote collective bargaining. Accordingly, the Constitution provides for this right in terms of section 23(5) and also by allowing union security arrangements.⁴¹² The LRA promotes this right in a number of ways, including by affording protection to the right of employees and employers to freedom of association;⁴¹³ providing statutory organisational rights⁴¹⁴ for trade unions, union security arrangements in the form of agency shop agreements and closed shop agreements,⁴¹⁵ the establishment of collective bargaining structures,⁴¹⁶ the conclusion and enforcement of collective agreements,⁴¹⁷ and suchlike. However, neither the Constitution nor the LRA impose a duty to bargain on trade unions and employers. Although the introduction of workplace forums was aimed at relieving collective bargaining of certain functions and moving away from an adversarial approach on certain matters to worker participation, this system has not been successful in South Africa. Consequently, collective bargaining has remained the preferred method through which most matters are dealt with between employers and trade unions.⁴¹⁸ The above discussion also indicates that most aspects of the employment relationship are subject to collective bargaining and many are regulated by collective agreements concluded between employers and trade

⁴¹¹ See the Right to Organise and Collective Bargaining Convention 98 of 1949.

⁴¹² See s 23(6) of the RSA Constitution.

⁴¹³ See ss 4(1)-(3) and 5(1)-(3) of the LRA.

⁴¹⁴ The LRA provides for five organisational rights: access to the workplace; deduction of trade union subscriptions; election of trade union representatives; leave for trade union representatives and disclosure of information.

⁴¹⁵ See ss 25 and 26 of the LRA.

⁴¹⁶ See s 27 of the LRA which deals with the establishment of bargaining councils.

⁴¹⁷ See s 23 of the LRA which deals with the legal effect of collective agreements; ss 31 and 32 which respectively deal with the binding nature of collective agreements concluded in bargaining councils and their extensions.

⁴¹⁸ See Manamela ME 'Regulating Workplace Forums in South Africa' (2002) 14 *SA Merc LJ* 728 at 732.

unions or in bargaining councils. The BCEA also gives preference to collective agreements that regulate terms and conditions of employment.⁴¹⁹ This discussion has also shown that although social responsibilities such as economic policies, the environment, HIV/AIDS, education and training, among others, are not dealt with formally through collective bargaining, they may be covered under collective bargaining processes, for example through NEDLAC. Although collective bargaining has been faced with challenges posed by among other things, globalisation and informal types of work, it still has an important role to play for trade unions. However, the role played by collective bargaining will only continue if South Africa has effective and strong trade unions.

Both the RSA Constitution and indirectly the ILO Conventions recognise workers' right to resort to industrial action to back their demands within and beyond the workplace. The LRA accordingly gives effect to this right and regulates its use by employees in backing up their demands. In addition, the LRA allows employees and their trade unions to engage in various forms of industrial action, including strikes, pickets and protest action, through which they can pursue their objectives or back their demands. Such actions may enjoy protection, provided they comply with the relevant provisions of the LRA.⁴²⁰ In order for an action to qualify as a protected strike it must fall within the definition of strike. One of the important elements of a strike is that its purpose must be to 'remedy a grievance or resolve a dispute in respect of any matter of mutual interest between employer and employee'. The ambit of the concept of matters of 'mutual interest' affords employees a broader scope regarding matters over which they may engage in a strike action.⁴²¹ In line with this, employees engaged in protected industrial action are protected from civil liability and dismissal.⁴²² This point important as it makes the strike a valuable economic weapon. However, the protection itself is not absolute as the employer may still dismiss employees engaged in

⁴¹⁹ See s 49(10) of the BCEA.

⁴²⁰ See ss 64, 69 and 77 of the LRA.

⁴²¹ See Basson et al op cit note 135 at 310; Du Toit et al op cit note 28 at 338-339.

⁴²² Ibid.

strike action on the basis of misconduct to the operational requirements of a business.

Although limited in certain respects, industrial action plays an important role in the functioning of trade unions. Strikes and pickets are directed at employers and serve to backup the demands of employees relating to the core responsibilities of trade unions such as job regulation, job security etc.. These actions also counter the employer's decision-making powers. On the other hand, protest action may also be directed at other entities such as the government, with the aim of promoting and defending the socio-economic interests of workers.⁴²³

Although registration and collective bargaining may be seen as hurdles in certain respects, their benefits as support for the overall functioning of trade unions outweighs any negative effects they may have on trade unions.

⁴²³ See *Government of the Western Cape Province v COSATU & Another* (1999) 20 ILJ 151 (LC). See also Grogan op cit note 22 at 177-178.

CHAPTER 4: THE INTERNATIONAL PERSPECTIVE: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS IN GREAT BRITAIN

1. INTRODUCTION

Trade unions internationally have started out under different circumstances. Some of these circumstances relate to economic development, resources and political and social factors.¹ Consequently, unions in different countries have adopted different styles and characteristics.² In certain systems trade unions are regarded as important and are part of the political system³ while in others they are not. There is a body of widely accepted international norms which has set standards for trade union rights. It should nevertheless be stated here that workers' rights are human rights and when workers' rights are violated, human rights are violated.⁴ International human rights instruments, namely, treaties, conventions and declarations of different types and forms serve as the main source of international law and, accordingly, create obligations for states, whether of a general, universal⁵ or regional⁶ nature. Such instruments include the Universal Declaration of Human Rights (UDHR),⁷ the United

¹ See *Freedom of Association and the Protection of the Right to Organize: A Workers Education Manual* (1952) at 2.

² See Sherman B *The State of the Unions* (1986) 13. See also Hyman R 'Changing Union Identities in Europe' in Leisink et al (eds) *The Challenges to Trade Unions in Europe* (1996) at 63; See also Eaton J *Comparative Employment Relations: An Introduction* (2000) at 45.

³ In South Africa, COSATU, one of the federations of trade unions in South Africa, is in alliance with the South African Communist Party (SACP) and the African National Congress (ANC).

⁴ See Leary VA 'The Paradox of Workers' Rights as Human Rights' in Lance et al (eds) *Human Rights, Labour Rights and International Trade* (1996) at 22.

⁵ For example, the United Nations Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

⁶ For example, the African Charter on Human and People's Rights.

⁷ The UDHR has been adopted by all states, however it is not directly binding on states as such, although some of its provisions have achieved the status of customary international law (see Dugard J *International Law: A South African Perspective* (2000) 34, 241). It sets out a series of internationally recognised norms in the field of human rights and makes general reference to human rights in the UN Charter. The UDHR expressly protects both the negative and the positive right to associate (see Articles 20(1) & (2) of the UDHR); however, it does not make any specific reference to the right to strike. The UDHR is not a treaty and therefore not enforceable against the states. It was not intended to be legally binding but rather to serve as 'a guiding light to all those who endeavored to raise man's material standard of living and spiritual condition ... a moral obligation on the different countries to find ways and means of giving effect to the rights proclaimed therein' (see the United Nations Plenary Meeting Official Records of the Third Session Part I (1948) 873; Netherlands Delegate). However, its essential principles have become part of international customary law binding on all states (see Waldock CHM *Human Rights in Contemporary International Law and the Significance of the European Convention* (1963)).

Nations (UN) instruments and ILO Conventions. These instruments will be further discussed in Chapter 6.

No research on South African trade unions can be conducted without reference to trade unions in Europe, as South Africa has a very strong connection to European trade unions and British trade unions in particular. Bob Hepple states the following regarding industrial relations in Great Britain:

Industrial relations make the case for Great Britain to be regarded as the innovating state of labour law. Consequently, Great Britain was for a time not only a 'workshop' for the world, it was also an exporter of labour law. The 21 million British citizens who emigrated during the 19th and early 20th centuries, to the United States, the British colonies and overseas dominions, took with them not only the attitudes and behaviour they had learnt in the industries of the mother country.⁸

This study is necessary for the following reasons:

- As South Africa was a British colony, its trade union movement developed out of the British trade union system.⁹
- Industrial relations began in Great Britain as a product of history of the first Industrial Revolution.¹⁰ A study of labour laws and industrial relations should therefore involve Great Britain.
- Early trade union leaders in South Africa were of British or Australian origin. The presence of South African trade unions, especially in the Transvaal, can be attributed to the efforts of immigrants, largely from these two countries. In Europe, the legal recognition of the right to join trade unions occurred in two stages. First, most of the countries in Europe removed the statutory criminal prohibitions on recognising the right to freedom of association of workers and trade unions. Second,

⁸ See Hepple B in *Making of Labour Law in Europe: A Comparative Study of Nine Countries to 1945* (1986) at 2.

⁹ The first union in South Africa (Cape Town) was established on 23 December 1881 as a branch of the Amalgamated Society of Carpenters and Joiners of Great Britain (see Du Toit op cit note 2 at 10-11 and Van Jaarsveld SR & Van Eck S *Principles of Labour Law* 3ed (2005) at 214, para 580).

¹⁰ See McLroy J *Trade Unions in Britain today* 2ed (1995) at 1.

this was done through the creation of positive rights in relation to employers.¹¹ Trade unionism was brought to South Africa by artisans mainly from Great Britain after the discovery of diamonds in 1867 and gold in 1886. These workers introduced the concept of trade unionism and established branches of existing British trade unions in South Africa.¹²

This chapter will focus on trade unions in Great Britain (Great Britain comprises of England, Wales, Northern Ireland and Scotland). It will investigate the legal framework for trade unions, and their core responsibilities and social responsibilities. It will further consider the effects of registration, collective bargaining and industrial action on the functioning of trade unions.

2. HISTORICAL BACKGROUND OF TRADE UNIONS IN GREAT BRITAIN

2.1. Introduction

Trade unions were first legalised in Great Britain in 1824.¹³ French and German workers, sponsored by their governments, came to Great Britain at the time of the Great Exhibition to study the way the new reformist British trade unions worked. Robert Owen, the pioneer of British socialism can be regarded as the father of international labour law because, as early as 1818, he carried his campaign to end the exploitation of human resources into Europe and presented a petition to European Powers such as Britain, Austria and Russia, appealing to them to regulate working hours throughout the Continent. His petition was dismissed, but when at the end of the century the movement was revived, Great Britain played a leading role

¹¹ See Anderson SD *Labour Law: Management Decisions and Workers Rights* (2000) at 306.

¹² For example Amalgamated Engineering Union, etc.

¹³ See Hepple B & Fredman S *International Encyclopaedia for Labour Law and Industrial Relations in Great Britain* (2002) Vol 6 at 15. Before 1824, trade unions were regulated by a total ban on the recognition of workers' collectives. This regulation was provided by various statutes such as the Statute of Labourers 1351; the Statute of Artificers 1563, the Poor Law 1601 and the Master and Servant Acts and the Combination Acts.

in various conferences which culminated in the founding of the ILO in 1919.¹⁴

Many trade unions in Great Britain can trace their roots back to the mid-nineteenth century or earlier.¹⁵ British trade unions can be classified as craft, general, industrial or white collar, depending on their origins and predominant membership.¹⁶ However, this categorisation is now blurred, as trade unions have gained members in more categories.¹⁷ Unlike most Western European countries, Great Britain has only one main union confederation known as the Trades Union Congress (TUC), which was established in 1868 to lobby government.¹⁸ It is sometimes referred to as the Parliament of Labour.¹⁹ The TUC was one of the founder-members of the International Confederation of Free Trade Unions in 1949 and also plays a prominent role in the European Union (EU), under the Social Dialogue procedure which gives important decision-making powers to the European TUC. In 2009, the TUC had 58 affiliated organisations, with a total membership of just over 6.5 million workers.²⁰

2.2. The Development of Trade Unions in Great Britain

Trade unions in Great Britain gradually developed from the medieval guild system.²¹ In the first half of the nineteenth century, trade unions were not

¹⁴ See Hepple op cit note 13 at 17.

¹⁵ In the 17th century groups of artisans organised themselves on both a permanent and temporary basis and by the 18th century industrial conflict and threatening behaviour were not unusual features of British industrial life, a fact testified to by the large body of legislation (see Laybourn K *British Trade Unionism 1770–1990* (1991) at 10).

¹⁶ See para 4.2 of Ch 1 for these classifications.

¹⁷ See *International and Comparative Industrial Relations: A Study of Industrialised Market Economies* (2ed) edited by GJ Bamber & RD Lansbury (1993) at 29.

¹⁸ Ibid at 30. The first Congress held in Manchester was attended by 34 delegates representing 118 000 trade union members (Trade Unionism: The evidence of the Trade Union Congress to the Royal Commission on Trade Unions and Employers' Associations (1966) at 1.

¹⁹ See Webb S & Webb B *History of Trade Unionism 1666-1920* 2ed (1920) at 358.

²⁰ See <http://www.tuc.org.uk/tuc/unions> visited on 28 November 2011. In the mid-1970s, the TUC played a central role in the corporatist decision-making process instituted by the then Labour government. However, the influence and stature of the TUC was deliberately undermined during the Conservative rule, and its status was not fully revitalised under a later Labour government. Nevertheless, it is playing an increasingly prominent role in the EU under the Social Dialogue procedure, which gives important decision-making powers to the European TUC, of which the British TUC is an active member (see Hepple op cit note 13 at 225).

²¹ A group of skilled craftsmen in the same trade formed themselves into a guild. Guilds looked after members if they were sick and would help the families of dead guild members (see http://www.historylearningsite.co.uk/medieval_guilds.htm visited on 31 October 2012). Guilds arose in the 12th and 13th centuries, and in the 16th century they were transformed into organisations to support apprentices' struggle

allowed in Great Britain²² and workers were prohibited by the Combination Acts of 1799 and 1800²³ from joining trade unions. However, trade unions were later legalised in 1824 and given limited recognition by Peel's Act of 1825. The right to combine, to bargain collectively and to strike, although restricted, were recognised for the first time in this Act. Later, the Trade Union Act of 1871 was enacted which fully recognised the right to freedom of association and to strike.

In Great Britain the right to associate and the right not to associate enjoy parallel protection.²⁴ Both these rights were provided for in the Industrial Relations Act of 1971.²⁵ However, this Act was repealed by the labour government in 1974 and was replaced by the Trade Union Labour Relations Act of 1976 aimed at providing positive rights to workers and trade unions as a way of supporting collective bargaining.²⁶ In 1992, the Trade Union and Labour Consolidation Act 1992 (TULCRA), which consolidated a number of statutes related to trade unions, was enacted. In this statute three individual legal rights were introduced to protect trade union membership.²⁷ Further reforms were implemented in the form of the Trade Union Reform and Employment Rights Act 1993 (TURERA). The Employment Relations Act,²⁸ which is mainly concerned with collective labour law and trade union rights, was introduced in 2004.

against their master craftsmen. In striving to improve the working conditions of apprentices the guilds engaged in boycotts and strikes. Guilds continued to exist until the mid-19th century, gradually being replaced by trade unions (see <http://encyclopedia2.thefreedictionary.com/Trade+Guilds> visited on 31 October 2012).

²² See Rosemary A *Trade Union and the Management of Industrial Conflict* (1998) at 24.

²³ These Acts introduced specific penalties for the simple act of combination, whereas previous legislation was concerned with assault and the destruction of property, actions which would have been felonies in any legal system (see Laybourn op cit note 15 at 11). The Acts were later repealed through the efforts of Francis Place who secured the Appointment of a Committee of Enquiry in 1824. A new Act was introduced in 1825 which permitted trade unions to combine to peacefully campaign for wage increases but limited their ability to combine to regulate the mode of production by use of violence (at 11).

²⁴ See Hepple op cit note 13 at 207.

²⁵ This Act recognised both the right to associate and the right not to associate. In its s 5(1) it gave every worker the right to be a member of a registered trade union of his or her choice and to take part in its activities at an appropriate time.

²⁶ See the Trade Union Labour Relations Act of 1974.

²⁷ First, the right of officials and members of independent trade unions to time off to participate in trade union activities (s 152); second the right for every employee not to be unfairly dismissed by reason of membership or activities in an independent trade union (s 146), third, the right not to be victimised because of trade union membership (s 137).

²⁸ Employment Relations Act 2004.

2.3. The ILO and Trade Unions in Great Britain

Great Britain has ratified international treaties guaranteeing freedom of association. These include four ILO Conventions; namely, Convention on Freedom of Association,²⁹ Convention on the Right to Organize and Collective Bargaining,³⁰ Convention on Protection of the Right to Organize in the Public Service,³¹ and Convention Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking.³² Great Britain has also accepted the obligations in Article 11 of the European Convention on Human Rights Fundamental Freedoms, which includes the right to form and join trade unions. The article provides as follows:

- Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.
- No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

However the policy of encouraging trade unions changed when Margaret Thatcher's³³ Conservative government came into power in 1979. Since the European Convention on Human Rights Fundamental Freedoms now applies in Great Britain, by virtue of the Human Rights Act 1998, the common law doctrine that trade unions are unlawful organisations is no longer good law.

²⁹ See Convention 87 of 1948.

³⁰ See Convention 98 of 1949.

³¹ See Convention 151 of 1978.

³² See Convention 135 of 1972.

³³ The Thatcherism view was that trade unions impede the operation of the 'free market' and threaten individual freedoms. Therefore legislation was introduced placing increasing restrictions on trade union freedom, and the government no longer aimed by its own practices to encourage employers in the private sector to permit and recognise trade union organisation. See http://www.en.wikipedia.org/wiki/Trade_unions visited on 21 August 2015.

2.4. The Constitution of Great Britain and Trade unions

The Constitution of Great Britain is not contained in a basic document. It consists of Acts of Parliament and other legislation, judge-made common law, and precepts and practices known as constitutional conventions.³⁴ The government of Great Britain is a party to the European Convention on Human Rights; however, until 1998 the terms of the Convention were not enacted as part of British domestic law. Concerns voiced by the Conservative government in 1984 over issues such as the denial of the right to belong to trade unions at the Government Communications Headquarters, and earlier legislation by the Labour government permitting compulsory trade union membership (the closed shop), have led to pressure for the incorporation of a Bill of Rights.³⁵ The Labour Party subsequently honoured its commitment and enacted the Human Rights Act 1998, which incorporates the European Convention of Human Rights into domestic law.

2.5. TULRCA and Trade Unions in Great Britain

2.5.1. Definition of Trade Union

In terms of section 1 of TULRCA, a 'trade union' is defined as

... an organisation (whether permanent or temporary) which either: (a) consists wholly or mainly of workers of one or more descriptions and *whose principal purposes include the regulation of relations between workers and employers or employer associations* (my emphasis) or (b) consists wholly or mainly of: (i) constituent or affiliated organisations which have those purposes; or (ii) representatives of such constituent or affiliated organisations, and in either case whose principal purposes include the regulation of relations between workers and employers or workers and employers associations, or include the regulation of relations between the constituent or affiliated organisations.³⁶

³⁴ See Hepple op cit note 13 at 20.

³⁵ Ibid at 21. The Labour Party honoured its commitment and enacted the Human Rights Act 1998 which incorporates the European Convention of Human Rights into domestic law (the Act only came into effect in 2000). The Convention includes the freedom to associate in trade unions but it does not provide for a right to strike or to bargain collectively.

³⁶ See Selwyn NM *Selwyn's Law of Employment* 14ed (2006). The definition of a trade union when introduced in 1974 cleared up a long-standing controversy as to whether objects other than labour-management relations could be validly pursued by a trade union (See s 28 of the Trade Union and Labour Relations Act of 1974).

This definition states that a trade union's principal purpose must 'include the regulation of relations between workers and employers'. This means their principal purpose may go beyond the regulation of relations between workers and employers. The purpose of trade unions is therefore not limited; however, the regulation of workers should be one of its main purposes.³⁷ British trade unions are allowed to include in their rule book (constitution) any lawful purpose, including political objects. The onus is on the union to provide a description of the persons who may be eligible to join as members.³⁸ However, similar to the South African position, a trade union cannot exclude a person on arbitrary and unreasonable grounds.³⁹ It should also be noted that, in terms of the definition, a trade union may consist of 'workers' and not 'employees'⁴⁰. TULRCA defines a 'worker' as follows:

An individual who works or normally works or seeks to work- (a) under a contract of employment; or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his; or (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as any such employment does not fall within ... (a) or (b) above.⁴¹

In terms of this definition, those who work under the contract of service may also be members of a trade union. It has, however, been held that a body whose sole concern is to support strike action or to exert political influence is not a 'trade union'.⁴²

³⁷ See *Midland Cold Storage Limited v Steer* [1972] ICR 435. See also *British Association of Advisers and Lecturers in Physical Education v National Union of Teachers* [1986] IRLR 497.

³⁸ See *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 All ER 716.

³⁹ See *Nagle v Feilden* [1966] 1 All ER 65. See s 95(5)(6) of the LRA.

⁴⁰ An employee means 'an individual who has entered into or works under a contract of employment ...' (see s 295 of TULRCA).

⁴¹ See s 296(1) of TULRCA. However a 'worker' has other statutory definitions in other contexts, for example in relation to 'trade dispute' the meaning of the word is different. See also *Carter v The Law Society* [1973] ICR 117.

⁴² See also *Frost v Clarke & Smith Manufacturing Co Limited* [1973] IRLR 216, where it was held that a mere body of workers claiming to be a trade union for purposes of claiming sole bargaining rights under the Industrial Relations Act 1971 was not an organisation since it had no name, no constitution, no rules, it held no meetings, kept no minutes, etc. See also in this regard *Midland Cold Storage Ltd v Turner* [1972] ICR 230, NIRC.

2.5.2. The Legal Status of Trade Unions in Great Britain

Unlike with South African trade unions, section 10 of TULRCA provides that a trade union shall not be a body corporate but shall nonetheless be capable of making contracts, suing and being sued in its own name, and capable of being prosecuted for any offences committed in its name. The property of a trade union must therefore be held by its trustees and any judgment shall be enforced against the property held by trustees. The status of a trade union as holding a quasi-legal personality, which was in place between 1901 and 1971, was removed by section 10. In *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers*,⁴³ it was held that a trade union, not having a legal personality, could not sue for libel in respect of its reputation, because section 10 states that a trade union shall not be treated as if it were a body corporate. It is a quasi-cooperative; it is not a company, a provident society or a friendly society.⁴⁴

3. THE LISTING OF TRADE UNIONS IN GREAT BRITAIN

3.1. Introduction

In Great Britain the registration of trade unions was abolished in 1974 and listing is automatically granted to any organisation which is a 'trade union' as defined in TULRCA, provided it complies with the prescribed formalities.⁴⁵ British trade unions are not obliged to be listed; this is a voluntary process just like registration in South Africa. Nevertheless, the Certificate Officer⁴⁶ keeps a list of trade unions.⁴⁷ Most of the requirements for the listing of trade unions in Great Britain are similar to those of registration discussed for the South African position in Chapter 3. Any organisation not listed may apply for inclusion by submitting the appropriate fee, a copy of the rules, a

⁴³ [1980] All ER 1097.

⁴⁴ See Bell AC *Employment Law* 2ed (2006) at 188.

⁴⁵ See ss 123-125 of TULRCA.

⁴⁶ The first Certificate Officer was appointed in 1975. He took over the functions previously performed by the former Registrar of Friendly Societies under the Trade Union and Labour Relations Act 1974. He is appointed by the Secretary of State and makes annual reports on his activities.

⁴⁷ See s 2(1) of TULRCA, which imposes a duty to keep a list of trade unions upon the Certification Officer. See Bell op cit note 44 at 188.

list of officers, the address of its head office, and details of its name.⁴⁸ However, the Officer will refuse to enter on the list any organisation the name of which is the same as a previously registered or listed organisation, or a name which closely resembles any such organisation as to be likely to deceive the public.⁴⁹ If it appears to the Officer that an organisation which is on the list is not a trade union, he may remove it from the list after giving notice of his intention to do so and considering any representations which may be made by the union.⁵⁰ An organisation which is aggrieved by the decision of the Officer may appeal either on the question of law or fact to the Employment Appeal Tribunal.⁵¹ In Great Britain, since the year 2000, there has been a trend towards concentrating⁵² union membership into fewer, larger unions than was previously the case.⁵³

3.2. Advantages for Listing

In Great Britain there are advantages of being a listed trade union, just as there are advantages for registration in South Africa. First, listing is evidence that the body concerned satisfies the statutory definition without further proof being required.⁵⁴ Second, there is tax relief on income in the union's provident funds.⁵⁵ Third, there are procedural advantages in connection with the passing of property consequent on the change of trustees.⁵⁶ Fourth, and probably the most important of all, is that only a listed trade union can apply for a certificate of independence.⁵⁷ In terms of section 6 of the TULRCA, any trade union which is listed may apply to the officer for a certificate stating that it is an independent trade union. A union

⁴⁸ See ss 2-5 of TULRCA.

⁴⁹ See s 3(2) of TULRCA.

⁵⁰ See s 4(1) of TULRCA.

⁵¹ See s 9 of TULRCA.

⁵² See Hardy S *Labour Law in Great Britain* 4ed (2011) at 247. The process of concentration was stimulated by a number of pressures, including the difficulties faced by the smaller unions in remaining solvent in the face of inflation and falling membership, changes in technology which have affected traditional crafts and skills, etc.

⁵³ Between 1999 and 2000 ten mergers took place, involving a total of 508 370 members. UNISON, which is a public service union, was formed in 1993 by the merger of three major unions (the Confederation of Health Service Workers (COHSE), the National and Local Government Officers' Association (NALGO) and the National Union of Public Employees (NUPE)).

⁵⁴ See s 2(4) of TULRCA.

⁵⁵ See Humphreys N *Trade Union Law and Collective Employment Rights* 2ed (2005) at 33, para 2.19.

⁵⁶ See s 12 of TULRCA.

⁵⁷ See Humphreys op cit note 55 at 33 para 2.21.

is independent if: (a) it is not under the domination or control of an employer or groups of employers or employers association; and (b) it is not liable to interference by an employer or any such group or association arising out of the provision of financial or material support or by any other means whatsoever tending towards such control.⁵⁸

If after making enquiries the Officer is satisfied that the union is independent, he will issue a certificate accordingly and if he refuses, he must give reasons for his refusal.⁵⁹ Even if he grants the certificate, he may still withdraw it if he is of the opinion that the union is no longer independent, however he must notify the trade union concerned of such intention.⁶⁰ Again, such a trade union may appeal on a point of law or fact to the Employment Appeal Tribunal against the decision of the Officer to refuse to grant or withdraw the certificate.⁶¹ In *General and Municipal Workers Union v Certification Officer*,⁶² a trade union objected to a decision of the officer to grant a certificate to another organisation, but it was held that the trade union had no right to appeal against the decision.

3.3. Advantages of Certification of Independent Trade Unions

There are a number of advantages that the certification of independent trade unions may hold for the union itself, the officials and the members. Once a trade union has received such a certificate, its members are entitled not to suffer a detriment or to be dismissed on the grounds of trade union membership.⁶³ An independent trade union may negotiate a dismissal procedure agreement that will replace individual statutory rights;⁶⁴ may negotiate away the right of employees to strike;⁶⁵ may negotiate a collective agreement modifying or derogating rights contained in the Working Time Regulations, the Fixed-Term Employees Regulations 2002, and may replace

⁵⁸ See s 5 of TULRCA. See Bell op cit note 44 at 188.

⁵⁹ See s 6(6) of TULRCA.

⁶⁰ See s 7(1) of TULRCA.

⁶¹ See Humphreys op cit note 55 at 38 para 2.38.

⁶² [1977] 1 All ER 771.

⁶³ See s 146(1) of TULRCA.

⁶⁴ See s 110 of Employment Relations Act 1999.

⁶⁵ See s 180 of TULRCA.

the statutory default scheme on parental leave under the Maternity and Parental Leave Regulations 1999. An official or member of an independent union can act as an independent adviser for purposes of compromise agreements.⁶⁶

Only an independent union will be able to receive money from the Secretary of State under the trade union modernisation scheme. In terms of section 116A of TULRCA, the Secretary of the State is empowered to provide money to an independent trade union to enable it or assist it to do any of the following; (i) improve the carrying out of its existing functions; (ii) prepare to carry out new functions; (iii) increase the range of services it offers to its members; (iv) prepare for an amalgamation or transfer; (v) ballot its members. This money is provided in such a way as the Secretary of the State thinks fit, whether by grants or otherwise, and on such terms as he thinks fit, whether as to repayment or otherwise.

3.4. Independent Trade Unions and Collective Bargaining

An independent union which is recognised by the employer for collective bargaining purposes has the right to receive information for collective bargaining purposes.⁶⁷ It also has the right to be consulted on redundancies⁶⁸ and proposed transfers. An official of such a union is entitled to paid time off work for trade union duties and unpaid time off work for trade union activities and to act as a union learning representative.⁶⁹

Such a union can also appoint safety representatives under the Health and Safety at Work Act, 1974,⁷⁰ and its representatives can act as employee representatives for the purposes of the Transformational Information and Consultation of Employees Regulations 1999. Furthermore such union is entitled to receive information from an employer concerning occupational

⁶⁶ See s 203(3A) of Employment Relations Act 1999. See also Bell op cit note 44 at 188.

⁶⁷ See s 181 of TULRCA.

⁶⁸ See s 188 of TULRCA.

⁶⁹ See ss 168–170 of TULRCA.

⁷⁰ See s 2 of TULRCA.

pension schemes⁷¹ and on recent and probable development of the undertakings included under the Information and Consultation Regulations.

3.5. Duties of Listed Trade Unions

In Great Britain every listed trade union is required to keep proper records and establish a satisfactory system of control over its cash holdings, receipts and remittances.⁷² An annual return must be sent to the Officer, with accounts duly audited. Sections 32 to 42 of TULRCA provide for matters that must be contained in the annual return. Any person who refuses or wilfully neglects to perform a duty imposed by these provisions, or who alters a document required for those purposes, shall be guilty of an offence punishable by a fine. This is not necessarily the case in South Africa. In Great Britain, an annual statement must be sent to all the members of a union giving details of the union's income and expenditure, salaries paid, and income from and expenditure to the political fund. This creates limitations in the manner in which British trade unions can function and use their funds.

4. TRADE UNIONS AND COLLECTIVE BARGAINING IN GREAT BRITAIN

4.1. Introduction

The existing definition of collective bargaining in Great Britain refers to 'negotiations between a union and an employer on different matters but includes terms and conditions of employment, termination and suspension of employment, allocation of work, discipline and physical conditions of work'.⁷³ Similar to South African trade unions, British trade unions remain very much collective bargainers in line with the words of the 1968 Royal Commission of Trade Unions and Employer Associations that 'collective bargaining properly conducted is the most effective means of giving the

⁷¹ See s 56A of the Social Security Act 1975.

⁷² See s 28 of TULRCA.

⁷³ See s 178 of TULRCA.

workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society'.⁷⁴ Negotiating the terms and conditions of employment for their members with employers remains a key trade union task for them,⁷⁵ and a union presence makes it difficult for employers to adopt a 'hire and fire' mentality and to treat their employees as disposable assets.⁷⁶

4.2. Historical Background of Collective Bargaining in Great Britain

In Great Britain, collective bargaining was a central feature of the country's industrial relations for much of the twentieth century, however without proper legal regulation.⁷⁷ Robson said the following in 1935:

England is the home of trade unionism; it was on her soil that the practice of combined bargaining first arose; yet here alone is the collective contract still denied the elementary right of legal enforcement in the courts of law despite the fact that it is the recognized method of determining the conditions of employment of the vast majority of wage earners.⁷⁸

Unlike with the South African position, in Great Britain there is no constitutional right to collective bargaining.⁷⁹ Collective bargaining is regulated under TULRCA. Similar to the South African position, the prevailing approach to collective bargaining has been one of voluntarism, with no legal regulation of either its procedures or its outcomes.⁸⁰ However, the Industrial Relations Act 1971 marked a turning point by attempting to bring collective bargaining within a framework of legal regulation. This Act was, however, replaced by the Employment Protection Act 1975. The scope of the subject of industrial relations is determined by attention being placed

⁷⁴ See Royal Commission on Trade Unions and Employers' Associations Report, Cmnd 3623 HMSO 1968.

⁷⁵ See Taylor R *The Future of Trade Unions* (1994) at 90.

⁷⁶ See Taylor op cit note 75 at 116.

⁷⁷ In Britain, the law no longer regulates the collective bargaining process or collective bargaining outcomes to any significant extent; the remaining provision which facilitates the bargaining process is a limited duty on employers to disclose information.

⁷⁸ Robson W 'Industrial law' *Quarterly Review* 51 (1935) at 204 referred to in Hardy S *Labour Law in Great Britain* 4ed (2011) at 47.

⁷⁹ However, the Human Rights Act 1998 gives effect to the rights and freedoms guaranteed under the European Convention on Human Rights. See para 3.3 of Ch 3.

⁸⁰ See Hardy op cit note 52 46-48. Voluntary collective bargaining meant that regulatory legislation laying down rules of employment on matters of wages, hours, health and safety took second place.

on the collective bargaining activities of trade unions.⁸¹ The term ‘collective bargaining’ which is said to have been invented by Mrs Beatrice Webb in 1891,⁸² was for many years regarded as the collective equivalent of industrial bargaining in the labour market:

Instead of the employer making a series of separate contracts with isolated individuals he meets with a collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged.

However, this was criticised by Allan Flanders⁸³ as being inadequate because it suggests that collective agreements commit someone to buying and selling labour, whereas in fact collective agreements simply lay down the terms upon which individual workers sell their ability to work. Flanders then developed the alternative theory of collective bargaining as an ‘institution for the joint regulation of labour management and labour markets’.⁸⁴ In Britain a distinction is made between negotiation and consultation. Negotiation refers to matters within the power of joint regulation by management and trade unions; while consultation refers to subjects within the scope of the managerial prerogative. Generally in Great Britain, workers’ participation in decision-making has been limited to consultation.⁸⁵ It should also be noted that Great Britain is probably the only industrial country in which a distinction between disputes of rights and disputes of interest is not recognised and for that reason collective agreements are generally not regarded as contracts.⁸⁶

An understanding of the relationship between collective bargaining and legislation enacted by Parliament in Great Britain is impossible unless two vital facts are borne in mind. The first, which Prof Sir Otto Kahn-Freund⁸⁷

⁸¹ See Hepple op cit note 13 at 33.

⁸² See the Webb B *Co-operative Movement in Britain*, London (1891). This was later developed by her and Sidney Webb in Webb S & Webb B *Industrial Democracy* (1898) at 173.

⁸³ See *British Journal of Industrial Relations*, 6 (1968) at 1.

⁸⁴ See *British Journal of Industrial Relations* 6 (1968) at 1, for a defence of this definition. See Hepple op cit note 13 at 36.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 37-38. See also Hardy op cit note 52 at 41.

⁸⁷ See Kahn-Freund O *Law and Opinion in the Twentieth Century* (1959).

has emphasised, is that the British trade unions won minimum labour standards without the aid of legislation. The second fact is that trade unions had given birth to their own leaders and their own pragmatic, reformist organisations long before the Socialist movement assumed importance. In Great Britain the state has taken a positive role in facilitating collective bargaining. From the end of the First World War until 1979, collective bargaining was actively encouraged by successive governments, both among state employees and in the private sector.⁸⁸ A further feature of collective bargaining in Great Britain is its enormous diversity. Traditionally, a distinction was drawn between industry-wide bargaining, regional or district level bargaining and plant or workplace bargaining.⁸⁹

4.3. Collective Agreements

In Great Britain collective agreements fulfil two main functions. First, they regulate relations between employers or employers' associations and trade unions. Second, they regulate the terms of individual contracts of employment. In practice, the main terms and conditions of employment of the majority of employees in Great Britain are determined by collective bargaining rather than by individual negotiation. A survey conducted in 1984 indicated that pay increases for 62 per cent of manual and 54 percent of non-manual workers were the direct result of collective agreements.⁹⁰ Nevertheless, unlike South Africa, British labour law remains rooted in the notion that terms and conditions are a matter of contract between individuals. Collective agreements are presumed not to be intended to be enforceable as contracts between the trade union and employer parties unless an intention to be so bound is expressed in writing.⁹¹

Notwithstanding the above, the terms of collective agreements may achieve legal effect if they are incorporated into individual contracts of employment. Incorporation into contracts is, however, not automatic. In this respect,

⁸⁸ See Hepple *op cit* note 13 at 244.

⁸⁹ *Ibid* at 244-245.

⁹⁰ *Ibid* at 98.

⁹¹ *Ibid* at 256.

British labour law stands in sharp contrast to that of other countries, such as France and South Africa, where clauses of collective agreements apply to employment contracts except where there are provisions more favourable to the worker.⁹²

In order to fall within the definition of a collective agreement, the agreement or arrangement must be made between one or more trade unions and one or more employers or employers' associations. The agreement must relate to one or more of the following matters: (i) terms and conditions of employment, or the physical conditions in which any workers are required to work; (ii) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; (iii) allocation of work of the duties of employment as between workers or groups of workers; (iv) matters of discipline; (v) the membership or non-membership of a trade union on the part of a worker; (vi) facilities for officials or trade unions; (vii) machinery for negotiation or consultation and other procedures relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiations or consultation or in the carrying out of such procedures.⁹³ While reference is made to the content of collective agreements in section 178 of TULRCA, the parties are free to include any matter they please in the agreement. The content will be entirely at the discretion of the parties with a few exceptions such as the prohibition on discrimination on the grounds of race and gender.⁹⁴

This in essence allows parties to include matters which are beyond the employer and employee relationship and thus fall under social responsibilities.

⁹² Ibid at 99.

⁹³ See s 178(2) of TULRCA.

⁹⁴ See s 6 of the Sex Discrimination Act 1986; the Race Relations Act of 1976; the Disability Discrimination Act of 1995, Schedule 3A, Part 2; the Employment Equality (Religion or Religious Belief) Regulations 2003 (SI 2003/1660); etc.

4.3.1. The Importance of Collective Agreements

It is a distinctive feature of British labour law that there is no general legislation laying down minimum standards for the length of the working day or the number of rest days and holidays. The absence of statutory controls has led some employees to seek the protection of the employer's common law duty of care. In *Johnstone v Bloomsbury Health Authority*,⁹⁵ junior hospital doctors were employed under a contract providing for a standard working week of 40 hours and doctors were also required to be available for a further 48 hours on average. The doctors claimed that the employers had acted unlawfully in requiring them to work for so many hours as this would foreseeably injure their health. The Court of Appeal allowed the claim to go forward to trial. The decision indicates that the employer's power to require overtime work has to be exercised in the light of their duty to take care of the employees' health and if they should have known that they are exposing the employee to the risk of injury to his or her health by requiring him to work the hours they did, then they should not have required him or her to work more than the number of hours they could safely have done.⁹⁶

4.3.2. Legal Effect of Collective Agreements

A collective agreement is any agreement made by or on behalf of a trade union on the one hand, and one or more employers or employers' association on the other, relating to one or more of the matters contained in the definition. Section 179 of TULRCA provides that any agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract, unless the agreement is in writing and contains a provision stating that the parties do intend the agreement to be legally binding.⁹⁷

⁹⁵ [1991] IRLR 118, CA.

⁹⁶ *Ibid* at 99.

⁹⁷ See *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1981] ICR 129.

4.4. Closed Shop and Agency Shop Agreements

4.4.1. Closed Shop Agreements

A closed shop agreement has been defined as a situation in which employees come to realise that a particular job is only to be obtained and retained if they become and remain members of one of a specified number of trade unions.⁹⁸ A distinction is sometimes drawn between the pre-entry closed shop, in which a worker cannot apply for a job unless he or she is a union member, and the post-entry closed shop, in which the worker is required to join a union within a stated period after having taken up the job. In Great Britain, the line between these two is often blurred in practice.

The right not to join a trade union has parallel protection in English law to the right to join. This became an issue because of the practice of the closed shop. The closed shop as such is not unlawful but it is now almost impossible to enforce in practice. Individuals, who refuse to join a union, or a particular union, have statutory protection against three forms of discrimination by employers. First, sections 152 and 153 of TULRCA give employees the right not to be dismissed for non-membership of a union. Secondly, section 146 of the Act gives employees the right not to be subjected to a detriment by any act, or failure to act, to compel them to be or become a member. Lastly, section 137 grants a remedy to any person who is refused employment because he or she is not a member of a trade union.

4.4.2. Agency Shop Agreements

Unlike in South Africa, agency shop agreements and their enforcement are prohibited in Great Britain. Thus, employees have a right not to comply with a requirement to make a payment or allow a deduction from remuneration as an alternative to union membership.⁹⁹ This protection is limited to employees or prospective employees, with exceptions which parallel those

⁹⁸ See McCarthy WEJ *The Closed Shop in Britain* (1964). This definition was followed by the Royal Commission on the Trade Unions & Employer Associations, Cmnd. 3623, 1968, para 588.

⁹⁹ See ss 137(i)(b)(ii), 146(3), 152(3) of TULRCA.

applicable to the right to join.¹⁰⁰ As in the case of dismissal for trade union membership and activities, protection against dismissal for non-membership is secured through the ordinary unfair dismissal procedure. Hence, the dismissal of an employee is automatically unfair if the reason for the dismissal is non-union membership. Dismissal for refusing, or proposing to refuse, to comply with any of the requirements to make a payment in the event of non-membership is also treated as dismissal, thus precluding enforcement of the agency shop.¹⁰¹ TULCRA provides that where there are arrangements between the employer of a worker and a union for the deduction from workers' wages of the union subscription (check-off), the employer must ensure that no such deduction is made from any worker's wages unless the worker has authorised in writing the making of such deductions and this authorisation has not been withdrawn.¹⁰²

4.5. Trade Union Recognition and Organisational Rights

4.5.1. Recognition

In Great Britain, the right of a trade union to bargain on behalf of its members depends on the willing cooperation of employers.¹⁰³ The employer may refuse to recognise a trade union or recognise it for some purposes only, for example representation, or for all purposes, including negotiations. Once recognition has been granted, various legal consequences flow, including the right to be consulted on redundancies and on transfers of the undertaking. Members of independent unions that are recognised by the employer are entitled to certain benefits, including time off work for union duties and activities, and receive various protections against dismissal and detriment.¹⁰⁴

¹⁰⁰ See Morris GS & Archer TJ *Collective Labour Law* (2000) at 160.

¹⁰¹ *Ibid* at 161.

¹⁰² *Ibid* at 168. See also s 68 of TULRCA.

¹⁰³ *Ibid* at 187.

¹⁰⁴ *Ibid*.

In the British system there is provision for voluntary recognition. In *National Union of Tailors and Garment Workers v Charles Ingram & Co Ltd*,¹⁰⁵ five propositions were established in that regard: recognition is a mixed question of law and fact; recognition requires mutuality; there must be an express or implied agreement for recognition; if the agreement was implied, there must be clear and unequivocal acts or conduct, usually over a period of time; and there may be partial recognition, for some, but not all purposes. It should, however, be noted that recognition for representation purposes is not the same thing as recognition for negotiating purposes.¹⁰⁶

The Employment Relations Act 1999 lays down a procedure for the recognition and de-recognition of trade unions, which is found in TULRCA, Schedule A1. An independent union can apply to the Central Arbitration Committee (CAC)¹⁰⁷ for a declaration requiring the employer to recognise it for collective bargaining purposes in respect of workers in a particular bargaining unit. The CAC will grant the declaration if the majority of workers in the bargaining unit already belong to the union or where the union obtains the support of a majority of those voting in a secret ballot, which consists of at least 40 per cent of those entitled to vote. The employer and the union should then agree on a method of collective bargaining; if they fail to do so an application may be made to the CAC by either party. Recognition obtained will last for a minimum of three years and cannot be ended unilaterally by the employer even after the end of that time, unless the de-recognition procedure has been followed. The manner in which collective bargaining is to be conducted is set out in the Trade Union Recognition Order 2000, which is legally binding, and can be enforced by an order for specific performance.

¹⁰⁵ [1978] 1 All ER 1271.

¹⁰⁶ See *Union of Shop Distributive and Allied Workers v Sketchley Ltd* [1981] IRLR 291.

¹⁰⁷ It was established in 1975 to take over the functions of the former Industrial Arbitration Board. It is governed by TULRCA, Part VI.

4.5.2. Disclosure of Information

For the purposes of all stages of collective bargaining it is the duty of the employer, on request, to disclose to representatives of a recognised independent union all such information relating to its undertaking as it is in its possession, and is information without which the representatives would to a material extent be impeded in carrying on such bargaining, and is information which it would be in accordance with good industrial relations practice that it should disclose.¹⁰⁸

The employer need not disclose the following information:¹⁰⁹ (i) information the disclosure of which would be contrary to national interest; (ii) any information which it could not disclose without breaking the law; (iii) information which it received in confidence; (iv) information relating to an individual, unless he has consented to the disclosure; (v) information the disclosure of which would cause substantial injury to the employer's business for reasons other than its effect on collective bargaining; (vi) information obtained by the employer for the purpose of bringing or defending any legal proceedings. If the employer fails to comply with the duty to disclose collective bargaining information, a trade union can present a complaint under the procedure set out in section 183 of TULRCA.

5. TRADE UNIONS AND INDUSTRIAL ACTION IN GREAT BRITAIN

5.1. Introduction

The 'right to strike' is described as being 'an essential element in the principle of collective bargaining'.¹¹⁰ The term 'strike' is defined by TULRCA as follows: 'a concerted stoppage of work'.¹¹¹ There are, however other forms

¹⁰⁸ The duty to provide information to a trade union recognised for collective bargaining was introduced by s 17 of the Employment Protection Act 1975, but is now covered under Chapter 1; Part IV of TULRCA.

¹⁰⁹ See s 182(1) of TULRCA.

¹¹⁰ See *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 463.

¹¹¹ See s 246 of TULRCA 1992. Lord Denning in *Tramp Shipping Corp v Greenwich Marine Inc* [1975] ICR defined a strike as 'a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour'. See also *Coates and Venables v Modern Methods & Materials* [1982] ICR 763.

of industrial action like go-slows,¹¹² refusal to work overtime,¹¹³ etc., which may fall under the definition.

Unlike with many countries, English law does not give workers a positive right to organise or participate in industrial action,¹¹⁴ but a 'freedom to strike'. In Great Britain, industrial action is regulated by a series of the common law wrongs, chiefly in tort and contract, limited by statutory immunities for action 'in contemplation or furtherance of a trade dispute'.¹¹⁵ Therefore freedom to strike is obtained on condition that the act is done in contemplation or furtherance of a trade dispute.¹¹⁶ This dispute must be between 'workers'¹¹⁷ and their employer.¹¹⁸ Criminal law ceased to be a central regulating force in 1875, but it retains an important role in respect of ordinary criminal actions such as criminal damage or breach of the peace which may take place in the course of industrial action, particularly picketing.¹¹⁹ Trade unions and strikes emerged from illegality at criminal law in a series of statutes from 1824 to 1825. However, the courts almost immediately began to develop a series of the common law liabilities, with the effect that most industrial action, while not unlawful at criminal law, was likely to give rise to civil liability. Parliament reacted not by creating statutory rights to strike or organise, but by enacting immunities to specific common law torts if committed in the course of a trade dispute. Although the Conspiracy and Protection of Property Act 1875 stated that simple conspiracy was not a crime if done in the context of a trade dispute, the courts held that this did not prevent liability for the civil tort of conspiracy

¹¹² See *Secretary of State for Employment v ASLEF (No 2)* [1972] ICR 19.

¹¹³ See *Power Packing Case Makers Limited v Faust* [1983] ICR 292.

¹¹⁴ See Morris GS & Archer TJ *Trade Unions, Employers and the Law* 2ed (1993) at 207.

¹¹⁵ In terms of s 244 of TULRCA, a 'trade dispute' includes, among other things, terms and conditions of employment; termination or suspension of employment or the duties of employment and matters of discipline. See Hepple *op cit* note 13 at 257.

¹¹⁶ See Perrins B *Trade Union Law* (1985) at 293; s 244 of TULRCA.

¹¹⁷ In this context 'worker' covers both workers employed by the employer at the time of the dispute and former workers whose employment was terminated in connection with the dispute.

¹¹⁸ The need for a dispute to be between workers and their employer imposes some limitations. It for example excludes industrial action against the government, unless the government is the workers' employer. The other two exceptions are where the dispute relates to matters which have been referred for consideration by a joint body on which there is statutory provision for a government minister to be represented (see *London Borough of Wandsworth v NAS/UWT* [1993] IRLR 344, CA) and where the dispute relates to matters which cannot be settled without a government minister exercising statutory power (see National Health Service (Remuneration and Conditions of Service) Regulations 1974, SI 1974/296).

¹¹⁹ See Hepple *op cit* note 13 at 260.

in taking industrial action.¹²⁰ In the same year, the *Taff Vale Railway Company v The Amalgamated Society of Railway Servants*¹²¹ case made it possible to sue a trade union in respect of this tort. The tort of inducing breach of contract of employment made most organised action a tort.¹²² The Conditions of Employment and National Arbitration Order No. 1305 severely restricted strikes and lockouts and made it compulsory to submit disputes to arbitration.

In terms of section 234A of TULRCA, the union must give advance notice of industrial action to the affected employer. Accordingly, the trade union must take such steps as are reasonably necessary to ensure that the employer receives a specified notice of industrial action. The pattern of industrial action in Great Britain since 1970 has changed. In 1970, the annual average number of stoppages was 2 631 as contrasted with annual averages of 1 129 during the 1980s. In the 1990s there have been more declines with an average of 234 stoppages per year.¹²³ The pattern of industrial action internationally shows similar trends to those in Great Britain. Statistics for 23 countries in the Organisation for Economic Cooperation and Development (OECD) show a general decline in the number of working days lost because of industrial disputes. In the EU the level of working days lost in 1998 was less than half of that in 1989.¹²⁴

Unlike in South Africa there is no legislation in Great Britain that restricts industrial action in essential services, although some special provisions restrict the right to strike of the police, armed forces, merchant seamen and postal and telecommunications workers.¹²⁵ There are no special restraints on civil servants, but disciplinary sanctions may be imposed on them for

¹²⁰ See *Quinn v Leathrem* [1901] A.C. 495

¹²¹ [1901] A.C. 426.

¹²² See *South Wales Miners Federation v Glamorgan Coal Company Ltd* [1905] A.C. 239. See also See Hepple op cit note 13 at 42.

¹²³ See Hepple op cit note 13 at 258. See also *Employment Gazette* (July 1991) at 379 and *Labour Market Trends* (June 2000) at 260.

¹²⁴ These figures were taken from *Labour Market Trends* (April 2000) at 148. Figures show that Britain tends to occupy a broadly middle ranking position when compared with other OECD countries. The British average for 1994-1998 was exceeded by Greece, Spain, New Zealand and Finland, but was greater than in Austria, Switzerland, Japan and Germany.

¹²⁵ See Bowers J *A Practical Approach to Employment Law* 7ed (2005) at 621.

individual action.¹²⁶ The employer's main offensive tactic against his or her workforce is the lock-out,¹²⁷ even though it has been little used in Great Britain.¹²⁸

5.2. Dismissal of Employees Engaged in a Strike

In general, a British employee may not complain of unfair dismissal if he or she is dismissed while participating in a strike or any other industrial action. Since 1990, a distinction has been made between official and unofficial action. Accordingly, action is only official if it has been authorised or endorsed by a trade union that has members participating. An employee dismissed in the course of an official action will regain the right to complain of unfair dismissal if some or all of the other participants are not dismissed or are allowed to return to work within three months of the dismissal.¹²⁹ However, where the action is unofficial there is no right to complain of unfair dismissal under any circumstances.¹³⁰

5.3. Benefits during a Strike

In Great Britain an individual who takes part in industrial action almost certainly breaks his or her contract of employment. This is the position even if the strike notice has been given to the employer. At common law such a breach will usually be construed as repudiation by the employee of the fundamental obligation to work, so entitling the employer summarily to dismiss him or her.¹³¹ The employer's best remedy in this case will be the withdrawal of wages. It has been the policy of successive British governments to withhold state benefits from those affected by industrial

¹²⁶ On strikes in the public services, see Fredman S & Morris G *The State as Employer* (1989), Chapter 10. See Hepple op cit note 13 at 274.

¹²⁷ No statutory definition exists as to what is meant by 'lockout' (see *Express and Star Limited v Bundy* [1987] IRLR 422 at 425).

¹²⁸ See Bowers op cit note 125 at 585.

¹²⁹ See s 62 of the Employment Protection Consolidation Act 1978, as amended by Employment Act 1982.

¹³⁰ See s 62A of the Employment Protection Consolidation Act 1978.

¹³¹ See *Simons v Hoover Ltd* [1977] ICR 61 (EAT). See Hepple op cit note 13 at 257.

action. The rationale for this was the belief that the taxpayer should not be required to subsidise strikers.¹³²

An employee is not entitled to a payment if the failure to provide work is due to a strike, lock-out or other industrial action involving any employee of his employer or associated employer.¹³³ There are five main torts which have been developed by the judiciary that have specific relevance to industrial action: civil conspiracy to injure; civil conspiracy to commit an unlawful act or use unlawful means; inducing a breach or interfering with performance of a contract; intimidation; and interference with trade by unlawful means.¹³⁴

5.4. Secondary Action

Since 1980, a central policy of legislation in Great Britain has been to restrict the extent to which industrial action is permitted to expand beyond the establishment concerned. Accordingly, secondary action has been subjected to a set of restrictions permitting such action only against direct customers or suppliers of the employer in dispute.¹³⁵ In 1990, the government introduced the Employment Act, which removed immunity from liability in respect of certain torts, including breach of contract and intimidation, whenever there has been unlawful secondary action.¹³⁶ Even if a trade union has satisfied the requirements of section 219 of TULCRA and lost immunity by virtue of section 224 of the same Act, the union and any individuals involved will lose their immunity from civil action in respect of certain torts if the balloting provisions in TULCRA are not fulfilled.¹³⁷

The introduction of statutory ballots before industrial action has important consequences for bargaining processes.¹³⁸ Ballots lengthen the bargaining process and such delay tends to give time for coolingoff in which both sides can assess the situation. The conditions that have to be met in order for the

¹³² Ibid at 278.

¹³³ See s 13(3) of the Employment Protection Consolidation Act 1978.

¹³⁴ See Hepple op cit note 13 at 260-263.

¹³⁵ See s 17 of the Employment Act 1980.

¹³⁶ See s 224 of TULCRA 1992. See also Morris GS 'The Employment Act 1990' 1991 *Journal of Business Law* 46.

¹³⁷ See s 226-235 of TULCRA.

¹³⁸ See generally Undy R & Martin R *Ballots and Trade Union Democracy*, London (1984).

ballot to be lawful are complex. A ballot is required even if the industrial action does not amount to a breach of contract,¹³⁹ and a trade union which fails to comply with the balloting requirements loses its immunity in respect of the torts of inducing breach of or interference with a contract of employment or a commercial contract.¹⁴⁰

5.5. Picket

Picketing has been a traditional feature of industrial action in Great Britain. However, it may lead to civil liability,¹⁴¹ as picketers who dissuade a fellow worker from continuing to work commit the tort of inducing breach of contract of employment.¹⁴² Other relevant torts include public and private nuisance.¹⁴³ In terms of section 220 of TULRCA, 'it shall be lawful for a person in contemplation or furtherance of a trade dispute to attend (a) at or near his own place of work or (b) if he is an official of a trade union, at or near the place of work of the member of the union whom he is accompanying and whom he represents for the purpose only of peacefully obtaining information or persuading any person to work or to abstain from work'.

6. CORE RESPONSIBILITIES OF TRADE UNIONS IN GREAT BRITAIN

6.1. Introduction

In this discussion the meaning of 'social responsibility' used will be the same as the one given in Chapter 1 where, among other things, it was said that socially responsible behaviour is 'action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good'. Social responsibility denotes an organisation's obligation to maximise its long-term positive impact and minimise its negative impact on society. As

¹³⁹ See Hepple op cit note 13 at 269-270.

¹⁴⁰ Ibid at 272.

¹⁴¹ See *Hubbard v Pitt* [1976] Q.B. 142; *Thomas v National Union of Mineworkers (South Wales Area)* [1985] IRLR 136.

¹⁴² See *Union Traffic Ltd v TGWU* [1989] IRLR 127.

¹⁴³ See *News Group Newspapers v SOGAT* 82 [1986] IRLR 337.

seen from the definition of trade union in paragraph 2.5 of this chapter, such an organisation should have the regulation of relations between workers and employers as one of its principal purposes. This implies that British trade unions may have both core responsibilities and social responsibilities.¹⁴⁴

In Great Britain, before the creation of the national welfare state, trade unions provided crucial institutions for working people in the form of voluntary friendly societies¹⁴⁵ that offered social benefits to their members, while unions also provided their members with representation.¹⁴⁶ The functions of trade unions are not stable but are in a process of constant change and evolution, determined to a certain extent by prevailing political and economic conditions. In this discussion, I will consider the core responsibilities of trade unions in Great Britain and the effects of listing, collective bargaining and industrial action on their social responsibility. It should be noted at this stage that the social responsibility of trade unions in Great Britain is not formalised.

6.2. Job Regulation

It is again clear from the definition of 'trade union' as used in Great Britain that job regulation should come at the top of the list of purposes for trade unions. This role relates mainly to 'matters of mutual interest' between the parties. These include terms and conditions of employment, which are dealt with under collective bargaining. British trade unions won minimum labour standards without the aid of legislation.¹⁴⁷ Consequently, Great Britain has no general legislation relating to, for example, holidays (although there is regulation of holidays in agriculture).¹⁴⁸

¹⁴⁴ See Perrins op cit note 116 at 3.

¹⁴⁵ See Van Jaarsveld & Van Eck op cit note 9 at 205 para 554. The friendly societies replaced the medieval labour guilds, whose aim was to provide mutual assistance.

¹⁴⁶ See Taylor op cit note 75 at 5.

¹⁴⁷ See Kahn-Freund op cit note 87; See Hepple op cit note 13 at 22. Note also that until 1998 it was a distinctive feature of British labour law that there was no general legislation laying down minimum standards for the length of the working day or the number of rest days and holidays. These are mainly regulated by directives and regulations.

¹⁴⁸ See Hepple op cit note 13 at 114.

British trade unions play an important job regulatory function, which acknowledges that trade unions are involved in a process of rule-making that extends beyond their members. This is done in one of the two ways; either directly or indirectly. It takes place directly through multi-employer collective bargaining, such as the Joint Industrial Councils, which set terms and conditions for an industry or sector, and indirectly through regulatory legislation where trade unions play a part in securing and lobbying for legislation.¹⁴⁹ The regulatory function of trade unions arises mainly by virtue of the scope and extent of the bargaining process.

This regulatory role is reinforced where there are legal mechanisms in place designed to extend an agreement so that it applies to employers in the sector even though they were not party to it by virtue of membership of the employer's federation.¹⁵⁰ In a regulatory – as opposed to a representational – system of collective bargaining, it is less likely that workers will have to be members of a trade union in order to be covered by a collective agreement. Hence, regulatory systems such as those in France, Germany and Italy have a higher density gap between trade union membership and collective bargaining coverage than do representational systems such as the United States and Canada.¹⁵¹ Great Britain has also largely moved to the representational system.¹⁵² Hence, listed trade unions which are independent are at an advantage as they may negotiate a collective agreement modifying or derogating from rights contained in the Working Time Regulations, the Fixed-Term Employees Regulations 2002.¹⁵³ In Great Britain, at a collective level, industrial action is generally unlawful unless it falls within the scope of limited statutory immunity. However, workers or their trade union can be engaged in industrial action if it is in contemplation

¹⁴⁹ See Collins H; Ewing KD & McColgan A *Labour Law Text and Materials* 2ed (2005) at 650.

¹⁵⁰ See Bercusson B *Fair Wages Resolutions* (1978), Part IV. For the position in other OECD countries, see OECD, *Employment Outlook* (1994), Chapter 5.

¹⁵¹ See ILO, *World Labour Report* (1998) at 248.

¹⁵² See Ewing KD *The Functions of Trade Unions* *Industrial Law Journal* 34(1) March (2005) at 1.

¹⁵³ See para 3 of this chapter.

or furtherance of a trade dispute that relates wholly or mainly to terms and conditions of employment.¹⁵⁴

The above discussion indicates that listing, collective bargaining and economic power, although limited in certain respects, have a part to play in the job regulation role of British trade unions.

6.3. Job Security

British trade unions also play an important representational function in ensuring the job security of their members.¹⁵⁵ This is also a collective bargaining role. Trade unions represent the interests of the employees in the workplace and offer them protection. This protection may take the form of individual representation, in which case the representation may be an extension of the union's service function in the sense that the union is providing the service of representation to those who may have a grievance or a disciplinary problem.¹⁵⁶ It may also take the form of providing professional support and a lay advocate or companion in any forum for handling individual disputes. It may also take the form of collective representation, in which case the representation may be close to the regulatory function of a trade union. Collective representation itself may take several forms, including consultation and bargaining on behalf of the workforce as a whole, both members and non-members alike.¹⁵⁷

Furthermore, section 10 of the Employment Relations Act 1999 creates a right for the worker who is invited to a disciplinary hearing to be accompanied by a companion who can either be an official of an independent trade union (not necessarily recognised by the employer) or a trade union official who has been certified by the union as having experience or having received training in acting as a worker's companion in such hearings, for example a shop steward. In redundancy cases the employer is

¹⁵⁴ See s 244(1)(a) of TULRCA. Such terms do not only include contractual terms and conditions but also terms understood and applied by the parties in practice, or habitually, without ever being incorporated into the contract (see *British Broadcasting Corporation v Hearn* [1977] IRLR 102).

¹⁵⁵ See Taylor op cit note 75 at 23.

¹⁵⁶ See Hugh et al op cit note 147 at 650.

¹⁵⁷ See Ewing op cit note 152 at 1.

also required to consult with the unions regarding the best means by which the desired object can be achieved with as little hardship as possible. However, failure to consult with the union does not necessarily mean that a dismissal is unfair.¹⁵⁸

An independent trade union has an advantage in redundancy cases, as section 188 of TULRCA requires the employer to consult with an independent trade union.¹⁵⁹ Consultation in this regard requires the employer and the appropriate representatives to discuss, among other things, ways of avoiding the proposed dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences.¹⁶⁰ In addition, the criterion for selection should be agreed on.¹⁶¹ A listed trade union which is independent may negotiate a dismissal procedure agreement with the employer. It also has the right to be consulted about proposed transfers.¹⁶²

Although with some limitations, British workers or their trade union can engage in industrial action which is in contemplation or furtherance of a trade dispute that relates wholly or mainly to termination of employment or suspension¹⁶³ and also on matters of discipline.¹⁶⁴ The TUC represents and supports UK workers who currently lack employment protection in relation to rights and conditions at work. A Commission on Vulnerable Employment¹⁶⁵ has been set up to highlight the issues facing this group.¹⁶⁶

This discussion has shown that listing, collective bargaining and economic power play a role in job security as a social responsibility of British trade unions.

¹⁵⁸ See *Forman Construction Ltd v Kelly* [1977] IRLR 468.

¹⁵⁹ See Council Directive 75/129/EEC, as replaced by Council Directive 98/59/EC.

¹⁶⁰ See s 188(2) of TULRCA.

¹⁶¹ This is one of the principles mentioned in *Williams v Compare Maxam Ltd* [1982] IRLR 83.

¹⁶² See para 3 of this chapter.

¹⁶³ This may include fear of future job losses (see *Hadmor Productions v Hamilton* [1982] IRLR 102).

¹⁶⁴ See s 244(1)(b) and (d) of TULRCA.

¹⁶⁵ The Commission was launched in 2007 to investigate the extent of workplace exploitation and consider improvements to the enforcement regime and legal protection available. The Commission has 16 members representing employers; academics; trade unions and civil society.

¹⁶⁶ In doing this the TUC is working together with groups like the National Union of Students and the Muslim Council of Britain, both of which represent groups whose members are likely to be employed in sectors with high levels of vulnerable employment (see TUC Directory 2008 at 3).

6.4. Employment Equity and Discrimination

In addition to the Commission mentioned above, Great Britain has established other two Commissions, the Equal Opportunity Commission (EOC) and the Commission for Racial Equality (CRE), which have been charged with a general duty to work towards the elimination of discrimination on the grounds of sex and to promote equality of opportunity between men and women or persons of different racial groups and also to review the operation of the anti-discrimination legislation.¹⁶⁷ Since 2000, the two Commissions have been joined by the Disability Rights Commission (DRC), which was established by the Disability Rights Commission Act 1999. The duty of this Commission is to work towards the elimination of discrimination against disabled persons. Its powers include proposing changes in law.¹⁶⁸ In all these Commissions trade unions and employers are represented.¹⁶⁹ British trade unions play an important role in developing and pressing for equal opportunity policies in the workplace.¹⁷⁰ The TUC also plays an important role in ensuring that new equal opportunity policies and procedures are being introduced.¹⁷¹ According to the EOC there remains a role for trade unions to monitor employment practices for sex discrimination and to challenge potential unlawful discrimination. This need is even stronger where there is no clear statutory framework of equality legislation and user-friendly procedures like in Britain.¹⁷²

In Great Britain trade unions are not required to be listed or be independent in order to play this role. Moreover, although this role is not categorically mentioned as one of the matters that can be bargained upon or included in collective agreements, it may be covered under the process of collective bargaining. However, from the definition of trade dispute it would not seem

¹⁶⁷ See the Sex Discrimination Act of 1975, Part VI.

¹⁶⁸ This Commission has however been replaced by the Commission for Equality and Human Rights created in terms of the Equality Act 2006.

¹⁶⁹ See Taylor op cit 75 at 165-166.

¹⁷⁰ British trade unions have acted as a force for equality, compressing wage differentials between skilled and unskilled men and women and black and white workers (see D Metcalf 'Water notes dry up', *British Journal of Industrial Relations* (1989), 27, 1). See also Taylor op cit note 75 at 147.

¹⁷¹ Ibid.

¹⁷² Ibid at 148.

to be a matter that can be backed by industrial action, unless it falls under section 244(2) of TULRCA.

6.5. Health and Safety

A paramount function of every trade union is to ensure the welfare of its members with regard to healthy conditions and safety in their work.¹⁷³ These matters all fall under collective bargaining and may be regulated in terms of a collective agreement.¹⁷⁴ In Great Britain, a Health and Safety Commission has been established in terms of the Health and Safety at Work Act 1974.¹⁷⁵ This Commission is responsible for supervising the promotion of health and safety at work. It consists of a chairman, three members representing employers and three representing trade unions.¹⁷⁶ Under this Act, listed and independent trade unions can appoint safety representatives. A trade union which is recognised by the employer may also appoint safety representatives from among the employees in respect of whom the union is recognised;¹⁷⁷ however, the appointed persons need not be members of the union. The employer has to consult with these representatives regarding all health and safety issues in the workplace and these representatives will investigate complaints and representations to employers regarding health issues. Under the 1974 Health and Safety at Work Act, health and safety committees are a statutory requirement where trade unions are recognised by employers but this is not the case in non-union companies.

Also representatives nominated by the TUC sit with those from the Confederation of British Industry (CBI) on the governing council of the Health and Safety Commission. No safety or health regulations are accepted by the Health and Safety Executive unless they have secured the approval of both trade union representatives and employers. In 1993, the Trade Union Reform and Employment Right Act strengthened the position of workers on

¹⁷³ See Turner-Samuels M *British Trade Unions* (1949) at 123. See also Taylor op cit note 75 at 149-153; Hughes J & Pollins H *Trade Unions in Great Britain* (1973) at 39.

¹⁷⁴ See definition of collective agreement under para 4.3 of this chapter.

¹⁷⁵ The Employment Protection Act 1975 amended the 1974 Act by limiting to recognised trade unions the power to appoint safety representatives and management.

¹⁷⁶ See Taylor op cit note 75 at 166.

¹⁷⁷ See *Cleveland County Council v Springett* [1985] IRLR 131.

health and safety issues with a provision that not only protected safety representatives from unfair treatment by their employer but also safeguarded workers from employer attacks ‘in circumstances of danger which the employee believes to be serious and imminent and which he or she could not reasonably be expected to avert’, and led them to leave the job or refuse to return to it while they believed the danger persisted.¹⁷⁸ Under this Act, safety representatives appointed by recognised trade unions retain considerable legal powers. They have the right to represent their members in industrial injury and sickness cases, to investigate potential health hazards in the workplace and deal with members’ health and safety complaints. They can also make formal workplace inspections at least once every three months.

Winning compensation for industrial illness and injuries is an increasing area of work for trade unions in Great Britain.¹⁷⁹ In 1992, the TUC estimated that its affiliate unions dealt with as many as 125 000 personal injury cases and recovered over £300 million in settlements for their members. In Great Britain, workers or their trade union may engage in industrial action in contemplation or furtherance of a trade dispute which relates wholly or mainly to the physical conditions in which any workers are required to work. Collective bargaining, the listing of a trade union and industrial action thus play a part in the health and safety of workers as a social responsibility role.

6.6. Skills Development

The training of workers is another important item on the bargaining agenda of trade unions.¹⁸⁰ In Great Britain, if a trade union is recognised it will be entitled to be consulted about the employer’s policies on training for workers within the bargaining unit and the plans for training those workers during the following six months, and to receive information about training provided since the previous meeting. Great Britain has Industrial Training Boards

¹⁷⁸ See Taylor op cit note 75 at 151.

¹⁷⁹ See Labour Research Department Bargaining Report, April 1994.

¹⁸⁰ See Taylor op cit note 75 at 153-158.

established in terms of the Industrial Training Act 1982, comprising a chairman, with an equal number of persons from different stakeholders, that is, employers and trade unions, educational representatives, etc. These boards may provide courses for training purposes, or approve courses to be run by other institutions.

After the abolition of the Training Commission in 1988, Training and Enterprise Councils (TECs) were established between 1990 and 1991 comprising employers, members from local education, training and development activities, voluntary bodies and trade unions that supported the aim of the Council. The main aim of the Council was to reverse what was perceived as the chronic failure of government policies to secure sustained employer commitment to and investment in training.¹⁸¹ However, another initiative was launched in 2001 under the leadership of the newly created Learning and Skills Council and the TECs were wound-up.¹⁸² The TUC has an arm called TUC Aid which is the development arm of the British trade union movement. This organisation promotes the long-term development of trade unions.¹⁸³ Trade unions form part of bodies such as the Sector Skills Development Agency and the Sector Skills Councils established by the government to address learning and skills needs. The government has also set aside money to fund a Union Learning Fund to support the trade unions' role in learning¹⁸⁴

As collective bargaining role players, trade unions whether listed or not have a developmental function. This is not one of the matters mentioned in the definition of collective agreement; however parties may choose to include it in their bargaining. Skills development does not fall under the definition of

¹⁸¹ See Hepple op cit note 13 at 61. The key functions of the TEC include to encourage employers to take a long-term view of training as an investment with clear business benefits; to work in partnership with local authorities and other local bodies to frame strategies for local regeneration; to widen access to training and business support in order to improve the competitive position of local businesses, and to ensure that decisions about publicly funded training are based on sound information about local needs.

¹⁸² The aim of this new council was to raise participation and attainment through education and training, targeting both young people and adults.

¹⁸³ The TUC has always identified itself closely with education, and as far back as the 1898 Congress called for a radical reform of the education system (see Turner-Samules op cit note 173 at 117).

¹⁸⁴ See Ewing op cit note 152 at 19. By 2004, £24 million had been allocated to 350 projects.

trade dispute and therefore no action may be taken in contemplation or furtherance of this role in the form of industrial action.

7. SOCIAL RESPONSIBILITIES OF TRADE UNIONS IN GREAT BRITAIN

Johan Monks who was the General Secretary of the TUC had the following to say regarding the role of British trade unions:

Workers today need support of trade unions as much as at any time in the past 100 years. And as I travel around the country, talking to workers and employers I find a great identification with any trade union message that the way forward for Britain lies in a combination of a strong commitment to economic success and a strong commitment to social justice.¹⁸⁵

7.1. Introduction

Over and above the core responsibilities of trade unions as discussed above, there are broader social responsibilities that trade unions in Great Britain pursue beyond workplace issues. The regulation of relations between workers and employers is but one of trade unions' principal purposes. Provided that British trade unions have the above role among their principal purposes, they may engage in any other lawful activities and still enjoy the status of a trade union.¹⁸⁶ The role of trade unions in Great Britain with regard to the following matters will now be considered: the economy; politics; HIV/AIDS; the environment; poverty alleviation; education and training; legal and financial assistance; unemployment; social protection. Great Britain is a member state to the United Nations¹⁸⁷ and, like South Africa, it is therefore also bound by the eight Millennium Development Goals which include, among others, the eradication of hunger and poverty; combating HIV/AIDS; and environmental sustainability. British trade unions have a role in achieving these goals as part of their social responsibility.

¹⁸⁵ See Monks J (General Secretary of the TUC) in the Introduction to *The Future of the Trade Unions* by Robert Taylor.

¹⁸⁶ See *Manpower and Employment in Britain: Trade Unions* (1975) at 2.

¹⁸⁷ See <http://www.un.org/en/members> visited on 28 January 2013. The United Kingdom of Great Britain was admitted as a member of the United Nations on 24 October 1945.

7.2. The Economy

In 1962, the Conservative government undertook to establish a tripartite¹⁸⁸ National Economic Development Council (NEDC) as 'effective machinery for the coordination of plans and forecasts for the main sectors of the economy'.¹⁸⁹ The Council was established to act as a pressure group with the following mandate:

- To examine the economic performance of the nation with particular concerns for plans for the future in both private and public sectors of industry.
- To consider together the obstacles to quicker growth, and to consider what can be done to improve efficiency and whether the best use is being made of the resources.
- To seek agreement on ways of improving economic performance, competitive power and efficiency, in other words to increase the sound rate of growth.¹⁹⁰

This structure served as a body in which representatives of industry and commerce discussed government's economic plans and policies directed at securing economic growth. The economic planning role was, however, later shifted to the Department of Economic Affairs (DEA) after the Labour government came into power and the NEDC was relegated to an advisory role only. NEDC was abolished in 1992 along with its secretariat. This clearly deprived trade unions access to an invaluable consultative forum, which made a positive contribution to the analysis of economic policy.¹⁹¹

However, the main economic objective of trade unions, including British unions, remains to defend and negotiate to improve their members' wages through collective bargaining.¹⁹² They can therefore also back their demands with industrial action in line with provisions of section 244 of

¹⁸⁸ It is comprised of union representatives; employer representatives and the government.

¹⁸⁹ See Selwyn L, quoted in Richard Bailey, *Managing the Economy* (London: Hutchinson, 1968) at 19.

¹⁹⁰ Ibid.

¹⁹¹ See Taylor op cit note 75 at 164.

¹⁹² See Burkitt B & Bowers D *Trade Unions and the Economy* (1979) at 23.

TULRCA. They may even use industrial action in socio-economic disputes that do not necessarily relate to the worker and employer, but which cannot be settled without a government minister exercising statutory power in terms of section 244(2) of TULRCA.

7.3. Politics

Trade unions are social and political actors.¹⁹³ In 1900 a number of British trade unions affiliated to the TUC in order to establish the Labour Representation Committee from which emerged the Labour Party. However, as mentioned before, there is no organisational link between the TUC and the Labour Party, although there is regular liaison. There are also individual trade unions which are affiliated to the Labour Party.¹⁹⁴ Furthermore, British trade unions have a political representation function through which they seek to protect and promote the interests of members in the political sphere and sometimes this requires a close relationship with political parties, legislators and governments.¹⁹⁵

Although British trade unions may have political objects, there is one limitation on that freedom. In 1909, the House of Lords held in the *Osborne*¹⁹⁶ case that it was beyond the powers of a trade union to levy a contribution on members to support the Labour Representation Committee.¹⁹⁷ This was later overruled by the Trade Union Act, 1913. TULRCA now lays down the necessary requirements to be met before a trade union can have a political fund and pursue political objects.¹⁹⁸ Accordingly, a resolution to establish such a fund must be passed at least every ten years by a ballot of all the union members, and if approved a separate fund may be created.¹⁹⁹ If such a fund is established no property of the union shall be

¹⁹³ See McIlroy op cit note 10 at 54.

¹⁹⁴ See Hepple op cit note 13 at 23.

¹⁹⁵ See Hughes et al op cit note 173 at 650.

¹⁹⁶ See *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87; see generally on the subject, Ewing KD *Trade Unions, The Labour Party and the Law* (1982).

¹⁹⁷ This was, however, overruled by the Trade Union Act 1913 which permitted a trade union to have any lawful objects. The Act laid down a complicated set of conditions which must be observed before the union may expend funds on political objects. The conditions served to protect political dissidents within the union.

¹⁹⁸ See ss 71–74 of TULRCA.

¹⁹⁹ See ss 71–96 of TULRCA.

added to that fund other than sums representing contributions made to the fund by the members. In addition, no liability to the fund may be met out of any other fund of the trade union. Any member who wants to contract out of the fund must be free to do so and if he does he shall not in consequence be excluded from any benefit or disqualified from holding any office other than a position connected with the management of the fund. Moreover, contributing to the fund must not be a condition for membership. An allegation that a union has broken the rule as to the use to which the political fund may be put may be subject to the officer's investigation. In *Richards v National Union of Mineworkers*²⁰⁰ a complaint was made that the union had spent money from the general fund sending members on a lobby of Parliament organised by the Labour Party. It was subsequently held by the Officer that such expenditure was in furtherance of political objects and he ordered that the money should come from the political funds and not general funds.

British trade unions have a government and public administration function which has two dimensions. The first involves the organised political representation of working people, both as a means of restraining the power of the state and a means of harnessing the power of the state. Secondly, these functions also involve trade unions being engaged in the process of government in the sense of being involved in the development, implementation and delivery of government policy. The latter function takes several forms. The first is where a trade union is an instrument for the delivery of certain programmes, whether health insurance or education. In other words, trade unions become to a certain extent the administrative agents of the State.²⁰¹ The other one is where trade unions are instruments for the delivery of certain economic objectives such as controlling wage inflation.

An important function of trade unions in a centralised system of industrial relations is their collaboration with the government in the formulation and

²⁰⁰ [1981] IRLR 247.

²⁰¹ See Cole GDH *Organised Labour* (1924) at 146.

implementation of industrial and social policies. Trade unions in Great Britain have also fought for human rights, with the object of obtaining and maintaining equal pay for equal work for women and to promote equal opportunities within the workplace and society in general, regardless of sex, race, national origin, etc.²⁰² TUC Aid also promotes long-term human rights throughout the world, raising funds for long-term development and capacity activities in developing countries.²⁰³

Trade unions are not required to be listed in order to perform this role and the role may not necessarily be subject to collective bargaining, as it can only be backed by industrial action if it falls under the provisions of section 244(2) of TULRCA.

7.4. HIV/AIDS

British trade unions have a tradition of helping to organise workers for democratic and developmental purposes. They are respected for promoting and providing education and information programmes for workers and building mutual understanding across a variety of social, cultural, political, organisational and geographical divisions. They also support social and welfare programmes which cover issues such as women's empowerment, the elimination of child labour and workers' health. They also raise awareness about issues such as HIV/AIDS. TUC Aid supports trade unions in developing workplace strategies to combat HIV/AIDS in sub-Saharan Africa. The federation has demanded action from employers to introduce clear and effective HIV/AIDS policies in the workplace. In 2004, it was reported that 53 000 people were living with HIV/AIDS in the UK, most of whom are of working age. Subsequently, a new website was introduced by the TUC entitled *Dealing with HIV and AIDS in the workplace*.²⁰⁴ UNISON, which is one of the biggest trade unions with 1.3 million members, has collaborated with South African trade unions since the late 1980s on HIV/AIDS-related

²⁰² See Collins et al op cit note 147 at 650.

²⁰³ The TUC has always identified itself closely with education, and as far back as 1898 Congress called for a radical reform of the educational system (see Turner-Samules op cit note 173 at 117).

²⁰⁴ See <http://www.worksmart.org.uk> visited on 21 August 2015.

matters. In 2001, it resolved to take further action on HIV/AIDS through practical solidarity, political lobbying and support for sister unions throughout the developing world.²⁰⁵

7.5. The Environment

The TUC is involved in the Green Workplaces project in the South West funded by the South West Regional Development Agency, working with unions such as the Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU) to promote workplace-based initiatives that bring together management and workers to secure energy savings and reduce the environmental impact of the workplace.²⁰⁶ This project shows how unions are leading the way in a wide range of initiatives for energy saving at work, waste reduction, recycling etc. The TUC has also launched a network for union green activities and works with unions and management to deliver training and support in projects aimed at greening workplaces.²⁰⁷

In 1972, the TUC held a conference on 'Workers and the Environment' which proved that although the central interest for trade unions is in the workplace environment, their concern extends beyond the boundaries of the factory to the domestic and natural environments.²⁰⁸ The TUC has even suggested that environmental issues should be brought into collective bargaining.²⁰⁹

7.6. Poverty Alleviation

Johan Monks has the following to say regarding trade unions and poverty:

²⁰⁵ See <http://unison.org.uk/>. During 2002, UNISON activists took part in a campaign to press the British government to provide political and financial support to a new initiative, the UN Global Fund to Fight AIDS, Tuberculosis and Malaria ('Global Fund').

²⁰⁶ The project succeeded in training nearly 90 Green Workplace Champions throughout the South West (see <http://www.unionlearn.org.uk/initiatives/learn> visited on 25 October 2011).

²⁰⁷ See <http://www.tuc.org.uk/workplace-issues/green-workplaces> visited on 24 August 2015.

²⁰⁸ See Elliot D, Green K & Steward F *Trade Unions, Technology and the Environment* (1978) at 8. At the 1972 Annual Congress of the TUC, a motion was passed expressing concern about pollution and the environment.

²⁰⁹ *Ibid* at 9. In 1973-4, 13 trade unions had policies on the environment (these included Technical Administrative and Supervisory Staffs, Amalgamated Union of Engineering Workers, National Union of Mineworkers, the Association of Professional, Executive and Computer Staffs).

Both history and international comparisons in the present day demonstrate the close correlation between strong trade union organization and the possibility of a gradual reduction in inequality and the elimination of poverty and of deprivations.²¹⁰

The TUC has an arm called TUC Aid which is the development arm of the British trade union movement.²¹¹ It promotes the long-term development of trade unions and human rights throughout the world, raising funds for long-term development and capacity activities in developing countries, and union training and education activities in developing countries.²¹² It supports trade unions in their efforts to end poverty, ill-health and oppression. According to the TUC there should be full employment and work for all who want it, but those who cannot work should get decent benefits that lift them out of poverty.

7.7. Job Creation

Full employment is one of the objectives for British trade unions. They see this as the precondition for rising output and real incomes. The TUC played an important role in the formulation of full employment policies.²¹³ The GPMU pays its jobless members £10 a week for ten weeks in the year if they have paid more than one annual subscription.²¹⁴ The BECTU does not find work for its members but it does offer members assistance to join a job-finding service (Production Base) at a discounted rate. At the end of 2000, unemployment rates were at their lowest since 1975 at 5.5 per cent of the working population.²¹⁵

²¹⁰ Monks J (General Secretary of the TUC) in the Introduction to *The Future of the Trade Unions* by Robert Taylor at xv.

²¹¹ TUC Aid was established by the TUC General Council in 1988 with a view to raising funds for humanitarian relief, long-term development, education and training activities in developing countries and is a registered charity. It relies on trade unionists for funding.

²¹² The TUC has always identified itself closely with education, and as far back as the 1898 Congress called for a radical reform of the education system (see Turner-Samules op cit note 173 at 117).

²¹³ See Hughes et al op cit note 173 at 40.

²¹⁴ See Taylor R *The Future of the Trade Unions* (1994) at 64.

²¹⁵ See Hardy op cit note at 36.1.

7.8. Education and Training

Workers' training has a high priority on the agenda of most British trade unions.²¹⁶ The TUC also helps schools and colleges to prepare young people for working life by supporting teaching in the curriculum on trade unions and wider issues relating to the world of work.²¹⁷ In 2006, TUC Education merged with TUC Learning Services to form Union-learn. Union-learn has the following aims: to help unions become learning organisations with programmes for union representatives; to help unions broker learning opportunities for their members, running phone and online advice services; and to research union priorities on learning and skills.²¹⁸

The training of workers has a high priority on the bargaining agenda of most British trade unions. One impressive approach came in 1993 from trade unions in the Confederation of Shipbuilding and Engineering Unions (CSEU). The CSEU proposed that a new series of National Vocational Qualifications from levels one to five should be set as essential targets for the engineering industry.²¹⁹ The British trade union movement has consistently supported the extension and improvement of vocational training so that there should be a more skilled labour force for the purposes of economic growth and for the advantage of the individual worker him or herself (providing better earning opportunities and opening new interests).²²⁰

In 1956, the TUC participated in the work of the Carr Committee to consider arrangements for industrial training in the light of the substantial increase in school leavers. It further played an important role in the setting up of the Industrial Training Council in 1958 through which trade unions, employers

²¹⁶ In 1993 the Confederation of Shipbuilding and Engineering Unions (CSEU) initiated what they called 'Engineering The Future', which was a training initiative for engineers. The TGWU (Transport and General Workers Union) and the GMB called for a right for workers to have a minimum five days a year paid education or training.

²¹⁷ See TUC Directory 2008 at 36.

²¹⁸ See TUC Directory 2008 at 75.

²¹⁹ See Taylor *op cit* note 76 at 153; speech by B Jordan, February 1994.

²²⁰ See Mortimer JE *Trade Unions and Technological Change* (1971) at 55.

and nationalised industries cooperated to expand training facilities in British industry.²²¹

7.9. Financial and Legal Assistance

British trade unions have a service function which involves the provision of services and benefits to members. This function takes two forms. One is a friendly society and the other is professional services. The friendly society provides benefits such as health and unemployment benefits which may include discount insurance and suchlike, since the traditional service functions have been taken over by the State. The professional services include legal advice²²² and representation to help with problems at work, accidents on the way to work, as well as problems unrelated to work.²²³

British trade unions continue to provide a wide range of financial benefits to their members.²²⁴ In 2012 UNISON gave more than 4000 grants to its members totalling £750,000.²²⁵ Unity Trust Bank²²⁶ also plays an important role in providing services to trade unions. It provides, for example, member benefit packages which include motor and home insurance, personal loans and mortgages. It also provides pension services to trade union members.²²⁷ It further promotes trade union interest in the concept of collective ownership and profit-sharing schemes. BECTU has a death benefit which the next of kin of members with at least five years' continuous service and who are members at the time of their passing are entitled to claim. It also has a Benevolent Fund which provides grants to members in financial

²²¹ Ibid at 58. Trade unions were among the strongest supporters of public action for better training and welcomed the passing of the Industrial Training Act in 1964.

²²² The TGWU provides members with half an hour of free legal advice with its solicitors on any subject in over a hundred different locations. In 1993 legal advisers for GMB won £44 million in compensation for its members in occupational accident and disease cases. See also Price J *British Trade Unions* (1942) at 25.

²²³ See Ewing op cit note 150 at 3.

²²⁴ See <http://www.tuc.org.uk/sites/default/files/unionatwork.pdf> at 5 visited on 26 August 2015.

²²⁵ See <http://www.unison.org.uk> visited on 27 August 2015.

²²⁶ Established in 1984 with the aim of becoming a significant financial power in the voluntary sector by the end of the century. See <https://www.unity.co.uk> visited on 27 August 2015.

²²⁷ See Taylor op cit note 75 at 145.

difficulty.²²⁸ The members of the union also have cover for any accidents whether at or away from work and union lawyers assist in that regard.

7.10. Social Protection

Trade unions in Great Britain also offer a service function in the form of provisions for cash benefits.²²⁹ This goes back to the early days when trade unions were more in the nature of benefit societies or friendly societies than industrial organisations.²³⁰ This function takes two forms. One is the friendly society approach in the form of benefits such as health and unemployment benefits, modernised to include discount insurance and suchlike, as traditional service functions have been taken over by the state. The other is professional services, which include legal advice²³¹ and representation to help with problems at work as well as problems unrelated to work.²³² Trade union mutual aid societies were the pioneers of modern social security. At the time when the state introduced state social insurance trade union experience provided the basis for the new state schemes.

British trade unions have expanded their benefits as a recruitment tool and now offer a wide range of services. Trade unions may play a role in this function as collective bargaining role players, whether listed or not, even though this is not necessarily a collective bargaining topic in Great Britain. This role does not fall under the definition of a trade dispute, however, and therefore no action may be taken in contemplation or furtherance of this role in the form of industrial action.

²²⁸ See <http://www.bectu.co.uk/> visited on 08 November 2012.

²²⁹ See Hughes et al op cit note 173 at 650.

²³⁰ This covered a range of benefits such as strike and victimisation pay; sick and accident and unemployment benefits, distress payments, legal assistance, funeral expenses, wives and children insurance, etc (see Turner-Samuels op cit note 173 at 129). However the right to such benefits is often dependent upon a number of conditions, e.g. payment of contributions.

²³¹ See Taylor op cit note 75 at 146.

²³² See Ewing op cit note 152 at 1.

8. CHALLENGES FACING TRADE UNIONS IN GREAT BRITAIN

Trade unions in Britain are confronted by some challenges. On the one hand membership has been eroded owing to structural changes in the economy and society,²³³ while on the other hand unfavourable political and institutional conditions make organising even more difficult.²³⁴ Long-term socio-economic changes also make collective organisation more difficult.²³⁵ The de-industrialisation and the growth of private services, white-collar, atypical, and part-time employment have also had an effect on trade union popularity and membership.²³⁶ In addition, the use of more flexible forms of labour by companies wanting to cut costs has had an effect as there has been a huge growth in temporary staff, contract labour and part-time workers. An important structural change that has further affected the level of trade union strength in the workplace has been a decline of the large-scale enterprises where workers were, since the 1940s, mainly represented by trade unions. Technological innovation has also increased the speed of change in the workplace.²³⁷

British trade unions are responding by increasingly adopting recruitment drives and measures to pool resources via mergers.²³⁸ A major long-term change has been the promotion of female participation in the union movement.²³⁹ Women represent 45% of union membership in the TUC.²⁴⁰ Low membership among young workers should also be a cause for concern about the future membership development of British trade unions. For many of the young people, unions seem to be rather old-fashioned

²³³ Total trade union membership in Britain fell by more than a quarter from 13.3 million in 1979 to 9.0 million in 1993. The numbers have however stayed around 7.3 million since 2000, but dropped below 6 million in 2012 (see Taylor op cit note 75 at 29 and http://www.en.wikipedia.org/wiki/Trade_Unions visited on 24 August 2015).

²³⁴ See Ebbinghaus B 'Trade Unions' Changing Role: Membership Erosion, Organisational Reform, and Social Partnership in Europe' (EU Paper Series, The European Union Center, University of Wisconsin – Madison, May 2002) at 2. See also Taylor op cit note 75 at 33.

²³⁵ Ibid at 43.

²³⁶ See Ebbinghaus B & Visser J (1999), 'When Institutions Matter: Union Growth and Decline in Western Europe, 1950-1995' *European Sociological Review* 15).

²³⁷ See Taylor op cit note 75 at 41-42.

²³⁸ See Visser J 'European Trade Unions in Mid-1990s' in B Towers & M Terry (eds) (1998) *Industrial Relations Journal* at 31; Waddington J 'Articulating Trade Union Organisation for the New Europe?' *Industrial Relations Journal* (2001) at 32.

²³⁹ See Taylor op cit note 75 at 57-59.

²⁴⁰ See Ebbinghaus op cit note 234 at 9.

movements that are certainly less attractive than ‘new’ social movements and ‘fun’ leisure activities.²⁴¹

Some of the trade unions in Britain have merged or amalgamated. In 1978 the TUC had 112 trade unions affiliated to it, but by 1994 the number had declined to 69 as a result of amalgamations. The TUC has stated that four factors have become influential in encouraging the trade union merger process: (i) the need to secure the trade union’s financial base; (ii) enhancing the range of services that trade unions could provide their members; (iii) enabling the newly merged union to extend its influence and (iv) improving the competence of union organisation.²⁴²

9. CONCLUSION

Great Britain has ratified treaties guaranteeing freedom of association,²⁴³ therefore the right to associate enjoys protection and workers have a right to form trade unions. An organisation of workers does not have to be listed in order to qualify as a trade union as defined by TULRCA²⁴⁴ and even in terms of common law no registration is required for a trade union to carry out its activities. Although trade unions can operate as voluntary organisations, to be recognised as a trade union such an organisation must have ‘the regulation of workers’ as one of its main purposes.

Great Britain has a system of voluntary listing and listed trade unions enjoy certain benefits, for example having access to information that is not available to unlisted trade unions.²⁴⁵ It is evident therefore that listing plays an important role in the overall functioning of British trade unions. For trade unions to play their social responsibility role effectively with direct

²⁴¹ Ibid at 14. See also Taylor op cit note 75 at 60-61.

²⁴² See Taylor op cit note 75 at 70-71. According the supplementary evidence provided by the TUC to the Commons Employment Committee, the financial factors driving mergers included the savings associated with economies of scale through the more efficient use of personnel and capital resources; the release of assets; a sounder financial base; a route out of financial difficulties for individual unions. Further, that certain services can more easily be provided and delivered with a larger membership and financial base, which can include research facilities; employment experts (e.g. covering health and safety, legal issues, management techniques, etc) and the provision of trade union education.

²⁴³ See para 6.2.3 of this chapter.

²⁴⁴ See s 1 of TULRCA and para 3 of this chapter.

²⁴⁵ See para 3 of this chapter.

bearing on employment, they need to be listed. Unlisted trade unions may be able to play this role, but to a limited extent. Although unlisted trade unions are recognised, under British law more support is given to listed trade unions. Although both listed and unlisted trade unions can fulfil their social responsibilities without affecting the employment relationship, where employers are involved they nevertheless prefer to deal with listed trade unions than unlisted trade unions.

Even though there is no constitutional right to collective bargaining in Great Britain, the country has ratified the Convention on the Right to Organize and Collective Bargaining²⁴⁶ and therefore recognises collective bargaining. However, one of the weaknesses of this system in Britain is that there are no structures like Bargaining Councils and Statutory Councils to support the system and make it more efficient. Although collective agreements are concluded between trade unions and employers or employers' association, they are not intended to be enforceable as contracts unless such an intention is expressed in writing.²⁴⁷ TULRCA promotes collective bargaining in a number of ways, including affording protection to the right of employees to form, join and participate in the activities of trade unions. In Great Britain most matters with a bearing on the employment relationship are dealt with through collective bargaining and contained in collective agreements.²⁴⁸ Although issues or aspects beyond the employment relationship, such as economic policies and social change and politics, may not be dealt with formally through collective bargaining, they are usually covered under the collective bargaining processes. Another disadvantage of the British system is the lack of a structure in the mould of NECD, which played a similar role to the role of NEDLAC in South Africa. Such a forum would provide a good platform for trade unions to participate in the economic development of the country.

Great Britain has no legally guaranteed right to withdraw labour. The power of industrial action is limited as industrial action is regulated by common

²⁴⁶ See Convention 98 of 1949.

²⁴⁷ See para 4 of this chapter.

²⁴⁸ See para 4 of this chapter.

law wrongs in tort and contract and is further circumscribed by statutory immunities for action in contemplation or furtherance of trade disputes.²⁴⁹ Matters which may fall under trade disputes are the same as matters that can be covered under collective bargaining.²⁵⁰ This implies that although limited in the way it is regulated, industrial action plays an important part in the social responsibility role of trade unions as it relates to the employment relationship. It can also play a role in disputes which do not relate to the worker and employer, but which cannot be settled without a government minister exercising statutory power, which may include socio-economic factors in terms of section 244(2) of TULCRA.

Although trade unionism is said to have started in Great Britain, it seems the law in that country has played a less significant role in supporting trade unions and their role.

²⁴⁹ See para 5 of this chapter.

²⁵⁰ See para 5 of this chapter.

CHAPTER 5: AN INTERNATIONAL PERSPECTIVE: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS IN AUSTRALIA

1. INTRODUCTION

Unlike South Africa and Great Britain, Australia is a federal state and in any such state, power is shared between the federal and state authorities. This sharing of power results in citizens being subject to two sets of laws instead of just one.¹ Australia is a federation of six former British colonies which, in 1901, became the Commonwealth of Australia by virtue of an Act of the British Parliament,² the Commonwealth of Australia Constitution Act.³ This Constitution outlines the relationship between each state and the Commonwealth. Accordingly, each state has legislative autonomy to regulate industrial relations within its boundaries. Until 2009, Australia had a multiplicity of industrial relations systems within which many trade unions and organisations functioned and it also had a range of dispute-settling procedures.⁴ However, since the introduction of the Fair Work Act of 2009, this has changed. Australia was chosen for this study for the following reasons:

- Australia has British colonial origins which shaped the character and structure of Australian trade unions; however, the development of industrial relations in Australia took a different turn from those of the British, as Australia did not continue with the voluntary British tradition of industrial relations, but instead established a system of compulsory arbitration of industrial disputes.⁵ This system also differs from the South African one, which is voluntary in nature. The

¹ Australian citizens are subject to both the federal law and state law. See Nil Lante Wallace-Bruce *Employee Relations Law* 1ed (1998) at 15.

² See Brooks B *International Encyclopaedia for Labour Law and Industrial Relations in Australia* (2002) Vol 3: Editor in Chief Prof Dr R Blanpain at 13.

³ The Commonwealth of Australia Constitution Act of 1900.

⁴ See Brooks op cit note 2 at 13.

⁵ See Brooks B *Labour Law in Australia* (2003) at 13. An industrial dispute is defined in s 4 of the WRA, 1996 as 'matters pertaining to the relationship between employers and employees' and extends to include a 'threatened, impending or probable (interstate) dispute' or a 'situation that is likely to give rise' to such a dispute.

Australian system encouraged the rapid growth of trade unions and, by 1921, almost half of the Australian labour force was unionised.⁶

This chapter will focus on trade unions in Australia. It will investigate the historical development and legal framework for trade unions and their social responsibilities. It will further consider the effects of registration, collective bargaining and industrial action on the functioning of Australian trade unions.

2. HISTORICAL BACKGROUND OF TRADE UNIONS IN AUSTRALIA

2.1. Introduction

The Australian system of industrial law and industrial relations is rather complex as the country has an interlocking structure of state–federal relations which, since 1901, has been moving steadily towards a unitary, centralised system.⁷ The right of freedom to associate is recognised as a fundamental human right deeply rooted in international and Australian law.⁸ This right is recognised in the Universal Declaration of Human Rights (UNDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR), which are binding on Australia.⁹ It is also recognised as a fundamental principle in different ILO Conventions that have been ratified by Australia, including the Freedom of Association and Protection of the Right to Organise Convention¹⁰ and the Right to Organise and Collective Bargaining Convention.¹¹ The right to form and join a union has been recognised by Australian industrial law for over a hundred years. It was regulated in terms of the Workplace Relations Act, 1996 (WRA, 1996) and one of its objects was to ‘ensure freedom of

⁶ See Lansbury RD & Wailes N *Employment Relations in Australia in International & Comparative Employment Relations Globalisation and Change* edited by Bamber GJ, Lansbury RD & Wailes N (2011).

⁷ See Brooks op cit note 5 at 42.

⁸ See Irving M *Union Membership and Representation in Australian Charter of Employment Rights* edited by Bromberg M & Irving M (2007) at 54.

⁹ See <http://www.humanrights.gov.au> visited on 24 August 2015.

¹⁰ See Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

¹¹ See the Right to Organise and Collective Bargaining Convention 98 of 1949.

association, including the rights of employees and employers to join an organisation or association of their choice'.¹² The WRA, 1996, was followed by the Works Choice Act 2005 which brought about a number of reforms. The objectives of the reforms were the creation of a single national system for labour market regulation, expansion of Australian Workplace Agreements (AWAs) that could replace awards and increased restrictions on union activities. It also established a new body known as the Australian Fair Pay Commission.¹³ However, trade unions launched a campaign called 'Your Rights at Work' against the Act emphasising job security. The Act also changed the constitutional foundation for federal industrial relations legislation from the conciliation and arbitration power to the corporations' power. The Work Choices Act was followed by the Fair Work Act 2009. This Act brought reforms which include the establishment of Fair Work Australia as the new employment regulator. The office of the Fair Work Ombudsman was also established to promote and enforce compliance with new workplace laws.

2.2. The Development of Trade Unions in Australia

The development of trade unions in Australia is often dated from the 1850s;¹⁴ however, Quinlain and Gardner have found extensive evidence of trade union organisations from as early as 1825.¹⁵ Australia's earliest trade unions came into existence under the influence of the British trade unions.¹⁶ Although at the time most trade unions were mutual benefit

¹² In 2005 the ILO Committee of Experts determined that Australia's industrial laws failed to give adequate protection to workers against anti-union discrimination by permitting employers to offer a job to a prospective worker on the condition that he or she signed an Australian Workplace Agreement (AWA).

¹³ See Lansbury & Wailes op cit note 6 at 119.

¹⁴ See Hagan J 'The Australian Union Movement: Context and Perspective, 1850-1987' in Ford B & Plowman D (eds), *Australian Unions: An Industrial Relations Perspective* 2ed (1989) Macmillan, Melbourne) at 1.

¹⁵ See Quilan M & Gardner M (1990) 'Researching Australian Industrial Relations in the Nineteenth Century' in G Patmore (ed), *History and Industrial Relations* (Australian Centre for Industrial Relations Research and Teaching, University of Sydney). See also 'Australia's Labour Movement Begins: The Start of Unionism in Australia from 1788 to 1899' (2008) by Jodie Martin: <http://labour-movements.suite101.com/article.cfm/australia-labour-movement-begins> visited on 29 January 2010 in which it is confirmed that trade unionism in Australia started in 1788 with the settlement of New South Wales as an English penal colony.

¹⁶ See Warren S A *Brief History of Australian Unionism and the Role of the Communist Party* at 2 at <http://cpa.org.au/resources/australian-politics/brief-history-australian-unionism> visited on 28 August 2015. See also Brooks op cit note 2 at 136.

societies,¹⁷ some bargaining and even a few strikes occurred over wages and conditions of employment through them. Nevertheless, the economic slump of the 1940s and government action to restrain trade union activity through the Masters and Servants Act led to the collapse of most unions. Later in the 1850s, the discovery of gold set in motion two forces responsible for the growth of a powerful trade union movement in Australia. One such force was immigration which supplied large numbers of new settlers who were sympathetic to unions. The other force was economic growth which created labour shortages that gave labour sufficient bargaining power to build strong trade unions. Craft unions similar to those in Great Britain were established in most of the skilled trades such as building and manufacturing, and by 1880 industrial unions extended from mining into the central sector of the economy.¹⁸ As early as 1885, 100 unions were in existence with 50 000 members out of a population of 2 700 000 people.¹⁹ Central councils which exercised considerable influence on their member unions were also set up in each of the Australian colonies. In 1888, the Melbourne Trades Hall Council coordinated action in all industrial disputes and each member union was required to refer all disputes to the Council before they reached an advanced stage.

In Australia, the traditional trade union distinction is between craft,²⁰ industry²¹ and general unions^{22,23} The majority of unions, however, do not fall into these categories as most are occupational unions covering a range of occupations related to both skilled and unskilled employees.²⁴ The recruiting boundaries of Australian unions are set in the process of

¹⁷ See Pelling H (1987) *A History of British Trade Unionism* 4ed, Macmillan, London. The early labour movement was much broader than trade unions. Many workers and their families were members of a friendly society to be insured against sickness, accident or unemployment.

¹⁸ See Brooks B *Why Unions? An Australian Perspective*, CCH Australia, Sydney, 2ed 1988.

¹⁹ See Brooks op cit note 2 at 136.

²⁰ Craft unions organise workers from a particular skilled trade, usually workers who have served an apprenticeship (e.g. the Operative Stonemasons Society of Australia).

²¹ Industry unions cover workers in a particular industry, regardless of occupation (e.g. the Waterside Workers Federation and the Australian Meat Industry Employees Union).

²² General unions organise in a wide range of industries and occupations (e.g. the Australian Workers Union and the Federated Miscellaneous Workers Union).

²³ See also Creighton B & Stewart A *Labour Law: An Introduction* (1990) at 49-50.

²⁴ For example the Metal and Engineering Workers Union and the Federation of Industrial Manufacturing and Engineering Employees. See Deery S & Plowman D *Australian Industrial Relations* 2ed (1985).

registration, under the various federal and state Acts. Trade unions are permitted to list the occupations and industries they want to cover, and are given relatively uncontested access to those workers. One piece of legislation that was passed by the colonies based on the pattern of the British Trade Union Act²⁵ strengthened the position of the unions by protecting their funds, protecting them from prosecution for conspiracy in restraint of trade, and by giving members certain legal rights which enabled them to control their officials.

In Australia inter-union cooperation is secured through trade union confederations or councils such as the Australian Council of Trade Unions (ACTU)²⁶ which was established in 1927 by the Melbourne Trades Hall Council. Trade unions operate at the national level through the ACTU and at state level through Trades and Labour Councils, which are state branches of the ACTU. Individual trade unions affiliate to these bodies and cede to them certain powers to make policy and coordinate action for the union movement as a whole. Australian trade unions focus most of their attention on local affairs; however, the union movement has maintained international contacts from an early age. When the ACTU was founded in 1927, it assumed responsibility for nominating workers' delegates and their advisers to the International Labour Organisation Conference and industry committees. The ACTU also belongs to the International Confederation of Free Trade Unions (ICFTU).²⁷

2.3. The Commonwealth of Australia Constitution and Trade Unions

The Commonwealth of Australia Constitution provides the Federal Parliament with limited powers, while the states retain their sovereign powers, except for those powers specifically given to the federal government under the federal Constitution.²⁸ Section 51(xxxv) of the Constitution provides that Parliament shall, subject to the Constitution, have power to

²⁵ See British Trade Union Act of 1871.

²⁶ ACTU is the single main national confederation in Australia.

²⁷ See Brooks op cit note 2 at 153.

²⁸ See Brooks op cit note 2 at 77.

make laws for peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any state. In Australia there is no Federal Trade Union Act, no Federal Workers Compensation Act, no Federal Occupational Health and Safety Act passed pursuant to section 51, because the Constitution does not allow enactment of such legislation using the labour power. Section 51 is the only express grant of power given to the Federal Parliament to regulate employee relations, although this power is actually exercised by tribunals and not Parliament itself. The reason for this is to promote peace in the industry by, among other things, encouraging the creation of organisations of employers and employees to give the determination of disputes the widest possible influence in the industry. Under the arbitration system, workplace power was useful but not essential, partly because the system provided the same conditions for both unionists and non-unionists.²⁹

2.4. Definition and Legal Status of Australian Trade Unions

2.4.1. Definition of Trade Union in Australia

In terms of section 4(1) of the WRA, 1996 a 'trade union' was defined as:

- an organisation of employees;
- an association of employees that is registered or recognised as a trade union under the State or Territory; or
- an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

On the other hand, section 107(7) of Commonwealth Social Security Act 1947 defines a trade union as:

Any organisation or association of employees (whether corporation or unincorporated) that exists or is carried on for the purpose, or for purposes that

²⁹ See Peetz D & Bailey J 'Dancing Alone: The Australian Union Movement Over Three Decades' *JIR* 2012 54:525 at 527.

include the purpose, of furthering the interests of its members in relation to employment.

The above definitions indicate that an organisation of employees³⁰ in Australia is regarded as a trade union whether it is registered or not. The two definitions further indicate that a trade union is an association of employees which has as its principal purpose 'the protection and promotion of employee's interests in matters which concern their employment'. This should be their principal purpose; however they may perform other functions as the definition does not limit their purpose, especially the definition in terms of the Commonwealth Social Security Act.³¹ This position is similar to that of both British and South African trade unions.³²

2.4.2. The Legal Status of Trade Unions in Australia

In Australia a trade union in its natural state is a voluntary, unincorporated association.³³ Under federal registration, section 27 of the FW (RO) Act states that an 'organisation' (a registered association) is a body corporate, which has perpetual succession, has a common seal, may own and deal with property, and may sue or be sued in its registered name.³⁴ Under State registration the significance of registration varies between the different jurisdictions. The Australian system of compulsory conciliation and arbitration could not function properly if trade unions lacked corporate personality.³⁵

³⁰ In terms of s 4(1) of the WRA, 1996 'employee' includes any person whose usual occupation is that of employee, but does not include a person who is undertaking a vocational placement.

³¹ Trade unions can pursue other interests on behalf of members, such as campaigns for the improvement of housing, health care, the election of a political party, environmental campaigns and the promotion of peace (see Irving op cit note 8 at 60). See also Brooks op cit note 5 at 158.

³² See Ch 2 and 4.

³³ See *Stevens v Keogh* (1946) 72 CLR 1 at 29, 34; *Re McJannet*; *Ex parte Minister for Employment, Training and Industrial Relations (Queensland)* (1995) 184 CLR 620 at 639-640. Creighton & Stewart op cit note 23 at 177.

³⁴ The same provision was included in the Registration and Accountability of Organisations Schedule (WRA, 1996 (Cth) Sch 1B).

³⁵ See Commonwealth Conciliation and Arbitration Act 1904 which, in s 2(e), expressly stated that one of the chief objects of the Act was 'to encourage the organisation of representative bodies of employers and employees and their registration under this Act'. The same object was found in s 3 of the Industrial Relations Act 1988 which replaced the 1904 Act.

3. THE REGISTRATION OF TRADE UNIONS IN AUSTRALIA

3.1. Introduction

As with South African and British trade unions, Australian trade unions are not obliged to register; however, there are some advantages and benefits to those that do choose to register. From as early as 1908 the High Court in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association*³⁶ upheld the validity of the provisions in the 1904 Act which permitted the registration and incorporation of unions. In presenting his judgment, O'Connor J referred to what he considered to be justifications for encouraging trade unions to participate in the federal system as follows:

If the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen ... The representative body must have some permanent existence, irrespective of the change in personnel of its members from time to time which is always going on.³⁷

The requirements and registration processes do not vary greatly between jurisdictions. The FW (RO) Act envisages two different types of body representing employees which can be registered federally: an association which is either a constitutional corporation³⁸ or of which some or all of the members are federal system employees,³⁹ or alternatively 'an association of which some or all of the members are employees performing work in the same enterprise.'⁴⁰ The supervision of the registration process is in the hands of the industrial tribunal.⁴¹ In order to be registered under this Act, an applicant association must satisfy a number of criteria. The applicant must be a 'genuine' association whose object is to further or protect the

³⁶ (1908) 6 CLR 309.

³⁷ Supra note 37 at 360.

³⁸ A union which was incorporated under some other statute and engaged in trading activities to a sufficient extent might have that status.

³⁹ Federal system employee is defined by s 6 to mean a national system employee within the meaning of s 13 of the FW Act or an independent contractor who would be such an employee if employed to the same work they are doing as a contractor.

⁴⁰ Enterprise for this purpose means a business carried on by a single employer or one or more operationally distinct parts of such a business (s 6 of the FW (RO) Act).

⁴¹ See Brooks op cit note 2 at 143.

interests of its members⁴² and must be free from control by or improper influence from an employer or another union.⁴³ An applicant's rules must comply with requirements set out in the FW (RO) Act and its regulations.⁴⁴ A further requirement is that the applicant must have at least 50 members who are employees.⁴⁵

A new criterion introduced in 1996 is that the Commission, and now Fair Work Australia (FWA), must be satisfied that the applicant would 'conduct affairs in a way that meets the obligations of an organisation' under the legislation.⁴⁶ The other criterion is that there must not be another organisation 'to which the members of the association could more conveniently belong' and that 'would more effectively represent those members' in a way consistent with the objects of the legislation.⁴⁷ It is further required that FWA must be satisfied that the association would conduct its affairs in a way that meets the obligations of an association under the Act. The Act further requires organisations to have rules which specify the purpose for which the organisation is formed and the conditions of eligibility for membership. Organisations which were registered under the WRA, 1996, are taken to be registered under the FW (RO) Act. When an application for registration is granted the registrar, known as the General Manager in Australia, enters the name of the association in the register and on registration an association becomes an organisation. Once registered the General Manager issues a certificate of registration.

An organisation's registration under the FW (RO) Act may be cancelled where, for example, the organisation itself applies for deregistration, it was registered by mistake, the enterprise to which it relates has ceased to exist.

⁴² See ss 19(1)(a) and 20(1)(a) of the FW (RO) Act. Registration and Accountability of Organisations Schedule (WRA, 1996 (Cth) Sch 1B) ss 19(1)(a), 20(1)(a).

⁴³ See ss 19(1)(b) and 20(1)(b) (first introduced in 1996).

⁴⁴ See ss 19(1)(f), 20(1)(e).

⁴⁵ See s 19(1)(d) of the FW (RO) Act. This figure was originally 100 in the Conciliation and Arbitration Act 1904, though higher from 1988 to 1994. As enacted, the Industrial Relations Act 1988 imposed a requirement of 1000, further increased to 10 000 in 1990 (the Confederation of Australian Industry (now ACCI) lodged a complaint with the ILO Committee on Freedom of Association, arguing that this requirement violated the principles of freedom of association (the Committee upheld the complaint in November 1992 and changes were made).

⁴⁶ See FW (RO) Act ss 19(1)(e), 20(1)(d).

⁴⁷ See FW (RO) Act s 19(1)(j)(3). The aim of the provision was to prevent the proliferation of organisations in the federal system.

It may also be cancelled if an application is made by an interested person or organisation or the Minister to the Federal Court.⁴⁸ If it is deregistered an organisation ceases to be a body corporate.

3.2. Advantages for Registration

Registration was important under the WRA in order for trade unions to operate within the tribunal system.⁴⁹ Under this Act registered trade unions in Australia had access to permanent industrial tribunals and the power to compel the other party to appear before the tribunal and to negotiate. They also had the right to use their funds for political purposes. In *Williams v Hursey*⁵⁰ the High Court held that a registered union could validly impose a levy in order to raise funds for the Australian Labour Party.⁵¹

Under the new system, however, there is less significance in being registered as it is now bargaining representatives who can participate in the negotiation of an enterprise agreement or organise protected industrial action and there is nothing to prevent an unregistered union taking this role. It is, however, important for a trade union to have the status as an organisation because such an association will be entitled to initiate certain proceedings or appear before the FWA on behalf of a member,⁵² or to exercise the right of entry provided for in Part 3-4 of the FW Act.⁵³ However, the price paid for these rights and privileges is the external control over the constitution and governance of the organisation.

3.3. Duties and Obligations of Registered Trade Unions

In Australia certain controls are exercised on trade unions which are registered. Both the external and the internal affairs of trade unions are supervised.⁵⁴ This approach differs from the position in many other industrialised countries; however, it has been acknowledged and approved

⁴⁸ See s 28 of FW (RO) Act.

⁴⁹ See Brooks op cit note 5 at 142.

⁵⁰ (1959) 103 CLR 30.

⁵¹ See also *Australian Workers Union v Coles* [1917] VLR 332.

⁵² See ss 540(2) and 596(4) of the FW Act.

⁵³ See Creighton & Stewart *Labour Law* 5ed (2010) at 667 para 20.22.

⁵⁴ See Brooks op cit note 2 at 142-143.

by Australian courts. It was said in *Gordon v Hospital Employees Federation of Australia*⁵⁵ that

it is our belief that one of the strengths of Australian trade unions over the years has been their tradition of sound and democratic government. This we think is due in part at least to the supervision of the affairs of unions provided for in legislation and exercised by this and other courts.

Section 5(3)(a) of FW (RO) Act serves to ensure that registered employee organisations are representative of and accountable to their members and operate effectively. It ensures this by making detailed provisions as to the kinds of associations that may seek registration; requires that the rules of organisations adhere to specified standards;⁵⁶ and requires adherence to detailed standards of financial accounting.⁵⁷ Financial reports must be prepared and audited in accordance with official Australian Accounting and Auditing Standards.⁵⁸ Australian registered trade unions are still not restricted from using their members' funds for political purposes.⁵⁹

4. TRADE UNIONS AND COLLECTIVE BARGAINING IN AUSTRALIA

4.1. Introduction

For many years in Australia the collective bargaining system has differed from that of South Africa and Great Britain.⁶⁰ In the Australian federal system the labour power of the central government was constitutionally prescribed and the federal government pursued the prevention and settlement of industrial disputes.

⁵⁵ (1975) 6 ALR 579 at 585

⁵⁶ This is provided for in s 141(1) of the FW (RO) Act.

⁵⁷ See Creighton & Stewart op cit note 54 at 670.

⁵⁸ See ss 253(1) and 257(8)

⁵⁹ See Creighton & Stewart op cit note 54 at 705 para 20.94.

⁶⁰ See Brooks op cit note 2 at 196. See also Niland, *Collective Bargaining and Compulsory Arbitration in Australia*, University of New South Wales Press, 1978; Brooks B 'Compulsory Arbitration Versus Collective Bargaining – The Australian Experience' (1979) 7 *International Business Lawyer* 139-45; Kirby R 'Some Comparisons Between Compulsory Arbitration and Collective Bargaining' (1965) 24 *Australian Journal of Public Administration* at 200; Yerbury D & Isaac JE 'Recent Trends in Collective Bargaining in Australia' (1971) *International Labour Review* at 421-5.

4.2. Historical Background of Collective Bargaining in Australia

Until 1890 the collective bargaining methods used by Australian trade unions were similar to those in Britain.⁶¹ Collective bargaining accordingly took the form of direct negotiations. However, the weaknesses of Australian trade unions and collective bargaining were exposed by the strikes of the 1890s,⁶² which left Australian trade unions powerless to force employers to recognise them for collective bargaining purposes. Industrial power alone was insufficient to force employers to bargain collectively. Trade unions saw that government intervention was necessary to guarantee the right and power to negotiate with management. This was to be done through a system of compulsory conciliation and arbitration of industrial disputes between representative groups of employers and employees. Legislation was passed during the 1890s and 1900s to establish conciliation and arbitration tribunals or wage boards. In 1901 the federal government was given constitutional power to make laws for conciliation and arbitration. However, Australia has no express constitutional provision that covers the right to collective bargaining.⁶³ Even though most trade unions operated through the arbitration machinery, the process of collective bargaining has always coexisted with the operation of tribunals in Australia.⁶⁴ However, collective bargaining took place in an environment dominated by arbitration tribunals.⁶⁵

The approach to collective bargaining in terms of the WRA, 1996, was contrary to the principles contained in Article 4 of the Right to Organise and Collective Bargaining Convention 1949, more especially the prohibition of

⁶¹ See Edwards PK *Conflict @ work* (1986) at 173.

⁶² *Ibid.*

⁶³ See McCallum R & Coulthard A *The Actors of Collective Bargaining: A World Report* (Australia) edited by R Blanpain (2003) at 37.

⁶⁴ See Isaac JE 'Equity and Wage Determination' 51st ANZAAS Congress (1981) at 11. Before a tribunal will attempt to settle a dispute by adjudication it will first order the parties to try to resolve their differences through negotiation.

⁶⁵ Even the Workplace Relations Amendment (Work Choices) Act 2005 (the Work Choices legislation) further restricted workers' ability to bargain collectively and to be represented by trade unions. This Act further restricted the ability of bargaining at a multi-employer or industry level. In addition, it increased the number of matters which are prohibited by law from being the subject of bargaining and provided for financial penalties to apply to individuals or organisations which seek to include these matters in their agreements. These matters included leave to attend trade union meetings or training; right of entry for union officials; general representative rights for unions; restrictions on contractors; encouragement of trade union membership; remedies for unfair dismissal; and restrictions on AWAs.

pattern bargaining and the circumscription of multi-business bargaining.⁶⁶ The same was the case with the favouring of Australian Workplace Agreements (AWAs) over collective agreements. Under the FW Act it is no longer possible to make individual agreements that displace collectively agreed terms and conditions. In the past, collective bargaining in Australia was not regulated by a Labour Code nor was it dealt with by civil law. It was only later that the federal WRA, 1996, and various State statutes provided a framework for voluntary collective bargaining. Collective bargaining in Australia is not defined in legislation or judicial decisions,⁶⁷ nor does it take place under federal labour laws; trade unions and their members were given limited powers to engage in lawful strikes to pursue their demands at the bargaining table.⁶⁸ The Australian Industrial Relations Commission (AIRC) and its predecessors exercised powers of conciliation and arbitration to settle labour disputes by providing for fair and reasonable wages and conditions of employment.⁶⁹ In the main, the agreed terms and conditions were placed in awards.⁷⁰ However, the primacy of collective bargaining was challenged by the introduction of AWAs, but these were later abandoned under the FW Act and the role of collective bargaining is currently emphasised.⁷¹

In the FW Act, collective bargaining is provided for in Part 2-4. The objects of Part 2-4 are to enable good faith collective bargaining at the enterprise level for productivity-oriented agreements. Bargaining under Part 2-4 commences when an employer agrees to bargain or initiates bargaining for enterprise

⁶⁶ See Creighton & Stewart op cit note 54 at 718 para 21.04.

⁶⁷ See McCallum & Coulthard op cit note 64 at 38.

⁶⁸ See Munro P, Peetz D & Pocock B *Fair Minimum Standards in Australian Charter of Employment Rights* edited by Mordy Bromberg & Mark Irving (2007) at 92.

⁶⁹ See McCallum R, Chin D & Gooley A *Fairness and Balance in Industrial Bargaining in Australian Charter of Employment Rights* edited by Bromberg & Irving (2007) at 92.

⁷⁰ An award is an equivalent of a collective agreement and it usually contains minimum conditions of employment such as wages, leave, etc; however the employer and employees can negotiate better terms but not less than those in the awards.

⁷¹ AWAs were a formalised individual agreement negotiated by the employer and employee. Employers could offer a 'take it or leave it' AWA as a condition of employment. These were individual written agreements on terms and conditions of employment between an employer and employee under the WRA. Trade unions have argued that AWAs are an attempt to undermine the collective bargaining power of trade unions in the negotiation of pay and conditions of their members. Further, that the ordinary working person has little to no bargaining power by themselves to effectively negotiate an agreement with an employer because there is inherently unequal bargaining power for the contract. The ACTU has pushed for AWAs to be abolished and for collective bargaining rights to be introduced.

agreement and suchlike. Bargaining representatives are important to the collective bargaining framework and have a formal role compared to the bargaining agents under the WRA. Employees can appoint a person of their choice as a bargaining representative and such representatives may include a union entitled to represent the industrial interests of an employee in relation to work that will be performed under the agreement,⁷² unless a member appoints someone else. The National Employment Standards (NES)⁷³ were established to set minimum conditions for all workers covered by the national system. In addition, a new system of modern awards⁷⁴ was introduced to provide an additional safety net for employees. This system requires employers and employees to bargain in good faith⁷⁵ and the FWA is permitted to make a workplace determination where a party ignores a good faith bargaining order. There is no distinction between union and non-union agreements but an agreement now requires the approval of employees. A union that has acted as a bargaining agent during negotiations may apply to FWA to be covered by the agreement. Union officials have rights to enter workplaces to hold discussions with employees provided that they hold a permit issued by FWA. The Act makes provision for the making of single or multipurpose agreements, subject to obligations to bargain in good faith. Parties may seek bargaining orders from the FWA if they believe the other party has failed to comply with the good-faith bargaining obligations.⁷⁶

In terms of section 228(1)(b) of the FW Act the employer should disclose information to the union during the bargaining process.

⁷² See s 176(1)(b)(c) of the FW Act.

⁷³ This included provisions for annual leave, personal leave, flexible work arrangements for parents, notice of termination and redundancy pay.

⁷⁴ In terms of s 55(1) of the FW Act, a modern award or an enterprise agreement must not exclude all or part of the NES. S 56 of the Act provides that the term of a modern award or an enterprise agreement has no effect on the extent that it contravenes the NES.

⁷⁵ Good faith bargaining means among other things the following: attending and participating in meetings at reasonable times; disclosing relevant information in a timely manner; responding to proposals made by other bargaining representatives for the agreement in a timely manner; refraining from unfair conduct that undermines freedom of association or collective bargaining. See section 228 of the FW Act.

⁷⁶ See s 229 of the FW Act.

4.3. Collective Agreements

4.3.1. Certified Agreements

The first federal provision for the registration of collective agreements was embodied in Part VI of the Conciliation and Arbitration Act 1904.⁷⁷ Part VIB of the WRA, 1996 provided for two broad categories of certified agreements: Division 2 agreements, involving an employer that is a 'constitutional corporation' or that is located in Victoria or a Territory (it also provided for greenfields agreements⁷⁸ between employers and employees); and Division 3 agreements, made in prevention or settlement of an interstate industrial dispute.

Both the Work Choices and the WRA made provision for six different types of 'workplace agreement'. In addition to AWAs, these included employee collective agreements, union collective agreements, union greenfields agreements and employer greenfields agreements. However, the passage of the Fair Work Act 2009 and the commencement of its enterprise agreement brought significant reforms. Now the collective bargaining rules provide for the negotiation of enterprise agreements between bargaining representatives⁷⁹ of employers and employees.⁸⁰ The bargaining process can be triggered by an employer initiating negotiations or responding to a request by employees or their union to commence bargaining. Where an employer refuses to bargain, this can be addressed through majority support determination which can be made by the FWA if it is satisfied that a majority of employees want to engage in collective bargaining. It can also be done through scope orders which are also used to resolve disputes over the

⁷⁷ The Act was repealed in 1988 and the provisions in the 1988 Act regarding agreement making were repealed by the Industrial Relations Legislation Amendment Act 1992, but repealed in 1993 by the Industrial Relations Reform Act 1993 which contemplated two types of agreement: certified agreements (Division 2) and enterprise flexibility agreements (Division 3). See Creighton & Stewart op cit note 54 at 293-295.

⁷⁸ A greenfield agreement is an agreement relating to a genuine new enterprise that the employer is establishing or proposing to establish. See section 172(4) of the FW Act.

⁷⁹ A bargaining representative is any union which has a member that would be covered by the agreement, unless the member has specified in writing that he or she does not wish to be represented by the union.

⁸⁰ In terms of s 172(1)(a) of the FW Act, such an agreement may be about matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement. Matters that may be dealt with in an enterprise agreement include the following: rates of pay; penalty rates and overtime; allowances; standard hours; personal and annual leave; any matters pertaining to the relationship between the employer and the employees.

coverage of enterprise agreements. Once bargaining for a single-enterprise agreement commences, bargaining representatives are subject to good faith bargaining obligations.⁸¹ If the obligations are breached other bargaining representatives can seek bargaining orders and serious breach declarations under the FWA.

4.3.1.1. *Types of Enterprise Agreement*

Single enterprise agreements can be made between an employer and its employees who are to be covered by the agreement.⁸² For this purpose an enterprise is any business, activity, project or undertaking.⁸³ Multiple enterprise agreements may be made between two or more employers and their employees.⁸⁴ Protected industrial action may, however, not be taken in the context of bargaining for multi-enterprise agreements although both agreements can be made greenfields agreements. Greenfield agreements may only be made by an employer with one or more relevant employee organisations.⁸⁵ Accordingly, an employer that will be covered by a proposed enterprise agreement must take all reasonable steps to provide the employees who will be covered by the agreement with a notice of their representational rights under section 173. Section 55(1) of the FW Act stipulates that a modern award (in terms of s 12 of the FW Act a modern award means 'a modern award made under Part 2-3') or an enterprise agreement (in terms of s 12 of the FW Act an enterprise agreement means 'a single-enterprise agreement or a multi-enterprise agreement') (both agreements are made in terms of section 172 of the FW Act) must not exclude all or part of the NES and section 56 provides that a term of a modern award or an enterprise agreement has no effect to the extent that it contravenes the NES. Modern awards are industry or occupation-based

⁸¹ Good faith bargaining requirements include the following: attending and participating in meetings at reasonable times; disclosing relevant information in a timely manner; responding to proposals made by other bargaining representatives for the agreement in a timely manner; refraining from conduct that undermines freedom of association or collective bargaining; etc. See s 228 of the FW Act.

⁸² See s 172(2)(a) of the FW Act.

⁸³ See s 12 of the FW Act.

⁸⁴ See s 172(3)(a) of the FW Act.

⁸⁵ This is any union that is entitled to represent the industrial interests of one or more employees covered by the agreement in relation to work to be performed under the agreement (see s 12 of the FW Act).

minimum employment standards which apply in addition to the NES, whereas enterprise agreements set out conditions of employment for a group of employees at one or more workplaces. Section 186(2)(c) requires that before approving an enterprise agreement, FWA must be satisfied that the agreement does not contain any terms that contravene section 55. Contractual provisions which are inconsistent with the NES are unlawful in terms of section 44(1).⁸⁶

4.3.2. The Effect of Certified Agreements

In Australia, enterprise agreements do not impose obligations on a person, or confer entitlements on a person, unless the agreement applies to that person.⁸⁷ Thus, an agreement applies to an employer, employee, or union if the agreement is in operation; if it covers the employer, employee or union; and if no other provision of the FW Act would result in the agreement not applying to them.⁸⁸ Agreements come into operation seven days after their date of approval by FWA⁸⁹ and operate until the date that a termination under section 224 or 227 of the FW Act takes effect. While in operation, an agreement applies to the total exclusion of any modern award in relation to the employees covered by the agreements.⁹⁰ An enterprise agreement will generally prevail over any State or Territory laws with which it is inconsistent.⁹¹

4.3.3. Variation of an Enterprise Agreement

An enterprise agreement may be varied jointly by the employer/s and the employees covered by the agreement.⁹² Such a variation must be approved by a majority of employees who cast a valid vote and the FWA.⁹³ However, a variation cannot have the effect of extending the nominal expiry date of an

⁸⁶ Failure to comply with the NES is a breach of a civil remedy provision (s 44(1)). Individuals who breach the NES may be liable to a penalty of up to \$6600 per breach whilst corporations are liable to penalties of up to \$33 000 per breach (see s 546 of the FW Act).

⁸⁷ See s 51 of FW Act.

⁸⁸ See s 52 of the FW Act.

⁸⁹ See s 54(1) of the FW Act.

⁹⁰ See s 57 of the FW Act.

⁹¹ See s 29(1) of the FW Act.

⁹² See s 207 of the FW Act.

⁹³ See ss 201–209 of the FW Act.

agreement beyond four years from the date that FWA approved the agreement.⁹⁴ Enterprise agreements continue to operate after their expiry date until they are terminated or replaced by a new agreement but employers and employees covered by an agreement may jointly agree to terminate it at any time. It may also be terminated by FWA on application by one of the party covered by it, but only after it has passed its nominal expiry date.⁹⁵

4.4. Closed Shop and Agency Shop Agreements

4.4.1. Closed Shop Agreements

A closed shop agreement was historically common in Australia, despite it apparently being beyond the capacity of the federal tribunal to include compulsory membership provisions in awards.⁹⁶ It was estimated that 25 per cent of the Australian workforce and over 50 per cent of union members were covered by such agreements at the beginning of the 1980s.⁹⁷ However, the position under the FW Act in Australia today is that in all jurisdictions closed shop agreements are effectively unenforceable as a matter of law, since it is unlawful to discriminate against employees on the ground that they do not belong to a union.⁹⁸ It is thus unlawful under the general protections in Part 3-1 to discriminate against employees on the ground that they do not belong to a trade union or do not propose to join.⁹⁹ Neither a modern award nor an enterprise agreement may contain an objectionable term; this is defined in section 12 to mean a provision that would require or permit any contravention of Part 3-1. Any such term is rendered of no effect by section 356.¹⁰⁰

⁹⁴ See s (s 211(2(b)) of the FW Act.

⁹⁵ See s 225 of the FW Act.

⁹⁶ See *R v Wallis; Ex parte Employers Association of Woolselling Brokers* (1949) 78 CLR 529; *R v Findlay; Ex parte Victorian Chamber of Manufacturers* (1950) 81 CLR 537.

⁹⁷ See Wright M "Unionisation in Australia and Coverage of the Closed SAHOP" *Australian Bulletin of Labour* (1981) at 122.

⁹⁸ See ss 346–347 of the FW Act

⁹⁹ See ss 346–347 of the FW Act.

¹⁰⁰ See *Gregory v Philip Morris Ltd* (1987) 77 ALR 79; (1988) 80 ALR 455.

4.4.2. Agency Shop Agreements

Contrary to the above position regarding closed shop agreements, agency shop agreements are allowed in Australia. In 2001, the Australian Industrial Relations Commission held that an agreement between the Electrical Trades Union and hundreds of contractors to levy a \$500 service fee on non-unionists was lawful. Consequent to that the ACTU planned to impose a service levy in major enterprise bargaining negotiations aimed at workers who choose not to belong to a union but who benefit from union negotiations for improved pay and conditions.¹⁰¹

4.5. Organisational Rights: Right of Entry

Australian union officials enjoy the right of entry to workplaces in order to communicate with their members and conduct inspections and to ensure that awards are being observed.¹⁰² This right affords unions an opportunity to recruit new members, especially in firms which are revealed to be underpaying their non-union labour. However, since the mid-1990s conservative governments have restricted this right, claiming that it has been abused and that the right should be limited to situations where a union has a 'legitimate' reason for entering a workplace.¹⁰³

After 1996, awards may no longer confer such rights. It is now necessary to obtain a permit from the FWA in order to enter the employer's premises. A permit holder may enter the premises in order to investigate a suspected breach of the FW Act, or a fair work instrument. A fair work instrument includes a modern award, enterprise agreement and workplace determination among others. Under section 484 of the FW Act, officials may enter the workplace to hold discussions with employees who either belong or are eligible to belong to the organisation. They may also enter workplaces to

¹⁰¹ See Brooks op cit note 2 at 169.

¹⁰² See *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1991) 30 FCR 183.

¹⁰³ See Creighton & Stewart *A Labour Law* 4ed (2005) at 530.

investigate suspected contraventions of occupational health and safety laws.¹⁰⁴

5. TRADE UNIONS AND INDUSTRIAL ACTION IN AUSTRALIA

5.1. Introduction

Australia is a founder member of the International Labour Organisation ('ILO') and has always been a member.¹⁰⁵ However, at one stage Australia was charged by the ILO Committee for failing to protect the right to strike.¹⁰⁶ Following this, the Commonwealth government enacted the Industrial Relations Act¹⁰⁷ in order to protect the right to strike pursuant to section 51(xxix) of the Australian Constitution. Section 170PA of the same Act identified specific international law sources which give rise to the obligation to protect the right to strike.¹⁰⁸ Australia was also obliged by a number of other international instruments to enact a right to strike. One such instrument is the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is a party and which expressly provides for the right to strike in its Article 8. Australia has also adhered to the right to strike in the US-Australia Free Trade Agreement which, in Article 18.1, includes a commitment by each party to strive to ensure that internationally recognised labour principles and rights such as freedom of association and the right to collective bargaining are protected by law. The successor Act, the WRA, 1996, largely retained the right to strike provisions of the Industrial Relations Act, 1993.¹⁰⁹

¹⁰⁴ See *John Holland Pty Ltd v CFMEU* (2009) 178 FCR 461.

¹⁰⁵ See Creighton B & Stewart A *Labour Law: An Introduction* 3ed (2000), Chapter 3; see also Creighton & Stewart op cit note 105 at 74.

¹⁰⁶ Trade unions and trade union members that took part in industrial action were exposed to actions in tort and contract (see *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383; *AMIEU v Mudginberri Station Pty* (1986) 161 CLR 98; McGarry G 'Sanctions and Industrial Action: The Impact of the industrial Relations Reform Act' (1994) 7(2) *Australian Journal of Labour Law* 98. See also the Commonwealth of Australia, Explanatory Memorandum to the Industrial Relations Reform Bill 1993 (Cth), 26 October 1993.

¹⁰⁷ Act of 1993. This Act provided for immunity from civil liability for striking employees in certain circumstances.

¹⁰⁸ Obligations arising under the Constitution of the ILO as contained in the ILO Act of 1947; the Customary International Law and the Freedom of Association and Protection of the Right to Organise Convention of 1948.

¹⁰⁹ See, for example, ss 170WB-WE; 170ML-MU of the WRA, 1996. See also Kollmorgen S 'Qualifying the Right to Strike' (1998) 11(2) *Australian Journal of Labour Law* at 128.

The WRA, 1996 was based on a philosophy of direct individual and workplace bargaining with limited third-party intervention. This carried with it the right of the parties at the bargaining stage to take lawful direct industrial action. 'Industrial' action is now regulated under section 19(1) of the FW Act and includes the following:

- the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in the performance of work '.
- a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
- a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

This definition appears not only to include but also to extend beyond what would ordinarily be understood to constitute industrial action. However, in *The Age Co Ltd v CEPU*¹¹⁰ the AIRC indicated that it thought it likely that the legislature did not intend to include conduct which stands completely outside the area of disputation and bargaining and that the definition should be read giving some weight to the word 'industrial'. This finding is still relevant under the FW Act. Accordingly, 'industrial dispute' includes a dispute that is about matters pertaining to the relationship between employers and employees.¹¹¹ Disputes which are predominantly political or of social nature may therefore not be regarded as industrial.¹¹² Industrial action may take the form of strike by employees. The term 'strike' embraces a much broader range of conduct, including work bans, boycotts, a go-slow, work-to-rule, picketing, occupation of the workplace and coordinated acts of industrial sabotage.¹¹³ For a strike to take place there must be a combined refusal to work and there must be a combined purpose of exerting pressure upon an employer to agree to a demand. The demands will often include

¹¹⁰ (2004) 133 IR 197 at 208.

¹¹¹ See s 4(1) of the WRA, 1996. See also *In Re Amalgamated Metal Workers Union of Australia; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345, 357; for example disputes about consultation over the introduction of technological change and the implementation of redundancy dismissals (see *Federated Clerks Union of Australia v Victorian Employers Federation* (1984) 154 CLR 472), etc.

¹¹² See *R v Coldham; Ex parte Fitzsimmons* (1976) 137 CLR 153 at 164.

¹¹³ See *Creighton & Stewart* op cit note 54 at 534-535.

better wages for employees or concerns over occupational health and safety issues.

In terms of section 147 of the FW Act, an employer, employee or employee organisation covered by an enterprise agreement or a workplace determination must not organise or engage in industrial action between the day on which the agreement is approved by FWA or the workplace determination becomes operative, and the normal expiry date of the agreement or determination.¹¹⁴ This is a re-enactment of section 494 of the Work Choices Act. This makes it clear that industrial action is permissible only for the limited purpose of negotiating a new enterprise agreement and that once such an agreement has been approved by the FWA there is no lawful capacity to take industrial action for any purpose during the life of that agreement. Section 28(1)(b) of the FW(RO) Act provides that the Federal Court can cancel the registration of an organisation on a number of grounds including that the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has engaged in industrial action (other than protected industrial action) that has prevented, hindered or interfered with (i) the activities of a federal system employer; or (ii) the provision of any public service by the Commonwealth or a State or Territory or an authority of the Commonwealth or a State or Territory. Section 408 of the FW Act contemplates that there are three forms of protected industrial action: employee claim action;¹¹⁵ employee response action¹¹⁶ and employer action (lockout). There is thus protection for those who engage in protected industrial action unless the action has involved or is likely to involve personal injury; or wilful or reckless destruction of; or damage to property.¹¹⁷

¹¹⁴ Ibid at 775 para 22.35.

¹¹⁵ It consists of industrial action that is organised or engaged in for the purpose of supporting or advancing claims that are, or are reasonably believed to only be about permitted matters; that is organised or engaged in against an employer that will be covered by the proposed agreement, by a bargaining representative of an employee who will be covered by the agreement or an employee covered by a protected action ballot and that meets the common requirements.

¹¹⁶ It is defined in s 410(1) to mean industrial action that is organised or engaged in as a response to industrial action by an employer.

¹¹⁷ See Brooks op cit note 2 at 205.

In terms of section 413 of the FW Act a strike will be protected in law provided the following circumstances apply:

- the industrial action must not relate to a proposed enterprise agreement; that is, a greenfields agreement or a multi-enterprise agreement
- where bargaining representatives, or those they represent are organising or engaging in industrial action, they must be genuinely trying to reach agreement; a party intending to engage in protected industrial action must meet the notice requirements in section 413(4)
- bargaining representatives and employees organising or engaging in protected action must not have contravened any orders that apply to them; section 417 makes it unlawful to take industrial action during the life of an agreement.

5.2. Secondary Boycotts

In 1977, the secondary boycott (e.g. pickets imposed by persons not employees of the affected employer) provisions were inserted into the Trade Practices Act 1974 by section 45D and later section 45E. Section 45D deals with conduct against others who put indirect pressure on the employer and section 45E deals with direct action against a person having a contractual dealing with the employer.¹¹⁸ The purpose behind the two provisions was to make it unlawful for a trade union to engage in conduct, in concert with others such as its officials, which interfered with the supply or delivery of goods or services from or to the employer with which they were involved in a dispute.¹¹⁹ The WRA, 1996, has restored the secondary boycott provisions that were contained in the Trade Practices Act, 1974.

¹¹⁸ The employer may seek damages and/or an injunction using the federal Trade Practices Act 1974 or by using the common law torts of conspiracy, intimidation, inducing breach of contract and interference with business relations.

¹¹⁹ See *Mudginberri Station Pty Ltd v Asian Meat Industry Employees Union* (1986) 15 IR 272 in which the Federal Court found that s 45D had been contravened by the union's picket line that prevented meat inspectors from carrying out their duties, which were essential for the export of meat from the abattoir. The picket line led to the plaintiff's business suffering substantial losses. See also *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 37 IR 380.

6. CORE RESPONSIBILITIES OF TRADE UNIONS IN AUSTRALIA

6.1. Introduction

The meaning of 'social responsibility' under this discussion will again be the same as the one under Chapter 1. It is evident from the definitions of an Australian trade union provided above that such an organisation can function without being registered. The definitions also indicate that the principal purpose of such an organisation must be the protection and promotion of employees' interests in matters concerning employment.¹²⁰ This implies that Australian trade unions can perform core responsibilities (the principal purpose) and also social responsibilities. In Australia, the limits to permissible trade union activity falling under core responsibilities are reached where the union seeks to advance interests which do not refer to the members' interests as trade unionists. For example, environmental action in the form of 'green bans' has been held to go beyond the legitimate principal activities of registered trade unions. In other words, the core responsibilities are measured in terms of the interests of employees as members of trade unions and not as citizens in society.¹²¹ The social responsibilities of trade unions are therefore those which go beyond the interests of members as employees.¹²²

The discussion that follows will consider different core responsibilities of trade unions in Australia together with the effects of registration, collective bargaining and industrial action on those responsibilities.

¹²⁰ See s 4(1) of the WRA, 1996 and s 107(7) of Commonwealth Social Security Act 1947.

¹²¹ See Brooks op cit note 18, Part 8.

¹²² Australian unions provide a range of benefits for their members that are financed directly from union revenue or special levies. Services such as legal aid, taxation advice, mortuary benefits, dental care, education programmes and various cultural and recreational activities are among the facilities available to various union members. Unions like the Australian Bank Employees Union have specified in their rules that one of their major objectives is 'to formulate and carry into operation schemes for the industrial, social, recreational and general advancement of members' and 'to establish and maintain clubs and holiday homes for the benefit of members and their families and to provide scholarships for children of members and deceased members'. The Federated Clerks Union has run a successful cooperative housing scheme for its members since the 1950s. Unions also form sickness and accident funds for members who become ill or are injured outside working hours. Some unions have mortality or funeral funds which provide the next of kin with cash payments. Unemployment registers and the establishment of quasi-employment agencies to help members find jobs have also emerged as a union response to increasing difficulties in the labour market.

6.2. Job Regulation

In Australia, improved pay and conditions of employment are the primary focus of union members' interests. For most of the twentieth century in Australia, fair minimum standards for workers were established through the operation of the award system and the decisions of independent industrial tribunals.¹²³ For employees who were covered by awards or agreements, the minimum wage was fixed by the award or the agreement.¹²⁴ Wages and hours of work have always been central issues and disputes over these matters accounted for a large proportion of industrial disputes involving a stoppage of work. In 1999 the ACTU took up the working hours issue under the theme 'Work-Time-Life' and began a drive towards a standard working week of 30 hours.

In Australia, under the compulsory conciliation and arbitration system, registration was very important as registered trade unions were able to participate in the system through which conditions of employment were determined in the form of awards and agreements. However, the employer was free to offer employees inferior AWAs even where there was a binding collective agreement in place. This in itself undermined the integrity of the trade unions' role in collective bargaining and the collective bargaining system itself. The situation has, however, changed under the FW Act, as AWAs have been abolished and conditions of employment are dealt with through enterprise agreements and modern awards. There is, however, less significance in being registered under the new system as it is now bargaining representatives who can participate in the negotiation of an enterprise agreement or organise protected industrial action, and there is nothing to prevent an unregistered union taking this role. It is, however, important for a trade union to have the status as an organisation because such an association will be entitled to initiate certain proceedings or appear before the FWA on behalf of a member,¹²⁵ or to exercise the right of entry

¹²³ See Munro P, Peetz D & Pocock B *Fair Minimum Standards in Australian Charter of Employment Rights* edited by Bromberg & Irving (2007) at 75.

¹²⁴ See Brooks op cit note 2 at 107.

¹²⁵ See ss 540(2) and 596(4) of the FW Act.

provided for in Part 3-4 of the FW Act.¹²⁶ For the purposes of collective bargaining, bargaining representatives are important; however, employees can appoint a person of their choice as a bargaining representative and not necessarily a trade union. Matters relating to job regulation pertain to the relationship between employers and employees and employees may engage in industrial action to pursue them.¹²⁷ However, in terms of section 147 of the FW Act, an employer, employee or employee organisation covered by an enterprise agreement or a workplace determination must not organise or engage in industrial action between the day on which the agreement is approved by FWA or the workplace determination becomes operative, and the normal expiry date of the agreement or determination.¹²⁸

6.3. Job Security

The job security of members has also been a traditional union objective in Australia.¹²⁹ Australian trade unions recognise the inevitability of technological change and they welcome it as a source of increased productivity, on condition that the benefits are fairly shared between employers and employees, and that displaced employees suffer no hardship.¹³⁰ In 1984, unions succeeded in a case aimed at establishing minimal industrial standards in the event of technological change which caused redundancies. Most awards and agreements prescribed employees' redundancy entitlements including notice periods, time off to look for new work, and severance payments.¹³¹

The WRA also required Australian employers to put procedures in place which involve consultation with the appropriate trade union representative

¹²⁶ See Creighton & Stewart op cit note 54 at 667 para 20.22.

¹²⁷ See s 4(1) of the WRA, 1996. See also *In Re Amalgamated Metal Workers Union of Australia; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345, 357. For example disputes about consultation over the introduction of technological change and the implementation of redundancy dismissals (see *Federated Clerks Union of Australia v Victorian Employers Federation* (1984) 154 CLR 472), etc.

¹²⁸ See Creighton & Stewart op cit note 54 at 775 para 22.35.

¹²⁹ In the latter part of the 1990s, the trade union movement turned its attention to job security cases, to establishing a 'living wage' and to ensure job security through framework agreements. See Brooks op cit note 2 at 157.

¹³⁰ See Brooks op cit note 2 at 157.

¹³¹ *Ibid* at 117.

in order to avoid allegations of unfair dismissals.¹³² If 15 or more employees became redundant after 26 February 1994 for reasons of an economic, technological, structural or similar nature, an employer was required as soon as practicable after so deciding and in any event before terminating an employee's employment pursuant to the decision, to inform each trade union of which any of the employees was a member, and which represented the industrial interests of those employees about the terminations and reasons for them; and the number and categories of employees likely to be affected; and the time when, or the period over which, the employer intended to carry out the terminations or did not give such a trade union an opportunity to consult with the employer on measures to avert the termination, or avert or minimise the terminations; and measures (such as finding alternative employment) to mitigate the adverse effects of the termination or terminations.

It was again important in Australia for trade unions to be registered in order to participate in the compulsory conciliation and arbitration system through which conditions of employment, including the job security of their members, were determined in the form of awards or agreements. However, as indicated above, again AWAs undermined the integrity of the trade unions' role in collective bargaining. The situation has however now changed, as matters relating to the job security of employees are regulated in terms of enterprise agreements and modern awards. However, registration no longer plays a significant role and the role of trade unions is limited by the fact that it is now bargaining representatives who can participate in the negotiation of an enterprise agreement or organise protected industrial action. Those covered by an enterprise agreement may not organise or engage in industrial action during the existence of an agreement.

6.4. Employment Equity and Discrimination

In 1973, Australia ratified the ILO Convention No 111 on Discrimination, Employment and Occupation. In terms of Article 2 of this Convention 'each

¹³² See s 170GA(1) of the WRA, 1996.

member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. In view of this, the Australian government established national and state committees on discrimination in employment and occupation. A representative of the Commonwealth government, two representatives each from employer bodies and ACTU and a women's representative together comprise the national committee. Each of the committees has a chairman together with a Commonwealth government representative and representatives of unions, employers and relevant state government. These committees carry out a community educational function as to the objects of the Convention and also deal with complaints relating to allegations of discrimination in employment.

The Australian Federal Parliament has enacted laws to promote equal opportunity in employment, an example of which is the Affirmative Action (Equal Employment Opportunity for Women) Act 1986. The intention of this legislation is that every enterprise in the private sector will develop and implement an affirmative action programme through a sequence of steps involving managers, trade unions and employees. It is important that trade unions be consulted in the process.¹³³ The union movement in Australia has been involved in the development and introduction of equity policies. In unions like the teachers' unions, the campaign for equal pay gained ground early on.¹³⁴ Workplace campaigns on sexual harassment and language classes for non-English-speaking workers are also evidence of trade union involvement in the development and implementation of equity policies.¹³⁵ In recognising problems with the representation of women who, despite lower unionisation comprise a substantial proportion of union membership, some unions have moved to institute affirmative action policies themselves.¹³⁶ The

¹³³ See Brooks op cit note 2 at 120.

¹³⁴ See Gardner M & Palmer G *Employment Relations: Industrial Relations and Human Resource Management in Australia* (1992) at 388.

¹³⁵ Ibid at 389.

¹³⁶ Ibid.

registration of a trade union will again not be important in this role under the new system. The role of trade unions in collective bargaining is also limited as bargaining representatives of the employees' choice represent them during negotiations.

6.5. Health and Safety¹³⁷

The Commonwealth of Australia Constitution does not give the commonwealth a general power to legislate for occupational health and safety, hence in Australia there are a number of occupational health and safety statutes for different states.¹³⁸ These statutes provide for the establishment of safety committees and the appointment of employers and employees representatives.

The need to promote and protect the health and safety of the workforce and to secure adequate compensation for those who have incurred work-related injuries and for their dependants has been an important element in the rationale of trade unionism in Australia.¹³⁹ Australian trade unions began to take a more active interest in occupational health and safety issues in the 1980s.¹⁴⁰ Unions also brought occupational health and safety issues before the industrial tribunals, an example of which was the case of *AMI Toyota v Association of Drafting, Supervisory and Technical Employees*.¹⁴¹ The

¹³⁷ In 2007–2008, 232 people in Australia died in work-related incidents that were compensable under the workers compensation legislation and several more died from work-related diseases (see Creighton & Stewart op cit note 52 at 439).

¹³⁸ For example, the Occupational Health and Safety Act 2000 (NSW); the Occupational Health and Safety Act 2004 (Vic); etc. The formulation of these statutes has been influenced by the report and the findings of the Roben Committee which was instituted in the 1970s to look into matters relating to occupational health and safety. The Commonwealth can legislate for the health and safety of its own employees and those of its instrumentalities under s 52(ii).

¹³⁹ A growing number of trade unions have appointed full-time health and safety officers and have also developed shopfloor campaigns around health-related issues in order to eliminate work-related death and injury. They have also been successful in obtaining improvements in state health and safety legislation which provided increased opportunities for greater worker participation in the formulation, implementation and management of occupational health and safety protection (see Gunningham N *Safeguarding the Worker* (1984); see also Deery S *Unions and Methods in Australian Unions: An Industrial Perspective* 2ed edited by Bill Ford & David Plowman (1989) at 75).

¹⁴⁰ This was clear from a number of comprehensive health and safety agreements negotiated in Victoria in the period before the Occupational Health and Safety Act 1985. The present ACTU policy calls upon trade unions to ensure that occupational health and safety is not compromised or rights bargained away (see Deery op cit note 141 at 75).

¹⁴¹ (1986) 17 IR 1. This case arose out of an attempt to obtain a consent award based on an agreement between the principal union in the vehicle building industry and the (then) six Australian vehicle manufacturers. The agreement provided for an industry-wide regime of occupational health and safety regulation within the framework of the federal Act, modelled upon the Victorian Act of 1985, but for constitutional and jurisdictional reasons was less comprehensive

Australian Safety and Compensation Council (ASCC), which replaced the National Occupational Health and Safety Commission (NOHSC), was established in 2005 with the power to declare national standards and codes of practice regarding health and safety issues. The ASCC is a tripartite body with members representing federal, state and territory governments, the Australian Chamber of Commerce and Industry and the ACTU.

Health and safety matters are important matters that are industrial in nature and relate to the employer–employee relationship. In the past, these matters were subject to a compulsory system of conciliation and arbitration which required trade unions to be registered in order to participate in the system itself. These matters were determined through awards and agreements, which could be altered by AWAs. However, under the new system registration is no longer that important, as bargaining representatives of employees' choice and not necessarily a trade union can participate in the negotiation of enterprise agreement or organise protected industrial action.

6.6. Skills Development

In Australia, union training and educational activities remained practically non-existent for a long time. It was not until mid-1970s, with the passage of the Trade Union Training Authority Act¹⁴² by the federal (Labour) government, that any substantial programme was established. The Trade Union Training Authority (TUTA) as a body independent from government control was set up by this legislation.¹⁴³ A national residential training union centre was also established where correspondence courses and training programmes were offered. However, this Act was repealed in the 1990s and trade unions have since then conducted their own training programmes.¹⁴⁴

than that measure in a number of respects. These shortcomings caused the other unions in the industry, supported by ACTU, to oppose the making of the award.

¹⁴² Act 50 of 1975.

¹⁴³ See Brooks *op cit* note 2 at 165.

¹⁴⁴ *Ibid* at 166.

7. SOCIAL RESPONSIBILITIES OF TRADE UNIONS IN AUSTRALIA

7.1. Introduction

They [trade unions] see themselves as part of the process of changing the existing social order and regard their function as being one of defending and advancing the overall interests of their members not only as producers, but also as consumers and citizens.¹⁴⁵

This quote also confirms that Australian trade unions perform other functions beyond the core responsibilities or their principal purpose. They see themselves as role players in the changing of the social order by defending and advancing the overall interests of their members. They do this by providing a range of services¹⁴⁶ and benefits to their members, which are financed directly from union revenue or special levies. Australia is a member state of the United Nations¹⁴⁷ and it is therefore, just like South Africa and Britain, bound by the eight Millennium Development Goals (MDGs) which include, among others, the eradication of hunger and poverty; combating HIV/AIDS; and environmental sustainability. Australian trade unions have a role in achieving these goals as part of their social responsibility. However, just like South Africa and Great Britain, Australia does not have a formalised system of social responsibility for trade unions. The discussion that follows will cover the specific social responsibility roles of Australian trade unions.

7.2. The Economy

Unions, as the representatives of worker interests, directly influence national and regional policy as well as employment relations in unionised organisations. In addition, they indirectly affect employment relations in non-unionised organisations through their impact on public policies.¹⁴⁸

¹⁴⁵ See Deery op cit note 141 at 75.

¹⁴⁶ Services such as legal aid, taxation advice, mortuary benefits, dental care, education programmes and various cultural and recreational activities are among the facilities available to various union members.

¹⁴⁷ See <http://www.un.org/en/members> visited on 28 January 2013. Australia was admitted as a member state to the United Nations on 1 November 1945.

¹⁴⁸ See Mulvey C *Wage Levels: Do Unions Make a Difference?* In Niland J (ed) *Wage Fixation in Australia*, Allen and Unwin, Sydney (1986); see also Gardener & Palmer op cit 136 at 77.

Australian union leaders have been appointed to the boards of a number of statutory bodies that deal with economic policy, including the Reserve Bank and the national airline Qantas. In addition to earlier institutions of conciliation and arbitration, there was a mechanism at the federal level for continuing consultation and cooperation between government, trade unions and employers, called the National Labour Consultative Council (NLCC) established in 1977. The council considered matters like occupational health and safety, employee participation, women's employment and others. Other tripartite cooperation at the national level includes the variation to the National Training Wage Award reached in 1997 between Australian Chamber of Commerce and Industry (ACCI), the ACTU and the federal government.

The ACTU also shaped new directions for union participation when it articulated a series of policies linked to the notion of 'strategic unionism'. Strategic unionism meant greater central coordination and control of trade union policy and activity, including increased tripartite participation in national economic and social policy. Its policy agenda was also widened to include improved productivity, skill formation, training and education policy, and industry and national economic policy. The ACTU represents the union movement on various bodies providing for consultation with government and employers and has good informal access to governments.¹⁴⁹ It plays an important role as a major mediator between government and the unions.

With regard to economic policy in general, ACTU, which is a confederation of trade unions, acts as a representative for the labour movement in tripartite cooperation. Trade unions in Australia have always used their industrial strength to influence government policies on issues related to economic interests; however, registration is not necessarily required for a trade union to play this role.¹⁵⁰

¹⁴⁹ See Gardner M & Palmer op cit note 136 at 82.

¹⁵⁰ See Brooks op cit note 2 at 157.

7.3. Politics

The Australian trade union movement and the Australian Labour Party (ALP) have always had close relations.¹⁵¹ This is the case because the party itself was founded by the unions.¹⁵² Many unions are directly affiliated with the ALP and donations from unions are a critical source of funds for the party.¹⁵³ Nevertheless, the union movement and the party remain separate and independent from each other.¹⁵⁴ The ALP also drew parliamentary candidates from officials of unions and many have gone on to hold the highest elective positions including Prime Minister of Australia and state premier. Affiliated unions generally had about 60 per cent of the delegates to ALP state conferences and therefore had a substantial voice in state and subsequently national party policy.

Consequent to these links, Australian trade unions have been able to have legislation favourable to its interests enacted by Labour governments at both the state and federal level. Some of the legislation has granted employees improvements in employment conditions which were at the time the subject of claims before tribunals (shorter working weeks and long-service leave). The Labour Party often also intervened before arbitration tribunals in the interests of trade unions and was inclined to accede to union claims for improvements in the employment conditions of employees.¹⁵⁵ The links with the Labour Party have not however prevented Australian trade unions from using industrial action to bring pressure on governments to change their policies. In Australia industrial action has been taken for political motives. For example, Australian trade unions mounted blockades of Western Australia against the second and third waves of reforms by the Government. In 1996, the unions engaged in industrial action against the Workplace

¹⁵¹ See Bennet L *Making Labour Law in Australia: Industrial Relations, Politics and Law* (1994) at 38.

¹⁵² In New South Wales, the Trades and Labour Council provided the impetus for the formation of the ALP in 1891. See also Markey R *The Making of the Labor Party in New South Wales 1880–1900* (1988).

¹⁵³ See *Williams v Hursey* (1959) 103 CLR 30 in which the High Court of Australia held that it was within the power of the Waterside Workers Federation to impose a levy upon members to assist a political party because in the view of the court 'any action which can fairly and reasonably be regarded as likely to further the interests of the organisation and its members is within the powers of the Federation'.

¹⁵⁴ See Gardener & Palmer *op cit* note 136 at 84.

¹⁵⁵ See Brooks *op cit* note 2 at 154.

Relations and Other Legislation Amendment Bill 1996, which ended in the invasion of and substantial damage to Parliament House in Canberra.¹⁵⁶

The NSW Builders Labourers Federation has been involved in numerous industrial, social and political campaigns. It has embraced political and social responsibility functions which included its participation in the Vietnam and Black Moratoriums, demonstrations and actions against apartheid. It also took part in protests alongside students and other members of society.¹⁵⁷ The union also demonstrated against the apartheid system in South Africa when the Springboks toured Australia in 1971.¹⁵⁸ This role does not require a trade union to be registered or to participate in collective bargaining.

7.4. HIV/AIDS

HIV/AIDS raises important social and financial implications for trade unions, as it affects many people of working age. It also threatens their membership base and reduces members' contributions. In Australia, the Union Aid Abroad has been working with trade unions in Papua New Guinea on the growing problem of HIV/AIDS since 2003. Union Aid Abroad-APHEDA worked with the South African Transport & Allied Workers Union (SATAWU) to assist it to deliver HIV and occupational health and safety education to members.¹⁵⁹ Union Aid Abroad funds the HETURA office of the PNG Trade Union Congress. HETURA has worked with five pilot unions to develop strategic plans on HIV/AIDS and provide training for union officials. It has been involved with the ILO in developing an 'HIV in the Workplace Toolkit'.¹⁶⁰ Other trade unions such as the Maritime Union of Australia and

¹⁵⁶ See Lante & Wallace op cit note 1 at 227. The ACTU supported the democratic movement in South Africa (the ANC) to fight apartheid. APHEDA also campaigned for democracy, rights and justice in many countries with partners in countries like Zimbabwe.

¹⁵⁷ See Mallory G *Uncharted Waters Social Responsibility in Australian Trade Unions* (2005) at 94 and 100.

¹⁵⁸ Ibid at 101.

¹⁵⁹ Union Aid Abroad APHEDA 2011 Annual Report at 5 (see <http://www.actu.org.au> visited on 18 May 2012).

¹⁶⁰ See http://www.apheda.org.au/projects/pacific/pages/1063797890_21466.html visited on 8 May 2012.

the Plumbers & Gasfitters Employees Union of Australia have highlighted campaigns against HIV/AIDS.¹⁶¹

This role does not necessarily require a trade union to be registered or to participate in collective bargaining. Trade unions may also engage in protests or campaigns against the government to ensure that appropriate HIV/AIDS policies are developed and implemented.

7.5. The Environment

Jack Munday coined the term 'Green Ban' to describe the withdrawal of labour for social and environmental reasons and it became known as an expression for workers' opposition to socially destructive work.¹⁶² ACTU, the Australian Conversation Foundation, the Climate Institute and the Australian Council of Social Service formed the Southern Cross Climate Coalition in 2008¹⁶³ and in that year released a report entitled 'Green Gold Rush' which relied on three strategies. First, that the state should develop and facilitate a long-term environmental market, such as an Emission Trading Scheme (ETS), second that it should strengthen industry codes and standards, and third that the need for an increased investment in environmental research, technologies and skills and training should be recognised.¹⁶⁴ The Builders Labourers' Federation (BLF) imposed the Green Bans in the mid-1970s.¹⁶⁵ Through these bans, building workers withdrew labour from projects which threatened the natural or the urban environment. It even made an active threat to halt work on all of the developer's building projects underway in Sydney if work at Kelly's Bush (where building development was to take place) went ahead. The action resulted in the bush land being preserved. This campaign was followed by many other actions on the environment.¹⁶⁶

¹⁶¹ See <http://www.itfglobal.org/campaigns/stopaids2009act.cfm> visited on 18 May 2012.

¹⁶² See Mallory op cit note 159 at 110 (see also Munday J, *Green Bans and Beyond* (1981) at 105).

¹⁶³ ACTU Climate Change is Union Business: tcfua.org.au visited on 08 March 2012.

¹⁶⁴ These strategies appear in the ACTU's 'Environment and Climate Change Policy'.

¹⁶⁵ See Ford GW; Hearn JM & Lansbury RD (eds) *Australian Labour Relations: Readings* 4ed (1987) at 283 and 285. See also Mallory op cit note 159 at 110.

¹⁶⁶ See Elliot D, Green K & Steward F *Trade Unions, Technology and the Environment* (1978) at 31. The BLF applied the Green Bans to about 42 projects by then holding up £2000 million of proposed development.

This role again does not necessarily require a trade union to be registered or to participate in collective bargaining unless the matter has a bearing on the employment relationship or the workplace. As seen above, trade unions may also engage in protests or campaigns to stop damage to the environment.

7.6. Poverty Alleviation

Australian trade unions play an important role in fighting poverty and their actions contribute to the regulation of the global economy. Union Aid Abroad – APHEDA and the Australian union movement support the Make Poverty History campaign and have proposed an increase in real aid, the cancellation of debts, fight for trade justice, good governance, the extension of human rights, and the provision of decent work, among other things.¹⁶⁷

This role does not necessarily require a trade union to be registered or to participate in collective bargaining. Trade unions may also engage in protests or campaigns against the government to ensure that appropriate policies are developed and implemented in order to eradicate poverty.

7.7. Job Creation¹⁶⁸

This is another important role played by Australian trade unions. Trade unions such the Launceston Benefit were more concerned with the provision of friendly benefits such as unemployment relief and finding work for their members.¹⁶⁹ The Hobart Trades Union also sought to provide broader representation to workers in struggles against unemployment.¹⁷⁰

Unemployment registers and the establishment of quasi-employment agencies to help members find jobs have also emerged as a union response

¹⁶⁷ See http://www.apheda.org.au/campaigns/make_poverty_history/resources visited on 28 August 2015.

¹⁶⁸ In Australia official unemployment rate rose from 4.3% in the mid-2008 to 5.3% by February 2010 (see Russell D & Lansbury & Nick Wailes *Employment Relations in Australia in International & Comparative Employment Relations Globalisation and Change* edited by Greg J Bamber, Russell D Lansbury & Nick Wailes (2011) at 131). The rising levels of unemployment have put downward pressure on wages and conditions of employment. Employers prefer to hire workers on temporary contracts during difficult economic times and trade unions find their economic powers are reduced and their membership levels decline.

¹⁶⁹ See http://www.utas.edu.au/library/companion_to_tasmanian_history visited on 2 July 2012.

¹⁷⁰ Ibid

to increasing difficulties in the labour market.¹⁷¹ These are funded directly from union revenue or special levies.¹⁷² The ACTU has pushed for the improvement of the protection of workers' entitlements, that the casualisation of the Australian workforce which led to insecure jobs must be reduced and that a new set of national standards for employment insurance and lifetime learning must be established. Trade unions have also recommended that there should be measures to boost training for laid-off workers. Wage subsidies for employers in areas of high unemployment have also been called for. ACTU has also pushed for a reduction in the use of casual and contract labour which ensured that awards allowed casuals to convert to full-time employment after a specific period.

This role does not necessarily require a trade union to be registered or to participate in collective bargaining. Trade unions may also engage in protests or campaigns against the government to ensure that appropriate policies are developed and implemented in order to eradicate or reduce unemployment.

7.8. Education and Training

In Australia, union training and educational activities remained practically non-existent for a long time due to the anti-intellectual tradition of the Australian labour movement. Australian trade unions have since raised concerns about the country's inadequate skill base and the absence of policy measures to assist workers to adapt to the pressures of structural and technological change.¹⁷³

According to ACTU, if Australia is to improve its economic performance it must develop a more highly skilled, adaptable and flexible workforce and education must be seen as an integral part of long-term corporate strategies to create and maintain a competitive edge in the marketplace. Australian trade unions such as the United Voice also give members benefits such as union education courses. The United Services Union supports its members

¹⁷¹ See Deery op cit note 141 at 77-78.

¹⁷² See *Australian Unions* 2ed (1989) edited by B Ford & D Plowman at 77.

¹⁷³ See Deery op cit note 141 at 84.

and their families through the Phil Smyth Memorial Scholarship programme for their education. The union contributes \$750 towards text expenses for members or their children undertaking Industrial Relations courses. It also contributes \$750 per annum towards university fees or books.

Unions such as the Australian Bank Employees Union have specified in their rules that one of their major objectives is 'to provide scholarships for children of members and deceased members'. The ACTU has an overseas humanitarian aid agency called the Australian People for Health, Education and Development Abroad (APHEDA)¹⁷⁴ which is supported directly by its affiliates. APHEDA works with project partners in developing countries and trains workers to help develop their own communities. It also supports more than 60 projects in nine countries.¹⁷⁵ In its operation it targets in particular the more marginalised workers including women, indigenous people, refugees, young people and the unemployed.¹⁷⁶ Australian trade unions play an important developmental function.

This role does not necessarily require a trade union to be registered or participate in collective bargaining. Trade unions may also engage in protests or campaigns against the government to ensure that appropriate policies are developed and implemented in order to ensure training and education.

7.9. Financial and Legal Assistance

The United Voice union gives members legal advice on work-related problems and members also get special rates with the union's lawyers. ACTU Member Connect (formerly ACTU Workers' Trust) has selected a number of organisations providing financial advice that have the capacity and the willingness to provide financial advice to union members.¹⁷⁷ The United Services Union also offers a free 'will' service through the unions'

¹⁷⁴ In 1984 this was established by ACTU so that Australian workers could directly contribute to justice, human rights and development internationally. See <http://www.apheda.org.au> visited on 26 January 2015.

¹⁷⁵ For example; Burma, Indonesia, and Cuba.

¹⁷⁶ See Brooks op cit note 2 at 153.

¹⁷⁷ See <http://www.memberconnect.com.au/MemberServices/FinancialPlanning/default.aspx> visited on 9 May 2012.

lawyers. Members can also obtain advice on a number of matters including purchase and sale of land, mortgage loans, and criminal law. The Australian Workers Union (AWU) has also negotiated with two legal firms for the purposes of looking after workers' rights and has negotiated special benefits for them. The Australian Bank Employees Union provides a set of services which include a discount purchasing scheme and legal advice.

This role does not necessarily require a trade union to be registered or to participate in collective bargaining. There is also no need for trade unions to use industrial action to pursue it.

7.10. Social Protection

Australian trade unions are also concerned about the social protection of their members. In 1981 the Federated Store-men and Packers Union initiated an insurance scheme through which members were offered a wide range of covers including life assurance, accident cover, home and motor vehicle cover.¹⁷⁸ The union also had sickness and accident funds for members who became ill or injured outside working hours. Other unions have mortality or funeral funds which provide the next of kin with cash payments. The United Services Union provides a monthly benefit payment to the immediate next of kin of a deceased member.¹⁷⁹

Australian trade unions have campaigned for union administered schemes as a result of the general failure of the existing company, occupational and industry superannuation¹⁸⁰ structures. For example, the Federated Store-men and Packers Union established its own fund known as the Labour Union Co-operative Retirement Fund (LUCRF) in 1978. The ACTU has also encouraged its affiliates to place superannuation on the agenda for award

¹⁷⁸ See <https://www.atua.org.au> visited on 27 August 2015. This union however underwent a series of amalgamations.

¹⁷⁹ See <http://www.usu.org.au/benefits> visited on 28 August 2015.

¹⁸⁰ Superannuation is a retirement (including pensions) scheme in Australia, which has a compulsory element whereby employers are required by law to pay an additional amount based on a proportion of an employee's salary and wages (currently 9%) into a complying superannuation fund which can be visited when the employee meets one of the conditions in Schedule [1][1] of the Superannuation Industry Supervision Regulations 1994.

negotiations.¹⁸¹ Subsequently, the Federal Tribunal also decided to leave decision-making on superannuation to direct negotiations between employees, their unions and the employers because it is an industrial matter. In addition, trade unions' superannuation received much support from the renegotiated Accord agreement between the Federal Labour Government and the ACTU concluded in 1985. By 1990 almost 90 per cent of employees were receiving superannuation as an employment benefit.

This role does not necessarily require a trade union to be registered or to participate in collective bargaining. There is also no need for trade unions to use industrial action to pursue it.

8. CHALLENGES FACING TRADE UNIONS IN AUSTRALIA

Union density has fallen to the point where, in August 2009, only 20 per cent of employees were found to be members of trade unions. This figure was down from around 50 per cent at the beginning of the 1980s. Some of the reasons include changes in the structure of the economy with jobs being lost in traditional union strongholds; growth in the number of white collar workers; an increase in precarious forms of employment such as casual or contract labour; the poor public image of unions; failure by unions to recruit young workers; and the inability of many unions to engage in a meaningful way with enterprise bargaining.¹⁸²

The ACTU's response to the decline has been to encourage affiliates not just to be more active in targeting industries where the organisation has been weak, but to improve and expand the services offered to members. There has also been emphasis on greater education of workplace delegates and better communication, marketing and public relations.¹⁸³ During the 1990s, the union movement focused on restructuring and amalgamation, which resulted in the merger of 360 federally registered unions into 20 industry-

¹⁸¹ See Deery *op cit* note 141 at 82. In 1980 the ACTU and the Australian Paper and Pulp Mills entered into an agreement regarding the participation of unions in the running of superannuation funds. In 1984 employers agreed to pay weekly contributions into a union-run superannuation scheme known as the Building Unions' Superannuation Scheme (BUSS).

¹⁸² See Creighton & Stewart *op cit* note 5 at 686–688 para 20.60.

¹⁸³ *Ibid* at 688 para 60.61

based 'super unions'. The rationale for this was to release resources for improved provision of services to members.¹⁸⁴ Although this steadied the decline to some extent, it did not halt the decline of trade unions altogether. Subsequently, at the ACTU Congress in 2000, Unions@Work was introduced as a strategy which emphasised the central role of the organising model in building a more inclusive social movement approach to unionism through which membership would be increased.¹⁸⁵ Trade union membership has also become flexible and is no longer limited solely to employees but has been expanded to include independent contractors. Workers can also elect to be non-members subscribing to only a selection of the trade union services they value through the payment of once-off fees or annual service fees.¹⁸⁶

9. CONCLUSION

Although Australia has British colonial origins the development of its industrial relations took a different route. For many years it did not have a voluntary system of collective bargaining but instead had a system of compulsory conciliation and arbitration. Australia has ratified a number of ILO Conventions, including those relating to freedom of association¹⁸⁷ and collective bargaining;¹⁸⁸ however, on a number of occasions the country was found not to be in compliance with certain obligations.¹⁸⁹ In Australia, an organisation of workers does not have to be registered in order to qualify as a trade union as defined;¹⁹⁰ and an unregistered union could participate in the compulsory system of conciliation and arbitration. To qualify as a trade union an association of employees must have, as its principal purpose, the protection and promotion of the employee's interests in matters concerning employment. This indicates that to a certain extent registration plays an

¹⁸⁴ See Lansbury & Wailes op cit note 6 at 122.

¹⁸⁵ See Cooper R 'Organise, Organise, Organise! The 2000 ACTU Congress' *Journal of Industrial Relations* (2000) 42(4) 582-94.

¹⁸⁶ Trade Union Benefits in the New Economy, posted in Media Briefs; 7 October 2010 visited on 5 October 2012.

¹⁸⁷ See Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

¹⁸⁸ See the Right to Organise and Collective Bargaining Convention 98 of 1949.

¹⁸⁹ See Brooks op cit note 5 at 86.

¹⁹⁰ See s 4(1) of the WRA, 1996.

important role in the overall functioning of trade unions in Australia. Although unregistered trade unions are recognised, support and protection is given only to registered trade unions.

In Australia, for many years a compulsory system of conciliation and arbitration prevailed over the normal system of collective bargaining and there was no express constitutional provision which covered collective bargaining, with collective bargaining being overshadowed by the system of compulsory conciliation and arbitration. Furthermore, the fact that employers and employees were allowed to conclude AWAs undermined the integrity of the collective bargaining system. Legislation did, however, promote and protect the system of compulsory conciliation and arbitration more than collective bargaining. This has now changed under the FW Act, as AWAs have been abolished and most matters with a bearing on the employment relationship are dealt with through enterprise agreements and modern awards. The aim of the FW Act is to restore the bargaining power of employees with new general protections for employees as well as good faith bargaining. Although trade unions have been recognised in Australia for many years, the law played a minor role in protecting and supporting them as collective bargaining role players.

Under the conciliation and arbitration system, strike activity was rendered illegal and subject to penalties. However, since the intervention of the ILO, Australia now has a legally guaranteed right to strike; although this right is highly restricted. Although limited, in Australia industrial action plays an important part in the social responsibility role of trade unions with a bearing on the employment relationship. It also plays a role in matters which do not necessarily relate to the employment relationship, such as economic and political matters.

CHAPTER 6: THE SOCIAL RESPONSIBILITY OF TRADE UNIONS: SUMMARY, RECOMMENDATIONS AND CONCLUSION

... trade unions must also remain crucial institutions in pressing urgently for a radical agenda of social reform. They believe in fairness not only in the workplace but also in society as a whole.¹

1. INTRODUCTION

Although trade unions have proved to be important agents of social reform, their social responsibility is under-emphasised worldwide, including in South Africa. Consequently, this causes uncertainty about whether trade unions should indeed have social responsibility and what that social responsibility should entail. This chapter brings to an end the study on the social responsibility of trade unions in South Africa. It summarises the findings in various chapters, including the development and main purpose of trade unions and the theoretical analysis of the social responsibility of trade unions in South Africa, Great Britain and Australia. Most importantly, this chapter provides recommendations on how to accommodate, finance and implement the social responsibility role of trade unions alongside their main purpose in South Africa.

For many years, South Africans lived under the apartheid system through which many people were denied basic human rights. It was a society deeply divided along racial lines with economic, political and social inequalities deeply entrenched. Apartheid has now been abolished; however South Africa is still faced with social ills such as poverty and unemployment. Under the new Constitution, everyone in South Africa has the right to have access to social security, including appropriate social assistance; etc.² however government resources are too limited to provide adequately for everyone's needs. Worldwide, governments are faced with challenges as they are no longer in a position to protect individuals from economic insecurities and

¹ See Taylor R *The Future of Trade Unions* (1994) at 221.

² S 27(1)(c) of the Constitution.

hardships.³ The involvement of trade unions in social responsibility activities will assist the government and business, which is already social responsibility conscious (corporate social responsibility – see Chapter 1 (paras 4.4.2.1 and 4.4.2.2), in dealing with these social problems. As a developing country, South Africa needs all stakeholders (government; business and labour) to join forces to contribute towards its economic growth and sustainable development, and trade unions through their social responsibility can play a pivotal role in that regard.

A trade union (just like business (a company)) is an integral part of society and should be considered as much a citizen of a country as any natural person.⁴ This implies that trade unions should also be responsible citizens, who are able to consider social, environmental and economic factors in their operation.

2. RESEARCH QUESTION ANSWERED

In Chapter 1 the research aim was clearly set to investigate the social responsibility role of trade unions in South Africa and to explore what it should entail and whether this role is enforced or underplayed through legislation.

In this study various roles for trade unions and their importance both within and beyond the workplace were identified. Indeed, it was shown that trade unions play an important role as agents of change in and beyond the workplace and yet the legislative framework does not support the practical reality.

An improved understanding of their broader role would thus enhance the effectiveness of trade unions in South Africa. Moreover, the social responsibility of trade unions should be developed and trade unions need to do more to ensure that it is promoted. Trade unions will also need the involvement of other social partners experienced in this role, such as

³ See Crowther D & Jatana R *International Dimensions of Corporate Social Responsibility* (2005) v-vi.

⁴ See King III Report which applies to all entities regardless of the manner and form of incorporation or establishment and whether they are in public, private or non-profit sectors.

business, NGOs and government, to assist them in pursuing their social responsibilities.⁵

This study, first of all finds that the social responsibility of trade unions should be emphasised, as it is part and parcel of the general role of trade unions.

Secondly, it finds that this role should not be overregulated, as this may do more harm than good to trade unions. In addition, the social responsibility of trade unions should not be viewed as a burden, but rather an opportunity to make a positive contribution towards development and social change. The significance of the social responsibility of trade unions is that it potentially provides benefits for trade unions themselves⁶ and their members, and also for the unemployed, society in general and the environment.

Nevertheless, the study further emphasises that there should be a balance between the core responsibilities and the social responsibilities of trade unions. However, it recognises that this balance may be accompanied by some challenges. This chapter therefore concludes by summarising

- the historical development of the social responsibility role of trade unions and the impact of international instruments on that role
- the core responsibilities and legislative framework of trade unions in South Africa, Great Britain and Australia
- the importance of the social responsibility role of trade unions in South Africa, Great Britain and Australia.

The discussion in this chapter then continues to identify the challenges and risks involved in the greater recognition of and support for trade union social responsibility in South Africa.

⁵ See paras 1 and 2 of Ch 1.

⁶ See para 4.4.2.4 of Ch 1.

It continues with recommendations for

- accommodating the social responsibility role of trade unions in the formal legislative framework alongside their core responsibilities
- additional (non-formal ways) ways in which the social responsibility of trade unions may be emphasised and increased.

3. SUMMARY: HISTORICAL DEVELOPMENT OF TRADE UNIONS AND THE IMPACT OF INTERNATIONAL INSTRUMENTS ON THEIR ROLE

Salamon views trade unionism as a social response to the advent of industrialisation and capitalism.⁷ In Britain before the Industrial Revolution, there were trade guilds which protected the interests of craftsmen. These guilds were able to look after their members when they were sick and also helped the families of deceased guild members.⁸ Later, the Industrial Revolution resulted in poor working conditions and the exploitation of workers and this warranted some form of protection for the workers. Later the guilds were replaced by friendly societies also established by craftsmen. Members of these societies contributed money and received benefits when they became sick, unemployed or died.⁹ The first trade union in Great Britain was established in 1824 after the Combinations Act, which had prohibited trade unions, was repealed. The right to combine and to bargain collectively was first recognised by the Peel's Act of 1825 and later by the Trade Union Act of 1871 followed by several other Acts, including TULCRA and the Employment Relations Act of 2004.¹⁰ In Britain there is just one main union confederation known as the TUC which was established in 1868.¹¹

⁷ See Bendix S *Industrial Relations in South Africa* (2010) 5ed at 162

⁸ See para 2 of Ch 4.

⁹ See also Taylor op cit note 1 at 5.

¹⁰ See para 2.2 of Ch 4.

¹¹ Ibid.

Although Australia has British colonial origins, it is a federal state and until 2009 its industrial relations system entailed compulsory conciliation and arbitration. Trade unions in Australia were started in the 1820s by settlers of the country and, similar to the British position, the early trade unions took the form of mutual benefit societies.¹² In Australia, however, trade unions were restrained through the Master and Servant Act; however the number of trade unions later grew because of the discovery of gold. The main union confederation in Australia is the ACTU which was established in 1927 by the Melbourne Trades Hall Council. The right to form and join trade unions was regulated by the WRA, 1996, followed by the Works Choice Act and now by the Fair Work Act.

In common with Australia, South Africa has British colonial origins and the first trade unions in South Africa were established towards the end of the nineteenth century as branches of British trade unions. The first local trade union was established in 1888. Again, in common with both Great Britain and Australia, some of the first trade unions in South Africa were based on the friendly society system.¹³ Trade unions were first regulated under the Industrial Act 1924; however the Act discriminated against black workers and their trade unions.¹⁴ Later, the Labour Relations Act, 1956, was promulgated but still blacks were excluded.¹⁵ This situation persisted until 1979, when the Wiehahn Commission recommended that full freedom of association be granted to employees regardless of their race.¹⁶ COSATU, which is the biggest federation of trade unions in South Africa, was launched in 1985 and played an important role in bringing about social change in the country.¹⁷ South Africa became a democracy in 1994 and a new Constitution was introduced which, among other things, protects labour rights as human rights. This development resulted in the

¹² See para 2.2 of Ch 5.

¹³ See para 2 of Ch 2; para 2 of Ch 4 and para 2.2 of Ch 5.

¹⁴ See para 2.2 of Ch 2.

¹⁵ See para 2.3 of Ch 2.

¹⁶ See para 2.5 of Ch 2.

¹⁷ See para 2.6 of Ch 2.

promulgation of the LRA which gives effect to those labour rights, including the right to form and join trade unions.¹⁸

A common factor in all the three countries is that there was initially resistance to the formation of trade unions as they challenged the status quo in workplaces. Another common factor and of great importance to this discussion is that they generally emerged as friendly societies, aimed at addressing social challenges. A friendly society is a mutual association for the purposes of insurance, pensions, savings or cooperative banking. Members of a friendly society have a common purpose which is both financial and social in nature.¹⁹ It is evident that in their early days, trade unions in all the three countries had a desire to serve their members beyond the day-to-day employment-related matters.²⁰

The above made it clear that there is a universal need to link work and personal life.

It should be noted that none of the countries under discussion currently has a formal system for trade union social responsibility. However, it is again evident from the definitions of trade unions discussed in the various chapters of this thesis that the purpose of trade unions in the three countries is not limited to their principal purpose.²¹ Accordingly, trade unions may perform other functions or roles beyond their principal functions. Salamon's definition of trade union states that a trade union 'is an organization which seeks to organise and *represent employees' interests both in the workplace and society*' [my emphasis]. Their role goes beyond what is required by law and extends to the society in which they function. The definition of trade union provided in the *Encyclopedia Britannica*²² also confirms that trade unions have a broader role, since it includes the

¹⁸ See para 3 and 4 of Ch 2.

¹⁹ See http://en.wikipedia.org/wiki/Friendly_society visited on 18 February 2014. Friendly societies played an important part in the lives of people before the development of government and employer health insurance and other financial services. In Great Britain they were regulated under the Friendly Societies Act of 1875, in Australia they are regulated under the Life Insurance Act 1995 and in South Africa they are regulated under the Friendly Societies Act 25 of 1956.

²⁰ See para 2.1 of Ch 2.

²¹ See para 5.2 of Ch 2; para 6.2 of Ch 4 and para 6.2 of Ch 5.

²² See para 4.1 of Ch 1.

provision of benefits as part of what a trade union can do. These definitions confirm that trade unions in general seek to improve the position and welfare of their members as employees and as social beings.

These other roles beyond what is required by law encompass the social responsibilities of trade unions and some of them can find their base in the UN Millennium Development Goals (MDGs).²³ For the purposes of South Africa, the vision behind NEPAD, which aims at eradicating poverty and the fostering of socio-economic development and the National Development Plan which aims at amongst others, job creation, also require trade unions' active participation²⁴ As discussed in the various chapters,²⁵ the non-core responsibilities or social responsibilities of trade unions will, among others, cover the following aspects: the economy; politics; HIV/AIDS; the environment; poverty alleviation; reduction of unemployment; education and training; financial and legal assistance; and social protection.

Unlike the core responsibilities, the non-core responsibilities or social responsibility role of trade unions is generally not regulated by legislation, mainly because this role is beyond what the law requires. It must nevertheless be emphasised that this role is important for sustainable development. Since trade unions emerged as social movements²⁶ and friendly societies providing benefits for their members, they have always in one way or another played an important role in the development of their members and the societies in which they operate.

In many countries, including South Africa, trade unions have been involved in liberation struggles and therefore brought about political change.²⁷ In some cases they even established alliances with community and political organisations in order to be more effective and relevant.²⁸ Their cooperation

²³ The goals include the following: eradication of poverty, combating HIV/AIDS, environmental sustainability, etc.

²⁴ NEPAD is an economic development programme for the African Union aimed at eradicating poverty and promoting sustainable growth and development and integrating Africa in the world economy (see <http://www.nepad.org> visited on 22 October 2014). See para 4.4.2.6 of Ch 1.

²⁵ See paras 5 of Ch 2; 6 of Ch 4 and 6 of Ch 5.

²⁶ See para 1 of Ch 1.

²⁷ See para 1 of Ch 1.

²⁸ Ibid.

with other organisations such as political parties gives them access to higher levels of decision-making.²⁹ The social trade union movement takes responsibility for society and plays an important role in the struggle for the future, ensuring that workers are valued and empowered.³⁰

The current study has shown that trade unions informally started to fill the void and the need for the social responsibility role in their early beginnings. From international standards it is also clear that the purpose behind the formation of trade unions has always been to uphold workers' rights and workers' standard of living. Consequently, international standards have played a pivotal role in the development of human rights in all the three countries examined in this study.³¹ It must once more be emphasised that workers' rights are human rights.³² The right to form and belong to associations, including trade unions, is therefore an important international human right. Through this right employees are able to organise themselves and protect their interests. There are various instruments, treaties, conventions and declarations, which are sources of international law that create universal obligations for states, examples of which include the Universal Declaration of Human Rights (UDHR),³³ the International Covenant on Civil and Political Rights (ICCPR),³⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁵ and also the ILO Conventions. As UN members, the three countries under discussion should therefore follow the guidelines provided by these instruments.³⁶

The UDHR was adopted by the UN in 1948 as a common standard of achievement for all people and all nations. It recognises 'the inherent dignity

²⁹ Kriesi H 'The Organisational Structure of New Social Movements in a Political Context' in D McAdam JD McCarthy & MN Zald (eds) *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures and Cultural Framings* (1996) at 152-184.

³⁰ Svendsen S, Anderson L, Jensen T, Olsen SS & Larsen G *The Trade Union Movement of the Future* at 1 <http://www.cifs.dk/scripts/artikel.asp?id=150&1ng=2> visited on 14 April 2014.

³¹ See Keightly R 'International Human Rights Norms in a New South Africa' (1992) 8 *SAJHR* 171.

³² See Leary VA 'The Paradox of Workers' rights as Human Rights' in Lance A et al (eds) *Human Rights, Labor Rights and International Trade* (1996) 22.

³³ Universal Declaration of Human Rights GA Res 217 (111) was adopted by the United Nations General Assembly on 10 December 1948.

³⁴ The International Covenant on Civil and Political Rights 1966 999 UNTS 171; 6 ILM 368 (1967).

³⁵ The International Covenant on Economic, Social and Cultural Rights UNTS 3 (1967) 6 ILM 360 (1960).

³⁶ See paragraphs 2.3 of Ch 4; 2.1 of Ch 5 and 3 of Ch 2.

and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace of the world'.³⁷ It is not a treaty and therefore not legally binding to the UN member states, but it was intended to serve as a guide to those who endeavoured to raise people's material standards of living.³⁸ However, some of its provisions have achieved the status of customary international law.³⁹ Article 23 of the UDHR recognises the right of everyone to just and favourable conditions of work, equal pay for equal work, and just and favourable remuneration. The Article further protects the right of workers to form and join trade unions. Trade unions are able to protect and enforce the rights mentioned in Article 23 as part of their principal purpose. Furthermore, Article 22 of the UDHR recognises that members of the society have a right of access to social security, while Article 25 recognises that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability etc. Article 26 covers the right to education. Although the UDHR does not specifically address the issue of trade union social responsibility, the Articles discussed above relate to the social needs.

In an attempt to make the UDHR an enforceable instrument, the UN adopted two covenants, the ICCPR and the ICESCR. In Article 22, the ICCPR recognises the right of everyone to freedom of association including the right to form and join trade unions for the protection of their interests.⁴⁰ Under the ICESCR, trade union rights, including the right to freedom of association, are provided for in more detail.⁴¹ In Articles 6, 7 and 8, the ICESCR also protects the right to just and favourable conditions of work and trade union rights.

³⁷ See the Preamble to the UDHR.

³⁸ United Nations Plenary meeting, Official Records of Third Session, Part I 1948 873, Netherlands Delegate.

³⁹ See Waldock CHM 'Human rights in contemporary international law and the significance of the European convention' quoted by Umozurike *The African Charter on Human and Peoples' Rights* (1997) 11; Dugard J *International Law: A South African Perspective* (2000) 34, 241.

⁴⁰ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> visited on 8 May 2014.

⁴¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> visited on 8 May 2014.

The ILO, which was established at the end of the First World War in 1919, is a specialised UN agency which deals with worker's rights, including freedom of association.⁴² In terms of its Constitution Act, freedom of association must be protected as a means of improving conditions of labour and establishing peace.⁴³ Under the ILO, the right to freedom of association is protected by Convention 87 of 1948⁴⁴ and Convention 98 of 1949.⁴⁵ These Conventions protect the right to freedom of association as specifically covered by the ICCPR and the ICESCR.⁴⁶

The right to freedom of association as protected by these instruments is the basis of trade unionism. This right is regarded as 'a shorthand expression for a bundle of rights and freedoms relating to membership of associations of workers'.⁴⁷ This bundle of rights includes the right to be represented by a trade union in matters of mutual interest between an employer and employees.

The ICCPR further recognises that everyone should enjoy civil and political rights, as well as economic, social and cultural rights.⁴⁸ The ICESCR also protects economic, social and cultural rights. It commits its parties to work towards the granting of economic, social and cultural rights to Non-Self-Governing and Trust Territories and individuals, including labour rights, the right to health, the right to education and the right to an adequate standard of living. Article 9 of the Covenant recognises the right of everyone to social security and social insurance. These rights relate to the social responsibility of organisations.

To a larger extent, the onus is on a state or government to make efforts to grant its citizens these rights, however, as previously noted, governments

⁴² The first Convention regulating freedom of association adopted by the ILO was the Right of Association (Agriculture) Convention 11 of 1921 which dealt particularly with the right of association in the agricultural sector.

⁴³ The Preamble to the ILO Constitution.

⁴⁴ Freedom of Association and the Right to Organise Convention.

⁴⁵ The Right to Organise and Collective Bargaining Convention.

⁴⁶ Article 22 of the ICCPR (freedom of association) and Article 8 of the ICESCR (trade union rights)

⁴⁷ Creighton B 'Freedom of Association' in Blanpain et al (eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1987) 173.

⁴⁸ See the preamble to the ICCPR.

may not be able to cater for all the needs of the people because of their limited resources; therefore trade unions should assist in that regard.

In 1998, trade unions, employers' organisations and governments at the ILO together issued the Declaration of Fundamental Principles and Rights at Work. This declaration was adopted, as the solution to social and economic problems, in order to stress the importance of social progress and workers' rights during a time when globalisation and economic growth were negatively affected. The UN Millennium Declaration adopted in 2000 is also an important international instrument which contains an international agenda for development, dealing with goals such as poverty alleviation and, education among others. These are some of the social responsibilities in which trade unions should be involved.

4. SUMMARY: CORE RESPONSIBILITIES OF TRADE UNIONS IN SOUTH AFRICA, GREAT BRITAIN AND AUSTRALIA

A contract of employment between an employer and an employee indicates a position of unequal strength. A single employee is generally not in a position to negotiate with the employer about terms and conditions of employment. A balance is therefore needed in this relationship and such balance is only brought about when employees act together and are represented by a trade union.⁴⁹

The purpose of a trade union is found in the definition of the term 'trade union'. Each of the three countries has a statute which regulates trade unions and also provides a definition for trade union. In South Africa trade unions are regulated under the LRA which defines a trade union as 'an association of employees whose *principal purpose* is to *regulate relations between employees and employers* [my emphasis], including any employers' organisation.⁵⁰

⁴⁹ See Davies PL & Freedland MR *Kahn-Freund's Labour and the Law* (1983)18.

⁵⁰ See s 213 of the LRA.

In Great Britain trade unions are regulated under the TULRCA which defines a trade union as ‘an organization ...whose *principal purposes include the regulation of relations between workers and employers or employers’ associations* [my emphasis]’.⁵¹

In Australia trade unions are regulated under the WRA, 1996, which defines a trade union as ‘an organization of employees a *principal purpose of which is the protection and promotion of the employees’ interests in matters concerning their employment* [my emphasis].⁵²

The above definitions of trade union provide a clear indication of the purpose of a trade union. Although the definitions are not phrased in the same way, they still highlight the same elements. It is evident from each of the definitions above that, firstly, an organisation must be an association of employees in order to qualify as a trade union. Secondly, the organisation must have a principal purpose, which must relate to the regulation of relations between employees and their employers. In other words, the main purpose of trade unions has to do with employment-related matters. Accordingly, their main and most prominent purpose must be to represent the interests of their members in the workplace. As discussed in the various chapters of this work, their core responsibilities or principal purpose will, among others, cover the following aspects: job regulation; job security; employment equity; skills development; and health and safety. These roles as shown in the discussion in different chapters are generally regulated by legislation. Legislation therefore serves as support for trade unions in their core responsibilities.

In the three countries under discussion trade unions all pursue a job regulation role as one of their primary roles.⁵³ By their nature trade unions concern themselves with the protection and enhancement of their members’ rights and interests in the employment relationship. This role is generally supported by legislation in the three countries. In South Africa this is

⁵¹ See Selwyn NM *Selwyn’s Law of Employment* (14ed) 2006.

⁵² See para 2.4 of Ch 5.

⁵³ See para 5.1.2 of Ch 2; para 6.1.2 of Ch 4; para 6.1.2 of Ch 5.

mainly dealt with under the BCEA.⁵⁴ In Great Britain it is, amongst others, regulated in terms of the Working Time Regulations 1998 and the Employment Rights Act of 1996⁵⁵ and in Australia it is regulated under the FW Act.⁵⁶

The job security of workers is also one of the important core responsibilities of trade unions in the three countries.⁵⁷ This role serves to protect members against unfair labour practices and unfair dismissals and is also supported by legislation. In South Africa this is mainly regulated by the LRA.⁵⁸ In Great Britain it is regulated under the Employment Rights Act of 1996⁵⁹ and in Australia under the FW Act.⁶⁰

Employment equity and the elimination of unfair discrimination is another critical role for trade unions in the three countries.⁶¹ This role ensures that there is equal treatment of employees in the workplace. In South Africa this role is regulated by the EEA.⁶² In Great Britain it is regulated by, among others, the Disability Rights Commission Act 1999⁶³ and in Australia by, among others, the Equal Employment Opportunity for Women Act 1986.⁶⁴

Trade unions in South Africa, Great Britain and Australia also ensure the development of workers by their employers and the state.⁶⁵ In South Africa this role is regulated by the SDA.⁶⁶ In Great Britain it is regulated under the Industrial Training Act 1982,⁶⁷ and in Australia this role was regulated under the Trade Union Training Authority Act in terms of which the Trade

⁵⁴ See para 5.1.2 of Ch 2.

⁵⁵ See para 6.1.2 of Ch 4.

⁵⁶ See para 6.1.2 of Ch 5.

⁵⁷ See para 5.1.3 of Ch 2; para 1.1.3 of Ch 4 and para 6.1.2 of Ch 5.

⁵⁸ See para 5.1.3 of Ch 2.

⁵⁹ See para 6.1.3 of Ch 5.

⁶⁰ See para 6.1.3 of Ch 4.

⁶¹ See para 5.1.4 of Ch 2; para 6.1.4 of Ch 4 and para 6.1.4 of Ch 5.

⁶² See para 5.1.4 of Ch 2.

⁶³ See para 6.1.4 of Ch 4.

⁶⁴ See para 6.1.4 of Ch 5.

⁶⁵ See para 5.1.5 of Ch 2; para 6.1.5 of Ch 4 and 6.1.5 of Ch 5.

⁶⁶ See para 5.1.5 of Ch 2.

⁶⁷ See para 6.1.5 of Ch 4.

Union Training Authority (TUTA) was established; however, after the Act was repealed trade unions conduct their own training programmes.⁶⁸

Trade unions in the three countries also ensure the health and safety of their members.⁶⁹ Legislation regulating this role in South Africa for employees in general is the OHSA.⁷⁰ In Great Britain this role is dealt with under the Health and Safety at Work Act 1974.⁷¹ In Australia this role is promoted and protected by, among others, the Occupational Health and Safety Act 2000 (NSW) and the Occupational Health and Safety Act 2004 (Vic).⁷²

In each of the three countries there is a piece of legislation that provides for and regulates trade unions. All these pieces of legislation define a trade union and state its main purpose. Although established under different circumstances, the core responsibilities of trade unions focus on the employment relationship between employees and their employers.

5. SUMMARY: SOCIAL RESPONSIBILITY ROLE OF TRADE UNIONS IN SOUTH AFRICA, GREAT BRITAIN AND AUSTRALIA

In addition to their core responsibilities, trade unions play a number of social responsibility roles. Trade unions in the three countries under discussion play an important role in the economy of their countries. In South Africa, trade unions form part of NEDLAC, which is an important platform for them to participate in the formulation of economic policies. In Great Britain, trade unions were in the past part of the National Economic Development Council (NEDC) which played an advisory role on economic matters.⁷³ In Australia union leaders form part of statutory bodies that deal with economic policies, including the Australian Reserve Bank.⁷⁴

⁶⁸ See para 6.1.5 of Ch 5.

⁶⁹ See para 5.1.6 of Ch 2; para 6.1.6 of Ch 4 and 6.1.6 of Ch 5.

⁷⁰ See para 5.1.6 of Ch 2.

⁷¹ See para 6.1.6 of Ch 4.

⁷² See para 6.1.6 of Ch 5.

⁷³ See para 5.2.2 of Ch 2.

⁷⁴ See para 6.2.2 of Ch 4.

All over the world trade unions have been involved in politics in one way or the other. In South Africa, COSATU has been at the forefront of the political struggles and anti-apartheid campaigns that took place before democracy and it is now in an alliance with the ANC (the ruling political party) and the SACP.⁷⁵ The Labour Party in Great Britain emerged from the TUC. British trade unions are even allowed to establish a political fund in order to pursue political objects and members make contributions to such funds.⁷⁶ The Australian trade union movement and the Australian Labour Party (ALP) have always had close ties and the ALP has drawn parliamentary candidates from union officials.⁷⁷

Today the world at large is faced with the problem of HIV/AIDS. This is also one of the central issues facing trade unions as it affects many people of working age.⁷⁸ In South Africa some trade unions have started projects in order to combat HIV/AIDS.⁷⁹ COSATU is also involved as a key partner of the Treatment Action Campaign.⁸⁰ In Great Britain, TUC Aid supports trade unions in developing workplace strategies to combat HIV/AIDS in sub-Saharan Africa.⁸¹ Australian trade unions have also been at the forefront in fighting HIV/AIDS through the Union Aid Abroad, which works with trade unions in other countries on HIV/AIDS-related issues.⁸²

Environmental issues are no longer just a matter for governments, but affect everyone, including trade unions.⁸³ In South Africa trade unions, including COSATU are involved in the formulation of environmental policies at the national level.⁸⁴ In Great Britain the TUC has been involved in the Green

⁷⁵ See para 6.2.2 of Ch 5. Earlier on, other federations of trade unions such as SACTU also played an important role in the fight against the apartheid system (Towards a Global Social Movement? at 5)

⁷⁶ See para 6.2.3 of Ch 4.

⁷⁷ See para 6.2.3 of Ch 5.

⁷⁸ This is one of the eight Millennium Development Goals.

⁷⁹ SACTWU is one such example. The union has an AIDS Project which was established in 1998. It offers training on HIV/AIDS, to members and counselling and voluntary tests to those who want to be tested.

⁸⁰ TAC is an organisation working towards educating and promoting understanding about HIV/AIDS.

⁸¹ UNISON, which is one of the biggest trade unions with 1.3 million members, has collaborated with South African trade unions since the late 1980s on HIV/AIDS-related matters.

⁸² See para 6.2.4 of Ch 5.

⁸³ Beck U 'Risk Society: Towards a New Modernity' in Chris Marsden *The New Corporate Citizenship of Big Business: Part of the Solution to Sustainability Business and Society Review* (1997)105 at 19-25

⁸⁴ In 1993 the Tripartite Alliance (ANC, SACP and COSATU) arranged an environmental policy mission with the assistance of the Canadian International Development Research Centre. The mission produced a report on

Workplaces project working with unions such as the Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU).⁸⁵ In Australia, the Builders Labourers' Federation (BLF) imposed the Green Bans in the mid-1970s, withdrawing labour for environmental reasons.⁸⁶

Trade unions in South Africa, Great Britain and Australia contribute towards the alleviation of poverty.⁸⁷ Among other things, they pursue this function by pushing for decent work and secure better conditions for their members. In South Africa, trade unions through the NEDLAC forum are involved in national development programmes which are aimed at reducing poverty.⁸⁸ In Britain, TUC Aid supports trade unions in their efforts to end poverty,⁸⁹ while in Australia, Union Aid Abroad – APHEDA and the Australian union movement support the Make Poverty History campaign which is also aimed at eradicating poverty.⁹⁰

The reduction of unemployment is one of the important social responsibility functions of trade unions. In South Africa trade unions were involved in the Growth and Development Summit organised to formulate strategies for employment creation. SACTWU also initiated the 'buy local campaign' in order to create jobs and was also involved in the Proudly South African and the Label of Origin campaigns, in order to fight job losses.⁹¹ In Great Britain, some unions such as the GPMU pay their jobless members £10 a week for ten weeks in a year if they have paid more than one annual subscription.⁹² In Australia, trade unions have established quasi-employment agencies to

environmental policy in South Africa which influenced the content of subsequent policy documents, for example the environment Green Paper. The trade union also became more involved in environmental policy through the Consultative National Environmental Policy Process (CONNEPP), which became the key mechanism for consultation on and the formulation of environmental policy (see An Environmental Policy for South Africa at <http://www.polity.org.za/polity/govdocs/green-papers/enviro0.html> visited on 14/04/2014).

⁸⁵ See para 6.2.5 of Ch 4.

⁸⁶ See para 6.2.5 of Ch 5.

⁸⁷ In South Africa, out of a total of 45 million people up to 50% live in poverty (see McCord A, *Policy Expectations and Programme Reality: The Poverty Reduction and Labour Market Impact of Two Public Works Programmes in South Africa*, Economics and Statistics Analysis Unit Working Paper (September 2004) 3.

⁸⁸ See 'Poverty Alleviation and the Role of Workers' organisations in Africa' *DPMN Bulletin* IX(2) May 2002 at <http://www.dpmf.org/images/poverty-alleviation-mohammed.html> visited on 14 April 2014.

⁸⁹ It is responsible for humanitarian relief, long-term development, education and training activities in developing countries. It relies on trade unionists for funding.

⁹⁰ See para 6.2.6 of Ch 5.

⁹¹ See <http://www.sactwu.org.za/jobcamp.asp> visited on 14 April 2014.

⁹² See para 6.2.7 of Ch 4.

help their members find jobs and the funding for these agencies comes from union revenue.⁹³

Education and training is important for the development of workers and society in general. In South Africa some trade unions⁹⁴ offer bursaries to members and their dependants to fund their education. In Great Britain TUC Aid promotes long-term development and capacity activities in developing countries, while Union-learn also play an important role in the training of workers.⁹⁵ In Australia trade unions also support members and their families through scholarship programmes for their education. In addition, ACTU through APHEDA has worked with project partners in developing countries and also trains workers who, in turn, develop their own communities.⁹⁶

When trade unions began they had an element of mutual insurance in order to provide benefits to their members.⁹⁷ This element has continued over the years and it is an important social responsibility role. In South Africa some unions provide financial services to their members in order to improve their economic and social well-being.⁹⁸ British trade unions also provide a wide range of financial benefits to their members, including health and unemployment benefits.⁹⁹ In Australia there are also trade unions that give their members financial and legal advice on work-related problems. Members also get special rates with the union's lawyers.¹⁰⁰

Social protection is another important role for trade unions. In South Africa some trade unions assist their members to save for retirement.¹⁰¹ British

⁹³ See para 6.2.7 of Ch 5.

⁹⁴ SACTWU has an education leg called 'Edupeg', which works with disadvantaged primary schools in the areas of numeracy and literacy. Solidarity and NUM also have bursaries (see para 5.2.8 of Ch 2).

⁹⁵ See para 6.2.8 of Ch 4.

⁹⁶ See para 6.2.8 of Ch 5.

⁹⁷ See Taylor op cit note 1at 146 and Ewing KD 'The Functions of Trade Unions' *Industrial Law Journal* 34(1) March (2005) at 1.

⁹⁸ NEHAWU has established the 'NEHAWU Savings and Credit Co-operative' (SACCO) for this purpose. Solidarity also offers legal aid on labour related matters to its members. See <http://www.solidariteit.co.za> and <http://www.samwu.org.za> visited on 21 August 2015.

⁹⁹ See para 6.2.9 of Ch 4.

¹⁰⁰ See para 6.2.10 of Ch 5.

¹⁰¹ Solidarity union has established a retirement plan called the Solidarity Retirement Plan. The union also has a funeral benefit; a sickness benefit and a maternity benefit for its members.

trade unions also have a service function which involves the provision of services and benefits such as health benefits and unemployment benefits.¹⁰² Trade unions in Australia are also concerned with the social protection of members and some trade unions have initiated insurance schemes providing for life assurance, accident cover, home and motor vehicle cover and also sickness and accident funds for members who become ill or injured outside working hours.¹⁰³

Similar to companies,¹⁰⁴ trade unions are a means of achieving economic and social benefits for their members and society. Trade unions, as important organisations in society, thus have a moral obligation to help society deal with its problems and contribute towards its welfare and sustainable development and this can be done through their social responsibility role.

6. SUMMARY: REGISTRATION, COLLECTIVE BARGAINING AND INDUSTRIAL ACTION – HURDLES OR SUPPORT FOR TRADE UNION CORE RESPONSIBILITIES AND SOCIAL RESPONSIBILITIES?

From an analysis of the ILO Conventions, the Constitutions of the countries under discussion and the historical background of trade unions, it is evident that registration has never been a condition for the existence and functioning of trade unions. South Africa in fact has adopted a system of voluntary registration by trade unions. The purpose of registration in terms of the LRA is ‘to promote the observance of democratic principles in the internal operation and governance of unions and also to ensure proper financial control over funds in line with public policy’.¹⁰⁵ The definition of trade union also does not require trade unions to register in order to qualify as trade unions.¹⁰⁶ Nevertheless, the legislature prefers the registration of

¹⁰² See para 6.2.11 of Ch 4.

¹⁰³ See para 6.2.11 of Ch 5.

¹⁰⁴ See s 7(d) of the Companies Act, 2008

¹⁰⁵ See s 213 of the LRA.

¹⁰⁶ See para 2.4 of Ch 3.

trade unions and grants registered trade unions certain rights and benefits which help them to be effective especially in their core responsibilities.¹⁰⁷

Similar to South Africa, in Great Britain an organisation of workers does not have to be listed or registered in order to qualify as a trade union as defined and trade unions can operate as voluntary organisations.¹⁰⁸ However, again, in Great Britain the legislature prefers listed trade unions as they are granted certain benefits under the TULRCA.¹⁰⁹ In Australia, similar to both South Africa and Great Britain, an organisation of workers does not have to be registered in order to qualify as a trade union as defined. However, unlike under the old Australian industrial system where it was pivotal for trade unions to register, under the FW Act there is now less significance in being registered.¹¹⁰

In South Africa and Great Britain, although registration is not required for trade unions' existence, it serves as support for the purposes of pursuing their principal role which is to regulate relations between employees and their employers. Consequently, registered trade unions are recognised and enjoy certain benefits which assist them in becoming more effective.¹¹¹ However, for the purposes of playing a social responsibility role there is no need for trade unions to be registered even though this may be a disadvantage for those trade unions that seek funding from donors.¹¹²

The right to collective bargaining is generally protected in terms of the ILO Conventions and the Constitutions of the countries under discussion.¹¹³ In South Africa collective bargaining is regulated under the LRA and is voluntary in nature.¹¹⁴ This system has remained the preferred system for dealing with matters of mutual interest between employers and employees. Through the bargaining council system, trade unions and employers are

¹⁰⁷ See para 2.4.4 of Ch 3.

¹⁰⁸ See para 3 of Ch 4.

¹⁰⁹ See para 3.2 of Ch 4.

¹¹⁰ See para 3.2 of Ch 5.

¹¹¹ See paras 5.1 of Ch 2; 6.1 of Ch 4; 6.1 of Ch 5.

¹¹² See paras 5.2 of Ch 2; 6.2 of Ch 4 and 6.2 of Ch 5.

¹¹³ See para 3.2 of Ch 3.

¹¹⁴ See para 3.2 of Ch 3.

able to deal with matters of mutual interest relating to core responsibilities of trade unions.¹¹⁵ In Great Britain, collective bargaining is regulated under the TULRCA and is also voluntary in nature. The main terms and conditions of employment of the majority of employees in Great Britain are determined by collective bargaining.¹¹⁶

In earlier years, Australia used collective bargaining methods similar to those in Great Britain; however, that changed when a system of compulsory conciliation and arbitration was introduced. This system has however now been abolished by the FW Act.¹¹⁷

The principal role of trade unions relates to matters of mutual interest between employees and employers and these are mainly dealt with through collective bargaining. Collective bargaining therefore serves as support for trade unions in their core responsibilities and will remain relevant. However, with regard to social responsibilities, there is no need for trade unions to engage in collective bargaining because this role will not necessarily involve employers, apart from cases where collaboration or cooperation from employers will be required; for example regarding environmental issues in the workplace, education and training, and where there are funds to which employers must contribute.

Industrial action is important for the functioning of trade unions. Although the right to strike is not directly provided for in the ILO Conventions, the Convention on Freedom of Association and the Protection of the Right to Organise Convention have been interpreted to include the right to strike.¹¹⁸ In South Africa this right is protected by both the Constitution and the LRA.¹¹⁹ Employees may also engage in protest action in order to advance other objectives relating to socio-economic matters. Similar to South Africa, in Great Britain industrial action is an essential element of collective

¹¹⁵ See para 3.4 of Ch 3.

¹¹⁶ See para 4 of Ch 4.

¹¹⁷ See para 4 of Ch 5.

¹¹⁸ See para 4.2 of Ch 3.

¹¹⁹ See para 4.3 and 4.4 of Ch 3.

bargaining.¹²⁰ However, British law does not give¹²¹ workers a positive right to participate in industrial action but a ‘freedom to strike’.¹²² Australia was at one stage charged by the ILO Committee for failing to protect the right to strike; however the country now has a legally guaranteed right to strike, although this is highly restricted.¹²³

Industrial action, especially strike action is important in relation to the coreresponsibilities of trade unions in South Africa, Great Britain and Australia, but not necessarily with regard to social responsibilities. Since protest action may be used to pursue socio-economic rights, it may therefore be useful with regard to demands relating to the social responsibilities of trade unions where the state is involved.

7. CHALLENGES AND RISKS FOR TRADE UNION SOCIAL RESPONSIBILITY IN SOUTH AFRICA

Through social responsibility, trade unions will be able to look after the interests of their members, society in general and the environment, and be able to contribute towards sustainable development.¹²⁴ However, trade unions must recognise the challenges this role will bring. The challenges discussed below are not an exhaustive list as there might be more.

7.1. Balancing Core Responsibilities and Social Responsibilities

The *first challenge* identified in this regard will be to balance core responsibilities and social responsibilities. In formally taking on new responsibilities, trade unions must ensure that social responsibilities do not overshadow the core responsibilities, because their principal functions are the reasons for the existence of trade unions. A trade union exists to protect the interests of workers and its rightful function is to maintain and improve

¹²⁰ See para 5 of Ch 4.

¹²¹ Ibid.

¹²² See para 5.1 of Ch 4.

¹²³ Ibid.

¹²⁴ See Chew R and Chew SB ‘Union Social Responsibility: A Necessary Public Good in a Globalised World’ at 2 <http://www.apeaweb.org/confer/hk10/papers/chew-chew.pdf> visited on 14/04/2014.

the working conditions of its members. Any other role must remain subservient to trade unions' main purpose.¹²⁵

7.2. Resources

The *second challenge* identified is with regard to resources.¹²⁶ In order for trade unions to be effective in their social responsibility role, more financial and organisational resources will be required.¹²⁷ More money and more workers will be required to carry out the new objectives. Members of trade unions may be negatively affected in this regard, in that more money may be required from them in the form of increased monthly subscriptions or levies to be paid to trade unions in order to achieve social responsibility roles.¹²⁸ Although trade unions do not have financial muscle, as discussed below,¹²⁹ governments and employers have financial resources and should be able to support trade unions in their social responsibility objectives because social responsibility is a common interest of governments, trade unions and business.¹³⁰ Trade unions may also increase their income or resources through mergers or amalgamations.¹³¹ In terms of the LRA, once an amalgamated organisation is registered all assets, rights and obligations of the constituent organisations, including those arising from collective agreements and council membership, devolve to the amalgamated union.¹³² Amalgamation is important for the social responsibility of trade unions as it will create large unions which are strong in terms of both membership base and resources. Trade unions need the force of combined resources and expertise in order to be effective in overseeing the interests of their members

¹²⁵ See Bottomley A *The Use and Abuse of Trade Unionism* (1963) at 11.

¹²⁶ See Taylor op cit note 1 at 65.

¹²⁷ See para 8.7 of Ch 6.

¹²⁸ See s 95(f) of the LRA.

¹²⁹ See para 8.7 of Ch 6.

¹³⁰ See paras 8.7.3 and 8.7.5 of Ch 6.

¹³¹ In 1997, the Federation of South African Labour (FEDSAL) merged with a number of other unions to form the Federation of Unions of South Africa (FEDUSA) and succeeded in expanding its membership. On the recommendation of the September Commission, the sixth National Congress of COSATU resolved to start a process of trans-industrial 'super unions'. A number of unions have also merged; the Chemical Workers Industrial Union (CWIU) and the Paper, Printing, Wood and Allied Workers Union (PPWAWU) merged to form the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU) (see Bezuidenhout *A Towards a Global Social Movement Unionism? Trade Union Responses to Globalization in South Africa*. DP/115/2000 Labour and Society Programme at 7 and 13).

¹³² See s 102(5) of the LRA.

and societies in general. This will increase the chances of success and costs can be well managed because in unity there is power.

7.3. Free Riders

The *third challenge* could relate to workers who may take advantage of the social responsibility services offered by a trade union and decide not to become members in order to avoid paying membership fees, nevertheless benefiting from the union (free riding).¹³³ Trade unions can counter this by designing benefits which are for members only (in addition to the core responsibilities from which members benefit) and those which are for the general community. This in a way will cause free riders to realise that they are losing out in certain respects owing to their non-membership.

In South Africa, free riders are prevented through trade union security arrangements, that is, closed shop and agency shop agreements. These arrangements are provided for in the Constitution of the Republic of South Africa, 1996¹³⁴ and given effect by the LRA¹³⁵. Although these arrangements limit employees' right to freedom of association, the limitation is justifiable because it encourages large, strong trade unions. In Australia, closed shop agreements are not allowed, however agency shop agreements are permitted.¹³⁶ In Great Britain, closed shop agreements are not unlawful, but they are not easy to enforce in practice. Agency shop agreements are prohibited in Great Britain. Thus, employees have a right not to comply with a requirement to make a payment or allow a deduction from remuneration as an alternative to union membership.¹³⁷

¹³³ See Chew & Chew op cit note 124. They on the one hand refer to traditional unions which are regarded as micro-focused in that they rely on the creation of a wage premium to induce workers to become members. This type of trade union raises wages in the unionised sector and ultimately this result in the retrenchment of some workers. On the other hand, they refer to macro-focused unions which work closely with the government and with firms to enhance competitiveness. With such unions the standard of living of members rises as wages rise in relation to the prosperity of the country. The problem faced by macro unions is that workers can ride freely (at 117).

¹³⁴ See s 23(6) of the Constitution.

¹³⁵ See ss 25 and 26 of the LRA.

¹³⁶ See ss 346–347 of the FW Act

¹³⁷ See ss 137(i)(b)(ii), 146(3), 152(3) of TULRCA.

The money paid by employees bound by agency shop agreements could be channelled to social responsibility activities since it should be used for in socio-economic interests of employees.¹³⁸

7.4. Changing Nature of Employment: Worker Individualism

Individualism is the key element in modern employee relations. It is the heart of modern trade unionism. Unions need to try to determine what individual employees want, to examine their current products to find whether they meet that need – and if they do not, to re-engineer themselves to provide new products which will appeal more strongly to the individual employee market.¹³⁹

The *fourth challenge* is the global trend towards individualised employee relations, which is a key element of modern employee relations.¹⁴⁰ This trend requires trade unions not only to determine the collective needs of employees, but also their individual needs. Trade unions must examine their current services in order to determine whether they meet those needs. Individualism among workers therefore demands an improvement in individual services. Such a service by a trade union will increase their relevance in their societies. Trade unions throughout the world are threatened by the mobility of capital, the shift towards service industries and home-work or self-employment. Accordingly, the emphasis is placed on the individual rather than on the collective and trade unions should adapt their approach to cater for such employees.¹⁴¹

7.5. Reporting

The *fifth challenge* relates to the social responsibility activities for trade unions, which will bring an additional administrative burden in the form of reporting. Nevertheless, this exercise is important because it is a means of informing and updating members and donors about the impact a trade union has on the society and how donated money is being put to use. Social

¹³⁸ See s 25(3)(c) and (d) of the LRA.

¹³⁹ See Basset P & Cave A 'All for One' Fabian Society, September 1993 at 27 in Taylor op cit note 1 at 3.

¹⁴⁰ See Theron J 'Employment is not what it used to be' (2003) *ILJ* 1247 and Cheadle H et al *Current Labour Law* (2004) 135-170; see also Deery S & Mitchell R *Employment Relations: Individualization and Union Exclusion* (1999).

¹⁴¹ See Bendix op cit note 7 at 229.

responsibility reporting may be incorporated into the annual reports that trade unions are required to prepare¹⁴² or may be done separately. Furthermore, trade unions should be free to develop goals, timetables and metrics for measuring their social responsibility activities. Regular reporting will increase both the transparency and the credibility of a trade union. Good reports about a trade union's activities with regard to social responsibility will safeguard its reputation among employees and the communities within which the trade union functions.¹⁴³

8. RECOMMENDATIONS TO EMPHASISE AND INCREASE THE SOCIAL RESPONSIBILITY OF TRADE UNIONS

The RSA Constitution has a Bill of Rights which protects various fundamental rights such as the right to human dignity, good health, education, social security, and a clean environment.¹⁴⁴ In line with the international instruments mentioned above, the Constitution seeks the development of society by improving the quality of life of all citizens. These rights and others are important in driving trade unions to engage in social responsibility activities in order to contribute to the realisation of these rights and the development of society. Human development should not only be the responsibility of government. Although the social responsibility of trade unions is pivotal, it is important first to consider the following: whether social responsibility for trade unions should be voluntary or compulsory; whether there is a need for legislative changes in this regard; whether policy should be reconsidered in light of this; what linkages with other stakeholders may exist; what to do in order to promote good governance and how social responsibility activities should be financed.

8.1. Voluntary or Compulsory

As seen in the various chapters of this study, trade unions' core responsibilities are mainly to comply with applicable laws and

¹⁴² See para 2 of Ch 3.

¹⁴³ Ibid.

¹⁴⁴ See ss 7, 10, 24, 27, 29 of the Constitution

regulations.¹⁴⁵ However, in addition to this, trade unions must go beyond what is legally expected from them by engaging in broader social responsibility activities, some of which have been discussed in this study.¹⁴⁶ There remains a need for voluntariness and flexibility so that social responsibility can fit within a trade union's overall objectives and financial muscle and capability. Trade unions differ in terms of their size or membership base and therefore in the size of their financial muscle and the activities they can pursue. There is therefore a need for trade unions to have sufficient flexibility to enable them to carry out social responsibility objectives in ways that suit their financial and strategic objectives. Although a voluntary approach should be adopted, the government through the Department of Labour (DOL) can provide guidelines in the form of a code and a structure that will facilitate trade unions' socially responsible objectives and activities. This will be discussed in detail later. A formalised trade union social responsibility will be new to trade unions and instead of using a compulsory approach for trade union involvement, incentives such as subsidies for trade unions doing well in terms of their social responsibilities can be introduced by the DOL. It is submitted that a 'carrot and stick' approach¹⁴⁷ will not be appropriate for trade union social responsibility. This new venture will instead require a 'carrot' approach as this will encourage trade unions to become more involved in social responsibility activities.

8.2. Legislative Changes

Section 1 of the LRA states its purpose as 'to advance economic development, social justice, labour peace and the democratisation of the workplace'. This shows that even in the labour law sphere, social responsibility is given consideration. Trade unions as institutions

¹⁴⁵ See paras 5.1 of Ch 2; 6.1 of Ch 4 and 6.1 of Ch 5.

¹⁴⁶ See paras 5.2 of Ch 2; 6.2 of Ch 4 and 6.2 of Ch 5.

¹⁴⁷ This is an idiom which refers to a policy of offering a combination of rewards and punishment to induce certain desired behaviour. It was used in reference to a cart driver dangling a carrot in front of a mule and holding a stick behind it. This would cause the mule to move towards the carrot because it wants the reward of food, whilst moving away from the stick behind it; because it does not want the punishment, thus drawing the cart (see <http://idioms.thefreedictionary.com> visited on 28 August 2015).

established by the LRA are therefore one of the vehicles through which the Act seeks to achieve economic development, social justice etc.

Legislation should do more to encourage the involvement of trade unions in social responsibility, but should not be too prescriptive as this may overburden smaller trade unions which lack the necessary resources. In as much as there is no duty to bargain in South Africa and the system is voluntary although regulated to a certain extent, trade union social responsibility should not be overregulated.¹⁴⁸ Trade unions have limited funds and personnel and at times struggle to serve their own members.

Nevertheless, the definition of trade union in South Africa allows trade unions to engage in other activities besides their principal purpose. British trade unions are allowed to include any lawful purpose in their constitutions.¹⁴⁹ In South Africa, this could be accommodated by amending section 95 to include a provision which states that a trade union may include in its constitution a social responsibility purpose in addition to its principal purpose.

The Act should also require trade union officials and office-bearers to act in good faith and for a proper purpose in the interests of the trade union itself and its members in carrying out their functions. This will help to avoid administrative irregularities. Nevertheless, there should be a flexible regulatory environment to ease the regulatory burden on trade unions that wish to engage in social responsibility. This is clearly the approach used in Australia where trade unions are encouraged to improve and expand their services to members. The ACTU encourages a more inclusive social approach without overregulation.¹⁵⁰ The social responsibility activities to be chosen by a trade union will to a large extent depend on the needs of the members of a particular trade union and the community in which the union functions.¹⁵¹ South Africa is a developing country and minimum legislative

¹⁴⁸ See Vettori S A judicially enforceable duty to bargain *De Jure* 38(2) (2005) 382;

¹⁴⁹ See para 2.5.1 of Ch 4.

¹⁵⁰ See paras 7.9 and 7.10 of Ch 5.

¹⁵¹ See para 1 of Ch 1 and 5.2.2 of Ch 2.

intervention may be needed to encourage socially responsible conduct by trade unions.

8.3. Code of Good Practice

Non-binding guidelines in the form of a code for the social responsibility of trade unions and also evaluation tools for social responsibility activities could be developed to assist trade unions in this role.¹⁵² Such a code may be called 'The Code: Trade Union Social Responsibility' and trade unions should be involved in its development to ensure their buy into the system. However, any such code should not impose any legal obligations upon trade unions and should merely serve to provide practical guidelines on the social responsibility of trade unions. The code should be flexible and allow trade unions to be innovative. The code may provide for the following amongst other things:

- *Aims or purposes of trade union social responsibilities.* This aspect may explain the importance of social responsibilities for trade unions. This will create awareness on the contributions trade unions can make through their social responsibility activities.
- *Status of the Code.* It should be clear that the code is not authoritative; it merely provides guidelines for trade union social responsibility. The code should be general in its approach to accommodate the uniqueness of each trade union. Trade unions should be encouraged to use the code to develop their own policies and approaches for social responsibility activities.
- *Definitions.* The code should provide definitions for important concepts relating to trade union social responsibility.

¹⁵² See Roselle J 'The Triple Bottom Line: Building Shareholder value' in *Corporate Social Responsibility: The Corporate Governance of the 21st Century* edited by Ramon Mullerat (2005) at 134. This type of code provides voluntary guidelines, typically aspirational and nonbinding and intended to provide examples of good practices or general operating standards.

- *Management of social responsibility activities.* This should provide guidelines on how to promote and conduct social responsibility activities for members of trade unions and for non-members and society in general.
- *Reporting on social responsibility.* This should provide guidelines on how to report on social responsibility activities, without placing an enforceable obligation to do so.

A code would be an important link between trade unions and government. Trade unions in Great Britain and Australia do not have a formalised system of social responsibility and therefore do not have codes of good practice for the social responsibilities of trade unions.

8.4. Policies

Officials and office-bearers¹⁵³ of trade unions have a responsibility to see to it that the union acts as a responsible organisation. Trade unions should have policies and practices in place which will enable them to make decisions and conduct their operations ethically, meeting legal requirements and showing consideration for society, communities and the environment.¹⁵⁴ A trade union can also adopt the policies or procedures which are necessary to deal with social responsibility and charitable giving and guidelines for members who would like to serve on charitable or community boards and committees. This may include policies which encourage the employment and empowerment of women¹⁵⁵ and the youth. Trade unions must ensure that such policies are supported by objectives, responsibilities for implementation, training for those who want to offer their services and the systems necessary to measure progress and the impact made on members and the community.¹⁵⁶

¹⁵³ See para 4.3 of Ch 1 for definitions of these concepts.

¹⁵⁴ See Miles L & Jones M 'The Prospects for Corporate Governance Operating as a Vehicle for Social Change in South Africa' *Deakin Law Review* (2009) 14(1) at 8.

¹⁵⁵ See, for example, paras 7.3 and 7.5 of Ch 4 and 6.4; 7.5 and 7.8 of Ch 5 where it is stated that trade unions in Great Britain and Australia encourage the empowerment of women.

¹⁵⁶ See Roselle J 'The Triple Bottom Line: Building Shareholder Value' in *Corporate Social Responsibility: The Corporate Governance of the 21st Century* edited by Ramon Mullerat (2005) at 119.

8.5. Alliances with Other Stakeholders

Through the forging of wider alliances with other pressure groups, trade unions in South Africa, Great Britain and Australia have provided a powerful collective voice for millions of working people and society at large.¹⁵⁷ They have in the past networked with other organisations such as religious groups, NPOs, government agencies and political parties in order to participate in addressing societal problems.¹⁵⁸ Corporatism is very important in the social responsibility role of trade unions as it incorporates the labour movement in the economic and social decision-making of society.¹⁵⁹ It introduces a cooperative relationship between different parties that have the same concerns. It therefore creates a platform on which parties may work together and achieve common goals. In South Africa, NEDLAC is a good platform for such a role at the national level and more such cooperation is needed even at the local level.¹⁶⁰ It is imperative for trade unions to continue articulating the views and the interests of their members in their relations with employers and government, and to influence public policy-makers in order to ensure sustainable development in the society through such forums. According to Hyman, almost universally trade unions emerged as social movements.¹⁶¹ It is in the nature of social movements to make alliances with other progressive social movements;¹⁶² therefore unions and other organisations must support each other in common goals or objectives.

8.6. Good Governance

King II, which provides guidelines for both financial and non-financial reporting, introduced seven characteristics for good governance, including

¹⁵⁷ For example, the alliance between COSATU; ANC and the SACP. For Australia see, for example, paras 7.2, 7.4, 7.5 etc. in Ch 5. For Great Britain see, for example, paras 7.2, 7.3 and 7.5 of Ch 4.

¹⁵⁸ See para 2 of Ch 2.

¹⁵⁹ See para 2 of Ch 2.

¹⁶⁰ Former President Thabo Mbeki launched the Millennium Labour Council composed of 24 members, 12 each from labour and business which was to operate alongside NEDLAC and was intended to be more creative than NEDLAC to endanger social dialogue and consensus.

¹⁶¹ Hyman R *Understanding European Trade Unionism: Between Market, Class and Society*, Sage (2001) at 60.

¹⁶² Bramble T 'Social Movement Unionism since the Fall of Apartheid: the Case of NUMSA on the East Rand in T Bramble and F Barchiesi (eds): *Rethinking the Labour Movement in the "New South Africa"*, Ashgate at 187.

transparency, independence, accountability, responsibility and social responsibility and ubuntu.¹⁶³ Trade union officials and office-bearers must commit themselves to adhere to behaviour that is accepted as correct and proper. They must be transparent in their operations. Transparency in this case refers to the ease with which an outsider is able to make a meaningful analysis of an organisation's actions, its economic fundamentals and pertinent non-financial aspects.¹⁶⁴ The LRA encourages transparency and accountability and therefore trade unions should be transparent and accountable.¹⁶⁵ Although trade unions may get help from government and employers, they should remain independent as required by the LRA.¹⁶⁶ In the three countries under discussion, good governance for registered trade unions is ensured through the requirement that they should keep records and submit financial statements to relevant bodies.¹⁶⁷ Poor governance is one of the root causes of evil and corruption within organisations and society at large. Donors and financial institutions base their aid and loans on the condition of good governance.¹⁶⁸ Accordingly, good governance means that processes and institutions produce results that meet the needs of society while making the best use of the resources at their disposal.¹⁶⁹ This is also important for trade unions as it relates to the main question as to why employees join them as members. Trade unions must give employees enough reasons to become attracted to them as members and to remain members. As the management of trade unions, trade union officials and office-bearers are responsible for their proper governance.

The survival of trade unions depends on their strength and their strength in turn is measured by membership numbers and the extent of their influence in the workplace and beyond. Workers today need the support of trade unions as much as at any time in the past 100 years; however preference

¹⁶³ See King II Report, para 18.

¹⁶⁴ See Khoza RJ 'Corporate Governance: Integrated Sustainability Reporting the Key Principle' May 2002 *Management Today* 18 at 21.

¹⁶⁵ See s 95 of the LRA.

¹⁶⁶ See s 95 of the LRA. See also King Report II, Ch 12, para 18.3.

¹⁶⁷ See para 2.5 of Ch 3; 3.5 of Ch 4; 3.3 of Ch 5.

¹⁶⁸ See King II Report, para 18.

¹⁶⁹ See Roselle J 'The Triple Bottom Line: Building Shareholder Value' in *Corporate Social Responsibility: The Corporate Governance of the 21st Century* edited by Ramon Mullerat (2005) at 117.

would be given to better organised and well-governed trade unions which are able to operate in a highly competitive labour market.¹⁷⁰ This will also enable them to attract funding and donations for their social responsibility activities. Social responsibility that is accompanied by good governance is a good way of creating competitive differentiation between trade unions.

The government can further play a role by ensuring that trade union officials, office-bearers and trade union representatives are properly trained in leadership, good governance, record keeping and financial management. This will enable them to perform their functions in good faith and for a proper purpose just as directors of companies are expected to do.¹⁷¹

8.7. Finance

Robert Taylor said the following regarding trade unions and financial resources:

Trade union activities – recruitment included – are limited by the size of their resources. Here finance is crucial. The demands placed on trade unions require the provision of a growing range of sophisticated and professional services in both collective bargaining, other workplace questions and on activities outside the workplace. None of this comes cheap.¹⁷²

8.7.1. Membership Fees and Other Fees by Members

Trade unions depend mainly on joining fees and monthly subscriptions from their members as their primary source of income.¹⁷³ This money is usually used to run the activities of trade unions which relate to their core responsibilities. However, in certain cases a percentage of monthly subscriptions is used for benefits such as funeral benefits, sick benefits, bursary funds, and so on, where a trade union has established such funds,¹⁷⁴ although this might at times mean an increase in monthly

¹⁷⁰ See Taylor op cit note 1 at xi (Introduction by John Monks).

¹⁷¹ See s 76(3)(a) and (b) of the Companies Act 2008.

¹⁷² See Taylor op cit note 1 at 65.

¹⁷³ See s 95(5)(f) of the LRA in terms of which it is required that the constitution of a trade union must provide for membership fees and other payments by members.

¹⁷⁴ For example, with SACTWU's benefit scheme a portion of the union's subscriptions is put into a dedicated Trust Fund, from which a range of benefits are paid (<http://www.sactwu.org.za/benefitfuneral.asp> visited on 14 April 2014).

subscriptions for members. If the money is not substantial, members can be asked to contribute a certain reasonable and affordable amount, for example as per the provisions of section 95(5)(f) of the LRA, towards a social responsibility fund. Trade unions may even encourage their members to donate certain items such as food parcels and clothes towards social responsibility activities. An example of a trade union in South Africa which is already doing this is Solidarity union, through its Helping Hand leg.¹⁷⁵

It is submitted that membership fees and other monies from members may not always be enough to cover all the costs of core responsibilities and social responsibilities. In view of this, it is imperative that trade unions should devise other means of obtaining funds in order to be able to pursue both core responsibilities and social responsibilities. Below are examples of avenues which may be used to acquire funds to further social responsibilities.

8.7.2. Trade Union Investment Cooperatives

Trade unions may start investment cooperatives through which they may be able to raise money for social responsibility.¹⁷⁶ NEHAWU has a savings and credit cooperative called NIH, launched in 2006, which provides financial services to members in order to improve their economic and social well-being.¹⁷⁷ NIH was birthed from the corporate restructuring of the NEHAWU Investment Company (NIC), the original investment company established in 1997 by Tshedza Trust. NIC was established as an investment vehicle in order to create value for members of NEHAWU by offering them benefits. South African trade unions in general should consider such ventures which will in turn assist by financing social responsibility activities from investment returns.

¹⁷⁵ See paras 5.2.9 and 5.2.10 of Ch 2.

¹⁷⁶ Union Social Responsibility: A Necessary Public Good in a Globalised World by Rosalind Chew & Chew Soon Beng (See <http://www.apeaweb.org/confer/hk10/papers/chew-chew.pdf> visited on 26 May 2014).

¹⁷⁷ See <http://www.nehawu.org.za/links/sacco.asp> visited on 16 March 2014.

8.7.3. Private Companies

Trade unions should pursue their own social responsibility activities separate from companies; however, where possible trade unions can join hands with private companies. Private companies have the financial muscle that trade unions do not necessarily have and by joining hands with them in certain projects trade unions may be able to access funding indirectly from them. This may for example include HIV/AIDS and environmental projects which obviously affect both trade unions and employers. Trade unions lose members and employers lose employees when people die as a result of the HIV/AIDS pandemic. Trade unions should however be careful to keep their independence, as required by sections 95(1)(d) and 95(2) of the LRA.¹⁷⁸

Furthermore, although trade unions do not have the necessary funds, they do possess negotiating powers which they can use to mobilise business to make donations to their social responsibility projects. To address the real priorities and needs of local communities, business must work with local stakeholders, such as trade unions, since they (trade unions) are in a better position to understand the needs of the communities from which their members originate. Trade unions should also change their stance from the adversarial approach to cooperation with businesses if they want to contribute towards the reconstruction of industry and the economy.¹⁷⁹

8.7.4. Non Profit Organisations

It is important to note that there is no one organisation that can hope to solve the complex, pressing social problems. The social ills in society can be alleviated by the cooperative involvement of trade unions, business, government and non-profit organisations (NPOs) as discussed above.¹⁸⁰ NPOs have an important role to play in addressing the needs of local communities. The development of social responsibility owes a great debt to

¹⁷⁸ In terms of these provisions a trade union must be free of any interference or influence of any kind from any employer or employers' organisation.

¹⁷⁹ See Bendix op cit note 7 at 176.

¹⁸⁰ See Tschirhart M 'A Three Sector Model of Community Service: The Alliance of Business, Government, and Non-profit Organizations' in N M Tichy et al *Corporate Global Citizenship* (1997) at 62.

the activities of NPOs as they alert communities to the need for more responsible practices in dealing with social problems. Governments normally support the work of NPOs by providing financial assistance and by engaging them in social development and environmental projects. This in turn has made them effective contributors to the welfare of the communities in which they function. Trade unions can therefore join hands with NPOs as a way of fulfilling their social responsibility activities. Trade unions may also help NPOs and ultimately their communities by encouraging their members to donate time (volunteering at NPOs).

8.7.5. Government

The impersonal hand of government can never replace the helping hand of a neighbour.¹⁸¹

Section 27(2) of the RSA Constitution requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of social security to citizens.¹⁸² Most workers in the informal sector are poor and do not have benefits such as medical aid and pension schemes. In addition, they do not have protection against risks such as unemployment or workplace injuries and illness. Trade unions with members in this sector, and which are able to establish funds, will be in a position to fill this gap and also alleviate the burden on the government to provide assistance by creating these benefits for members, for example, unemployment benefits and sickness or medical benefits. As modern organisations with a social responsibility role, trade unions can make a big difference in this sector. Accordingly, more efforts should be made by trade unions to recruit and organise employees in this sector in order to ensure their protection. The implementation of proper measures to ensure the social protection of people is important to trade unions. COSATU has proposed that engagement on the shaping of a comprehensive social security system needs to happen at various levels, including the

¹⁸¹ A quote by Hubert H (see <http://www.brainyquote.com> visited on 16 May 2014).

¹⁸² Social security refers to the set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies or risks (see Olivier MP, Okpaluba MC, Smit N and Thompson M *Social Security Law General Principles* (1999) at 7).

introduction of the Basic Income Grant (BIG). It called on government to deepen its commitment to improving the coordination of the social security system in order to provide people with the knowledge that government is committed to putting in place a system which will ensure that no South African lives in poverty.¹⁸³

Although government may not directly fund trade unions for their social responsibilities, it can assist by facilitating the relationships of social responsibility corporations with trade unions and other stakeholders such as business and local governments, which through their day-to-day dealings with the local community may be in a position to understand its needs. The government can perform this function through its specialist agencies whose role it is to bring together local stakeholders, and to supervise and guide development, such as NEDLAC. DOL can also endorse the behaviour of champions (trade unions doing well in their social responsibility) through award schemes. These could be in the form of money and some form of recognition.

9. IMPLEMENTATION OF INCREASED SUPPORT FOR AND RECOGNITION OF TRADE UNION SOCIAL RESPONSIBILITY IN SOUTH AFRICA

The following section discusses the factors that could help in achieving the introduction and implementation of trade union social responsibility. These factors provide some guidance on the way forward.

The discussion above highlighted a number of factors which relate to trade union social responsibility, including how to get finance for it. Although they are important factors, they do not answer the question of how trade union social responsibility should be implemented. Although some trade unions have in one way or another played social responsibility roles, generally the main focus of trade unions has been on their core responsibilities. It is

¹⁸³ See Audit of COSATU Positions on Social Security (see <http://cosatu.org.za> visited on 25 August 2015). See also Minimum Wage: Poverty report strengthens Cosatu's case (*Daily Maverick* Zwelinzima Vavi 18 February 2015 visited on 25 August 2015)

therefore high time that trade unions in general should accommodate social responsibilities in their functioning. Accordingly, the success of trade unions in this venture will be determined by their commitment to their social responsibilities. South Africa is a developing country which is still busy addressing the imbalances of the past and through their social responsibility role trade unions will make a huge contribution in assisting the government to deal with such issues.

The proposals below for trade union social responsibility should be seen as an attempt to present a system through which trade unions can make a contribution towards development, while still pursuing their core responsibilities. The underlying assumption of the proposals is that social responsibility should be recognised as an important aspect of the role played by trade unions in general. Below are a number of steps towards attaining trade union social responsibility:

9.1. Recognise trade union social responsibilities alongside their principal purposes

The Chinese Academy of International Trade and Economic Cooperation Draft Guidelines on CSR Compliance by the Foreign Invested Enterprises states the following:

There is no one-size fits all approach and the model for performing corporate social responsibility. The key is to incorporate CSR considerations into the company's mission, vision, strategies and operating activities and to evaluate and continuously improve behaviour against measurable criteria.¹⁸⁴

It is one of the recommendations of this study that the social responsibility role of trade unions should be recognised alongside their principal purpose. The principal purpose of trade unions as seen from various definitions of a trade union in different countries is to regulate relations between employees and employer.¹⁸⁵ Although the two roles differ, as modern organisations it is

¹⁸⁴ Draft Guidelines on CSR Compliance by the Foreign Invested Enterprises, Chinese Academy of International Trade and Economic Cooperation (2008).

¹⁸⁵ See para 4 of Ch 6.

important for trade unions to become involved in both of them.¹⁸⁶ The overall function of trade unions should relate to sustainable development and not only workplace matters. It is therefore recommended that social responsibility should form part of the broader functioning of trade unions. Trade unions should accordingly devise certain strategies and programmes of action for achieving their social responsibilities. It is important to develop trade union programmes and strategies in the context of society's social needs. The current context in South Africa, as seen from the NDP,¹⁸⁷ requires intervention in order to deal with problems relating to poverty, unemployment, and so forth. These circumstances must be analysed to understand the limits and possibilities of trade unions in contributing towards the attainment of the required goals.

To promote their social responsibilities, trade unions which are representative within the workplace have the advantage of using organisational rights, such as the right of access to the workplace, leave for trade union representatives, and so on, which were acquired in terms of the LRA.¹⁸⁸ These rights allow for interaction between the union and its members and between the employer and the union. Trade union representatives will also be able to keep members up to date regarding social responsibility activities. The social movement unionism of the past was effective because shop stewards, now trade union representatives, were able to address the real problems of their members in the workplace.¹⁸⁹

This is the time for trade unions in South Africa to go back to their roots in order to bring about social justice. Support for social justice can come from within the scope of collective agreements between trade unions and employers and those concluded within bargaining councils.¹⁹⁰ This may be

¹⁸⁶ See para 4.4.2.3 of Ch 1.

¹⁸⁷ See para 4.4.2.6 of Ch 1.

¹⁸⁸ See ss 11-22 of the LRA.

¹⁸⁹ See Bezuidenhout *A Towards a global social movement unionism? Trade union responses to globalization in South Africa*. DP/115/2000 Labour and Society Programme at 26.

¹⁹⁰ See paragraphs 2.4.4.3 and 3.4.4.1 of Ch 3.

in the form of the establishment of funds to help employees in times of need.¹⁹¹

In their quest for social responsibility alongside their core responsibilities, trade unions must act responsibly by aiming at wages that maximise employment and which are based on the competitiveness of the company. They must also refrain from calling unnecessary strikes which are counter productive. There is therefore a need for trade unions to start behaving like responsible partners in order to enable business to survive competitive pressure.

9.2. Maintain core responsibilities for members and identify social responsibilities based on membership (contributory social responsibility activities/benefits)

The principal purpose or core responsibilities of trade unions are recognised and generally legislated.¹⁹² Thus, this role should not be ignored but should be maintained. Trade unions have generally done well in their principal purpose and through this they have brought about many changes to the benefit of employees, mainly through the collective bargaining system.¹⁹³ If this role is not properly performed employees will end up suffering as a result of poor working conditions. Members of trade unions should continue to benefit from the core responsibilities of their unions based on their membership. In addition to those benefits, however, trade unions should identify specific membership benefits which are orientated to social responsibility, such as education and training, and financial and legal services for their members. For example, trade unions may assist their retrenched members by paying them a certain amount of money per month for a specified period as is done by some trade unions in Great Britain.¹⁹⁴ Trade unions may also establish quasi-employment agencies to help their members obtain employment as is done in Australia.¹⁹⁵ Such benefits would

¹⁹¹ See para 3.4.4.1 of Ch 3.

¹⁹² See para 4 of Ch 6.

¹⁹³ See paras 3 of Ch 3; 4 of Ch 4 and 4 of Ch 5.

¹⁹⁴ See paras 6.2.7 of Ch 4 and 5 of Ch 6.

¹⁹⁵ See paras 6.2.7 of Ch 5 and 5 of Ch 6.

be based on relational responsibility, as discussed in Chapter 1.¹⁹⁶ This would also help trade unions to deal with the problem of free-riders who would like to benefit from trade unions, but do not want to pay membership fees, as discussed under paragraph 7.3 above in this chapter.

9.3. Identify non-membership social responsibilities (non-contributory social responsibility activities/benefits)

Trade unions should further identify non-membership-based social responsibilities which will cover employees who are not members of a trade union, the unemployed and the community at large. The benefits here may include HIV/AIDS-related matters, environmental matters, poverty alleviation, job creation, and social assistance in the form of food or clothes. Through this, trade unions will be able to serve the interests of paying members and also members of the community in general. These benefits will be based on the concept of social activism as discussed in Chapter 1.¹⁹⁷ In this regard, there should be ongoing investigations in the community within which the trade union functions in order to identify current needs to be addressed. This will in turn help trade unions to remain relevant in terms of broader social responsibility activities beyond their members. This is again in line with social movement trade unionism. It is important for South African trade unions to continue building on their social movement approach, which connects workers and their communities.¹⁹⁸ The involvement of trade unions in broader social issues and their campaigns against or in support of government decisions helped to bring about change in South Africa.¹⁹⁹ South Africa still faces various social challenges such as poverty and unemployment, as may be seen from the NDP²⁰⁰ and the statistics presented in this study,²⁰¹ and it is therefore incumbent upon trade unions to revert to the social movement approach in order to assist in

¹⁹⁶ See para 4.4.2.3 of Ch 1. See also Parkinson JE *Corporate Power and Responsibility* (1996), chapter 9.

¹⁹⁷ Ibid.

¹⁹⁸ See paras 1 and 8 of Ch 1.

¹⁹⁹ See para 1 of Ch 1.

²⁰⁰ See para 4.4.2.6 of Ch 1.

²⁰¹ See para 6.6 of Ch 2.

addressing some of these challenges. Social movement unionism is able to respond to social, economic and political conditions.²⁰²

9.4. Identify ways and methods for raising funds for social responsibilities

As discussed above under paragraph 8.7, social responsibility will not be possible if trade unions do not have the resources needed to pursue it. Trade unions must therefore be able to identify methods through which they will be able to acquire funds for purposes of their social responsibility activities and this will require finance. Some of the methods proposed above could assist trade unions to obtain finances for social responsibility activities. Over and above this, it is important for trade unions to acknowledge that the more members they have, the more money they will acquire from subscriptions and other fees. The merging of smaller unions with the aim of forming bigger and stronger ones, as has been done in Great Britain²⁰³ and Australia,²⁰⁴ will also ensure that trade unions are strengthened and are able to do more for their members and society in general.

9.5. Training of officials; office bearers and trade union representatives in the social responsibility role

In order to be effective in their social responsibility role, officials, office bearers and trade union representatives should be trained in social justice issues such as anti-poverty initiatives; HIV/AIDS counselling; environmental matters and so on, and also in the code that would be developed as discussed under paragraph 8.3 above. This training should be available to both newly appointed and more established trade union representatives and, where possible, employers should allow them time off for this purposes as allowed by section 15 of the LRA.

²⁰² See Webster E The Rise of Social-movement Unionism: The Two Faces of the Black Trade Union Movement in South Africa in *State, Resistance and Change in South Africa* eds Frankel P, Pines N and Swilling M (1988) at 175.

²⁰³ See paras 3.1 and 8 of Ch 4.

²⁰⁴ See para 8 of Ch 5.

10. CONCLUSION

Although South Africa is now a democratic country, it is still a developing country with social problems that include the poverty and unemployment left by the apartheid system. In order to remedy some of these problems, the Constitution places certain responsibilities on the government such as requiring it to provide social protection to its citizens.²⁰⁵ However, as discussed in this chapter the government cannot provide social protection to everyone in the country, as it can only do so within its available resources and therefore needs some assistance from other organisations such as trade unions.

This study has shown that South African trade unions have over the years played various significant roles. Trade unions made a great contribution towards the elimination of apartheid and in creating a democratic country. They fought to ensure that workers' rights are recognised and protected. Today, through a system of collective bargaining and industrial action, they ensure that the terms and conditions of employment of their members and workers in general improve. This study has shown that trade unions began as social movements and friendly societies, and that they can still pursue that role in the form of social responsibility alongside their normal employment-related role. Although the social responsibility role of trade unions has not been formally recognised in South Africa, Great Britain and Australia, the time has now arrived that just like companies worldwide have corporate social responsibility; trade unions too should have trade union social responsibility. Trade unions have over the years proved themselves to be effective agents of change. Therefore, as modern organisations, South African trade unions should fully embrace this role and help deal with societal ills such as poverty, unemployment and HIV/AIDS. Constitutional values and rights such as human dignity and social security are important in driving trade unions to engage in social responsibility activities. In as much as *corporate social responsibility* has become possible, *trade union social responsibility* is also possible.

²⁰⁵ See s 27 of the Constitution.

The study cannot be expected to have dealt with all the issues related to the social responsibility of trade unions as there might have been other issues that have been overlooked during the study. Amongst these as it was stated in Chapter 1 is a comparative enquiry with other African countries. South Africa is part and parcel of the African continent and participates in NEPAD and therefore a comparative enquiry may be necessary in future to determine how trade unions in other parts of Africa approach the issue of social responsibility. Furthermore, there are many other possible social responsibility roles a trade union may engage in to assist its members and the society in which it functions, which were not discussed in this thesis. Trade unions need to continuously show that they are not only relevant but are important modern organisations for bringing about change in the wider community. However, this role should not downgrade the importance of trade unions as employee representatives and collective bargainers in the workplace.

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