Compliance with minimum wages: A South African legal perspective

by

Erik Heppell

Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University

Supervisor: Prof Nicola Smit

March 2021

Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work; that I am the sole author thereof (save to the extent explicitly otherwise stated); that reproduction and publication thereof by Stellenbosch University will not infringe any third-party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

February 2021

Abstract

Globalisation has increased competition and resulted in various advancements of human life. However, it also has negative consequences, such as stagnating lower spectrum wages that occur despite increased labour productivity. Stagnating lower labour market wages that coincide with progressive top hierarchy wages result in excessive income inequality that presents detrimental consequences on various microeconomic and macroeconomic levels. Wages are the most common earnings of people and is therefore used within a regulatory framework to establish a minimum wage to address excessive income inequality. The utilisation of minimum wage is especially relevant in the South African context with its unequal labour market – one of the worst in the world – that undoubtedly played a role in introducing the SANMW.

A threat to reaching the objectives of the SANMW and other minimum wage policies in other nations is the lack of compliance with minimum wage (that may be) exacerbated by non-compliance in developing countries. Establishing a legal minimum wage is important, but equally important is compliance/obedience to it. Without compliance, legal provisions may arguably only be of academic value and limited to paper. This thesis considers the compliance with minimum wage from a legislative viewpoint by deliberating three research questions.

Firstly, how is minimum wage compliance pursued and achieved through the South African legal framework by considering three elements: being the coverage of minimum wage, the determination of minimum wage, and the legal enforcement of minimum wage and the sanctions/remedies for non-compliance.

Secondly, what weaknesses in legal regulation can be identified, and based thereon, what recommendations can be made for more effective regulation and implementation of a minimum wage in South Africa?

Thirdly, what lessons good and bad can be learned from the comparative foreign national legal minimum wage compliance frameworks of Australia and the United Kingdom?

In answering the research questions, the concept of inequality is further examined, particularly in the South African context, before considering statutory/regulatory measures intended to address inequality in the labour market. The international legislative minimum wage compliance framework is established as a benchmark before considering the South African minimum wage compliance framework. Possible weaknesses are identified, followed by applicable recommendations.

The legal minimum wage compliance frameworks of Australia and the United Kingdom are analysed. These nations arguably present respectable well-established minimum wage compliance frameworks that may act as a point of reference to other nations. Based on this comparative analysis, best and worst practices of the foreign jurisdictions are established before providing an effective legal minimum wage compliance framework.

Opsomming

Wêreldinkrimping verhoog arbeidsmededinging en lei tot gunstige wendinge in die mens se alledaagse bestaan. Dit het egter ook negatiewe gevolge – soos 'n stagnante laeloonskaal ten spyte van verhoogde arbeidsproduktiwiteit. Die stagnering van laer lone in die arbeidmark in teenstelling met toenemende hoër lone van die topsloonskaalhiërargie bevorder en beklemtoon inkomste-ongelykheid wat verskeie nadelige gevolge op mikro- en makro-ekonomiese vlak het. Lone is die algemeenste bron van inkomste wat minimumloon binne 'n gereguleerde raamwerk kan vestig met die doel om uitermatige inkomste-ongelykheid teë te werk. Minimumloon is veral relevant in die Suid-Afrikaanse konteks waar die ongelyke arbeidsmark die meeste ander ongelyke arbeidsmarkte in die wêreld oortref. Hierdie ongelykheid in die arbeidsmark het sonder twyfel 'n rol gespeel om die Suid-Afrikaanse nasionale minimumloon te bewerkstellig.

'n Bedreiging tot die verwesenliking van die doelwitte van die Suid-Afrikaanse nasionale minimumloonbeleid en diverse minimumloonbeleid in onderskeie lande is die gebrek aan die toepassing daarvan (wat) vererger (word) deur nienakoming van 'n ooreenstemmende relevante minimumloonbeleid in ontwikkelende lande. Die vestiging van 'n minimumloonbeleid is noodsaaklik, maar ewe noodsaaklik is die toepassing en nakoming daarvan. Sonder toepassing en nakoming is wetlike voorskrifte moontlik slegs van akademiese belang. Hierdie studie oorweeg die toepassing en nakoming van 'n minimumloonbeleid vanuit 'n wetlike oogpunt aan die hand van die volgende drie navorsingsvrae:

Eerstens, hoe kan die Suid-Afrikaanse regsraamwerk 'n minimumloonbeleid in werking stel en nakoming daarvan verseker en handhaaf? Oorweging word gegee aan drie elemente, naamlik die strekwydte van minimum lone, die vasstelling van minimum lone en die wetlike handhawing van minimum lone sowel as gesanksioneerde remedies vir nienakoming.

Tweedens, watter gebreke in regsregulering kan geïdentifiseer word, en gebaseer daarop, watter aanbevelings kan gemaak word vir doeltreffender regulering en implementering van minimumloon in Suid-Afrika?

Derdens, watter lesse is daar te leer uit die ooreenstemmende nasionale regstelsels vir nakoming van minimumloon van die Verenigde Koningryk en Australië?

In die beantwoording van die navorsingsvrae word die konsep van ongelykheid verder ondersoek, spesifiek in die Suid-Afrikaanse konteks, voordat daar oorweging gegee word aan die statutêre/regulatoriese maatreëls wat ten doel het om ongelykheid in die arbeidsmark onder die loep te neem. Die internasionale wetlike nakomingsraamwerk vir minimumloon word bepaal alvorens 'n ooreenstemmende Suid-Afrikaanse nakomingsraamwerk oorweeg word. Moontlike swakhede word geïdentifiseer gevolg deur toepaslike aanbevelings.

Die wetlike nakomingsraamwerk vir minimumloon van Australië en die Verenigde Koningryk word geanaliseer. Hierdie lande veronderstel argumentshalwe hoog aangeskrewe, goed gevestigde nakomingsraamwerke wat as model kan dien vir ander lande. Gebaseer op die vergelykende analise word die beste en slegste praktyke van die buitelande jurisdiksies oorweeg alvorens 'n effektiewe wetlike nakomingsraamwerk vir minimumloon uiteengesit word.

Acknowledgements

Professor Nicola Smit. It took one person to change my life completely forever. Thank you.

Thank you to my wife, Chanri Heppell, for your patience, support, understanding, and sacrifice throughout this process. Wim and Tiekie Liebenberg, Marlize and Warrick Heppell, Freddie and Rizanne van Heerden, Cornea Geyer, Jumbi and Tigger, thank you. This thesis is as much your achievement as it is mine. My late father-in-law, Gerhard Geyer, who passed during this research, I wish you were here.

Althéa Erasmus, thank you for reading and rereading this thesis to improve my sometimes-precarious grammar.

Deidre Duvenage, thank you for assisting me with the style requirements.

I am humbly thankful to God for the opportunity, ability, and perseverance to complete this study. It is solely by His grace.

It is my sincere hope that this thesis will contribute in some way to the South African minimum wage compliance framework.

Erik Heppell

February 2021

Table of Contents

List of Abbreviations

ATT	Administrative Appeals Tribunal
BCEA	Basic Conditions of Employment Act
BEIS	Department for Business, Energy & Industrial Strategy
BIS	Department for Business, Innovation and Skills
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief Executive Officer
CPS	Crown Prosecution Service
DEFRA	Department for Food and Rural Affairs
DOL	Department of Labour
DPRU	Development Policy Research Unit
EAS	Employment Agency Standards
ECC	Employment Conditions Commission
EPWP	Expanded Public Works Programme
FCA	Federal Court of Australia
FWA	Fair Work Act, 2009
FWO	Fair Work Ombudsman
FWI	Fair Work Inspector
GLA	Gangmaster's Licensing Authority
GG	Government Gazette
GN	Government Notice
HCA	High Court of Australia
HMRC	Her Majesty's Revenue and Customs
HSE	Health and Safety Executive
IALI	International Association of Labour Inspection

ILO	International Labour Organisation
JSA	Job Seeker's Allowance
LPC	Low Pay Commission
LRA	Labour Relations Act, 1995
LWF	Living Wage Foundation
NMW	National Minimum Wage
NMWA	National Minimum Wage Act 2018
NMWA 1998	National Minimum Wage Act 1998
NTP	Notice to produce
OBR	Office for Budget Responsibility
OECD	Organisation for Economic Cooperation and Development
QB	Queens Bench
SANMW	South African National Minimum Wage
SANMWC	South African National Minimum Wage Commission
SASSA	South African Social Security Agency
TERS	Temporary Employee/Employer Relief Scheme
UIF	Unemployment Insurance Fund
UK	United Kingdom
UN	United Nations
UKEAT	United Kingdom Employment Appeal Tribunal
UKET	United Kingdom Employment Tribunal

List of Figures

List of Tables

Law — good and bad, enforced and unenforceable — reflects the lived experience of a country's inhabitants.[1]

Chapter 1: Introduction

1.1 Problem identification

1.1.1 Globalisation and wages

The economies of the world are becoming more integrated, which is (arguably) a prominent characteristic of globalisation.[2] Globalisation has made new markets more accessible, knowledge more transferable, and the utilisation of resources more efficient; creating more opportunities for people and reducing poverty.[3] Research indicates that trade openness does result in an increase in per capita income in numerous countries.[4] As a result, globalisation has led to various advances stretching over all daily human life domains. However, globalisation is not completely beneficial all the time because increased competition may create winners and losers.[5]

---

[1]Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2013) 2-24.

[2]Mohr P, Fourie L & Associates *Economics for South African Students* 4 ed (2008) 370. "Globalization has introduced the concept of border-less and integrated world economy", Akram M, Faheem MA, Bin Dost MK & Abdullah I "Globalisation and Its Impacts on the World Economic Development" (2011) 2 *Int J Bu Soc Sci* 291.

[3]Mohr et al *Economics* 370; OECD "Globalisation, Jobs and Wages" (2007) *OECD* <http://oecd.org/els/emp/globalisation-jobs-and-wages-2007.pdf> (accessed 27-9-2017).

[4]A strong link exists between free trade and GDP per capita but other factors such as political stability, may also play a role, Lambrechts J, Erin M & Rule N "Does Free Trade Result in Higher GDP Per Capita: An International Perspective" (2012) 5 *DPIBE* 12 21 <https://ojs.deakin.edu.au/index.php/dpibe/article/view/53/60> (accessed 7-7-2019); Huchet-Bourdon M, Le Mouël C & Vijil M "The relationship between trade openness and economic growth: Some new insights on the openness measurement issue" (2018) 41 *World Econ* 59 4 & 7-9; OECD "Globalisation, Jobs and Wages" *OECD* , "a 10 percentage point increase in trade openness translates over time into an increase of around 4% in per capita income in the OECD area".

[5]Mohr et al *Economics* 370; Altman M "Formal-Informal Economy Linkages" (2008) *HSRC Repository* 12 <http://repository.hsrc.ac.za/bitstream/handle/20.500.11910/5420/5263_Altman_Formalinformal economylinkages.pdf?sequence=1&isAllowed=y> (accessed 23-2-2021); Huysamen E "The Future of Legislated Minimum Wages in South Africa: Legal and Economic Insights" (2018) 51 *De Jure* 271 274 & 286; Guerriero M & Kunal S "What Determines the Share of Labour in National Income? A Cross-country Analysis" (2012) 6643 *IZA Discussion Paper Series* 1 2.

Because of globalisation, wages may have increased at a much slower rate than Gross Domestic Product (GDP) per capita.[6] The majority of countries indicate a decline in the share of national income towards wages that suggests a gap between increases in productivity and the increase in wages.[7] In other words, wages have not increased in correlation with productivity increases. The total share of labour income[8] has also not increased in correlation with increases in productivity. In South Africa the labour share is around 5% less than its emerging market peers.[9] The opening up of the international market has influenced the rising income inequality in some countries.[10]

Inequality is interconnected with poverty and unemployment.[11] For example, an increase in national unemployment may increase national poverty and inequality and

---

[6]Specifically referring to real wages, ILO "*Global* Wage Report 2008/09 Minimum Wages and Collective Bargaining: Towards Policy Coherence" (2008) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_100786.pdf> (accessed 4-2-2016) and ILO, IMF, OECD & World Bank Group "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" (2015) *OECD* <https://www.oecd.org/g20/topics/employment-and-social-policy/Income-inequality-labour-income-share.pdf> (accessed 4-12-2019); a prominent reason behind rising global wage inequality is that "capital is mobile but labour is less so. This reduces the negotiating power of nations and of workers. It intensifies competition between firms and encourages strategies to reduce cost and mitigate risk", Altman "Formal-Informal Economy Linkages" *HSRC Repository* 12.

[7]ILO "*Global* Wage Report 2008/09 Minimum Wages and Collective Bargaining: Towards Policy Coherence" *ILO*; "Our labour is producing more value today, but working people aren't seeing any of the gains", Engler M "The Case for a Maximum Wage" (2013) 462 *New Internationalist* 33 <http://web.a.ebscohost.com.ez.sun.ac.za/ehost/pdfviewer/pdfviewer?vid=1&sid=d532b56b-290f-4596-958b-a9726312af89%40sessionmgr4008> (accessed 23-2-2021).

[8]"National income is the sum of all income available to the residents of a given country in a given year. The division of national income between labour and capital is called the *functional distribution* of income. The labour income share is the share (or labour share of LIS) of national income allocated to labour compensation, while the capital share is the part of national income going to capital", ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 5.

[9]Strauss I & Isaac G "Labour Compensation in the South African Economy: Assessing its Impact Through the Labour Share Using the Global Policy Model" (2016) 4 *NMW-RI Working Paper Series* ii & 6 <http://nationalminimumwage.co.za/wp-content/uploads/2016/08/NMW-RI-GPM-Model-Final.pdf> (accessed 8-5-2018).

[10]Cornia GA & Martorano B "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" (2012) *UNCTAD* 28 <https://unctad.org/system/files/official-document/osgdp20124_en.pdf> (accessed 23-2-2021); Cornia GA & Court J *Inequality, Growth and Poverty in the Era of Liberalization and Globalisation* (2001) 5 & 35. Although globalisation has influenced rising income inequality, there are numerous other factors that also play a detrimental role such as public policies regarding asset distribution, taxation, education and structural adjustment.

[11] Chibba M & Luiz JM "Poverty, Inequality and Unemployment in South Africa: Context, Issues and the Way Forward" (2011) 30 *Econ Pap* 307 307.

vice versa. In the South African context, the problems created by poverty, unemployment and inequality are particularly concerning. At the time of writing this thesis, 30,8% of South African citizens were unemployed.[12] When the individuals 'who have given up looking for work are included',[13] the figure increases to 43,1%.[14] Furthermore, in 2015, South Africa demonstrated the greatest discrepancies and inequalities regarding income distribution globally,[15] and 51% of the population lived below the food poverty line in 2016.[16]

Wages are the most common earnings of people and therefore one of the most important reasons why people work.[17] Consequently, wages influence the standard of living and people's livelihood and are central to the scenario where there are winners and losers. The International Labour Organisation (hereafter referred to as the ILO) describes wages as the cost employers pay to get work done and, thus, the

[12]Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" (2020) *Stats SA* 13 *<http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2020.pdf>* (Accessed 17-12-2020).

[13]National Minimum Wage Panel A National Minimum Wage for South Africa: Recommendations on Policy and Implementation: National Minimum Wage Panel Report to the Deputy President (2016) 7 <http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF> (accessed 3-8-2017).

[14]Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA 13*.

[15]ILO "Towards a South African National Minimum Wage" (2015) *ILO* 8 <http://lrs.org.za/media/2018/2/f06ac094-fd58-4e9c-9bdb-7440a774d60c-1518619496429.pdf> (accessed 7-7-2017)

[16] National Minimum Wage Panel A National Minimum Wage for South Africa 8.

[17]ILO "*Global* Wage Report 2008/09 Minimum Wages and Collective Bargaining: Towards Policy Coherence" *ILO*. Although people may normally primarily engage in work to generate income they may also work for self-fulfilment and other objectives (see Cloete A "Youth Unemployment in South Africa: A Theological Reflection Through the Lens of Human Dignity" (2015) 43 *Missionalia* 513 517-519). Dignity plays a salient role in the workplace, see Kristen L "Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity" (2015) 52 *J Manag Stud* 621 622, "The concept of decent work is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth". NEDLAC *Draft South Africa Decent Work Country Programme* (2010) *<http://new.nedlac.org.za/wp-content/uploads/2014/10/decent_work_country_programme_sa.pdf>* (accessed 1-1-2018); Huysamen (2018) *De Jure* 284.

monetary reward workers[18] receive for work performed.[19] Article 1 of the Protection of Wages Convention, 1949, no. 95 defines wages as:

> "remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or for services rendered or to be rendered".[20]

According to the South African Labour Relations Act 66 of 1995 [21] (hereafter referred to as the LRA) remuneration refers to any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and "remunerate" has a corresponding meaning. Ghosheh[22] emphasises the importance of remuneration by stating that:

> Remuneration is the aspect of work that has the most direct and tangible impact on the day to day lives of workers and their dependents.

Remuneration is most often obtained through wages for work performed.[23] Isaacs states that wages constitute the principal source of income in middle-income

---

[18]This thesis will generally refer to worker and employee in a broad sense, meaning someone that works for another for remuneration.

[19]ILO "Global Wage Report 2016/17: Wage Inequality in the Workplace" (2016) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_537846.pdf> (accessed 13-7-2018)

[20]Article 1 of the Protection of Wages Convention, 1949, no.95.

[21]Section 213 of the LRA. The Basic Conditions of Employment Act (hereafter referred to as the BCEA) defines remuneration as "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning" and deals with remuneration in s1.

[22]Ghosheh N "Wage Protection Legislation in Africa" (2012) *ILO* 1 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_203972.pdf> (accessed 2-10-2017)

[23]1.

countries.[24] As such, wages largely influence the livelihood[25] of workers and their dependents[26]. The number of dependents that a wage earner supports may contribute to the demands placed on wage earners. Finn[27] estimates that a South African wage earner living in a poor household supports an average of 2,65 dependents (3,65 people in total, including the wage earner). Wages play a prominent role in the living standard of the earner and dependents.

The central position that wages assume in an individual as well as a global context is indicated by the declaration of the ILO that "peace and harmony in the world requires the provision of an adequate living wage"[28]. Anker[29] states that the notion of a living wage is contained in major ILO declarations it takes on the form of a human right. Anker considers an adequate living wage as a minimum wage,[30] capable of supporting a basic standard of living to the recipient thereof and family.[31] According to the ILO, a living wage should maintain a reasonable living standard where at least basic needs[32] are fulfilled while being in context with the society (place) and the specific time in which it finds itself.[33]

---

[24]Isaacs GA "A National Minimum Wage for South Africa" (2016) *NMW-RI* 28 <http://nationalminimumwage.co.za/wp-content/uploads/2016/07/NMW-RI-Research-Summary-Web-Final.pdf> (accessed 23-2-2021).

[25]Reynaud E "The International Labour Organization and the Living Wage: A Historical Perspective" (2017) 90 *Conditions of Work and Employment Series* 1 27 <https://ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_557250.pdf> (accessed 23-2-2021).

[26]Dependents are those people that each wage earner supports in a household, see; Finn A "A National Minimum Wage in the Context of the South African Labour Market" (2015) 1 *Wits Working Paper Series* 1 5.

[27]7.

[28]Anker R "Estimating a Living Wage: A Methodological Review" (2011) 29 *Conditions of Work and Employment Series* 1 16

[29]4.

[30]Throughout the thesis there will be referred to minimum wage (as opposed to minimum wages) as concept. The concept is used with the presupposition of entailing various minimum wages and not solely a singular minimum wage.

[31]Anker (2011) *Conditions of Work and Employment Series* 4.

[32]ILO "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (2017) *ILO* 11 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (accessed 21-12-2018).

[33]The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30. Also see; Huysamen (2018) *De Jure* 285.

Growing trade (that can be associated with globalisation)[34] has played a role in terms of increased inequality in most Organisation for Economic Cooperation and Development (hereafter referred to as OECD) countries "by depressing the wages of low-skill workers".[35] The increase in inequality may amplify employers' bargaining power that may contribute to workers' exploitations.[36] Wage increases tend to happen faster in the top sphere of the labour market, while the lower sphere of the labour market tends to reflect a slower increase in wages.[37] This disproportional distribution of wages exacerbates inequality (refer to chapter 2.1). Cornia and Court[38] aptly indicate the magnitude of the problem of inequality by stating that:

> High and rising inequality is one of the most pressing problems facing countries around the world, and the international community.

The subsequent chapter considers minimum wage as a measure to address some of the major global challenges.

1.2 Minimum wage to address the challenges of inequality, poverty and unemployment

Inequality consists of two distinct parts or poles in terms of earnings: the top part (pole) of the labour market and the bottom part (pole) of the labour market. Statutory intervention in the form of a minimum wage is primarily focussed on the bottom part of the labour market. There can also be statutory interventions directed at the top part of the labour market in the form of progressive taxation. The notion of a maximum wage may also come to mind and will briefly be considered in chapter 2.2.

Minimum wage as statutory intervention (directed at the bottom part of the labour market) may be utilised to assist in rectifying the disproportionate unequal position

---

[34]See chapter 2.1.

[35]OECD "Globalisation, Jobs and Wages" *OECD*.

[36]Huysamen (2018) *De Jure* 275.

[37]ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 2: "the highest earners have captured an increasingly large portion, (of the labour share) while those at the bottom have seen their shares decline significantly".

[38]Cornia & Court Inequality, Growth and Poverty 35.

by, firstly, increasing the labour income share to be more in line with productivity and secondly, to assist in dealing with the disproportionate distribution of the labour income share. Minimum wage may be considered a legislative intervention in the labour market that counteracts the excessive inequality of bargaining power where it may result in the exploitation of workers.[39] Adams[40] states that:

> The "problem" to which minimum wage mechanisms respond is not simply the problem that firms often exploit market imperfections with a view to paying below the "natural" wage rate, distorting competition; rather, the problem is that "free competition" itself tends to encourage firms to pay insufficient wages because there is simply no way to ensure that the actual needs of workers are taken into consideration when decisions in the labour market are made.

Statutory intervention in the form of minimum wage may help alleviate the challenges of inequality, poverty, and unemployment by focussing specifically on the lower portion of the labour market.[41] By determining a minimum wage, the bottom part of the labour market wages is statutory determined at a certain minimum that may not legally be transgressed, thus narrowing the wage discrepancy (gap) between the top and bottom part of the labour market.[42]

Minimum wage may contribute to addressing these challenges because wages are a major source of household income in developing and developed economies alike.[43] In South Africa, it is estimated that around 80% of workers are paid employees[44]

---

[39]Huysamen (2018) *De Jure* 275.

[40]Adams Z "The EU Minimum Wage Directive: A Missed Opportunity?" (12-11-2020) *UK Labour Law Blog* <https://uklabourlawblog.com/2020/11/12/the-eu-minimum-wage-directive-a-missed-opportunity-by-zoe-adams/> (accessed 15-11-2020).

[41]Huysamen (2018) *De Jure* 274 & 293.

[42]Davidov G "A Purposive Interpretation of the National Minimum Wage Act" (2009) 72 *Mod Law Rev* 581 586.

[43]ILO "Global Wage Report 2014/15: Wage and income inequality" (2015) *ILO* xvii <http://ilo.org/global/publications/books/WCMS_324678/lang--en/index.htm> (accessed 22-7-2018).

[44]Section 213 of the LRA, defines employee as: (a) 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 (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee".

(dependent on paid employment).[45] Because of the high proportion of workers dependent on wages, minimum wage can be utilised as a minimum wage floor to decrease income inequality.[46] Finn[47] states that wages are the main drivers of poverty dynamics in South Africa. Cornia and Court[48] indicate the potential held by minimum wage:

> Minimum wage can provide stability, foster the commitment of workers, represent an incentive to raise productivity and help reduce poverty.

In establishing a wage floor, inequality may be reduced as the remuneration gap between the bottom and top of the labour market is narrowed. Minimum wage may also positively influence poverty as minimum wage often represents an increased wage. Minimum wage holds potential in addressing some of the problems associated with globalisation. The proposal directive of the European Parliament confirms this by utilising adequate minimum wages in the European Union and by the wide utilisation of minimum wage by nations across the globe.[49] Minimum wage is, therefore, commonly:

> "Embraced as a mechanism capable of expressing fairness norms, channelling the distributional conflicts that are inherent in a capitalist (or

[45]Rani U, Belser P, Oelz M & Ranjbar S "Minimum Wage Coverage and Compliance in Developing Countries" (2013) 152 *Int Labour Rev* 381 & 384.

[46]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 33.

[47]Finn (2015) Wits Working Paper Series 5.

[48] Cornia & Court Inequality, Growth and Poverty 32.

[49]See Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 2020.

> market society) so as to secure term social and economic sustainability".[50]

Literature indicates that increases in the top 20% of the income distribution have a negative connotation with economic growth[51] while increases in the income of the lowest 20% have a positive connotation with growth.[52] Minimum wage that may represent increased wages, may result in wage earners spending more, thus increasing the demand for goods and services. An increase in the demand for goods and services may result in consumption-fuelled growth and consequently, increase employment opportunities.[53]

South Africa is expanding its protective measures regarding interventions focussed on the bottom sphere of the labour market with the introduction of the South African national minimum wage (hereafter referred to as the SANMW) that will be considered further in chapter 3.1. Accordingly, a policy choice has been made to focus proactively on the bottom sphere of the labour market. The question remains whether this is the best or preferred approach to reducing inequality in South Africa. Minimum wages are utilised in South Africa, and in all likelihood, it will continue to be for the foreseeable future. Therefore, for this study, the premise of the potential positive influence of minimum wage is accepted. This study intends to contribute to the development of a better South African minimum wage framework.

---

[50]Adams Z "Understanding the Minimum Wage: Political Economy and Legal Form" (2019) 78 *Camb Law J* 42 43; Adams "The EU Minimum Wage Directive: A Missed Opportunity?" *UK Labour Law Blog*. Davidov states that "these laws (minimum wage) are best understood as tools for redistributing resources and ensuring respect for human dignity", Davidov (2009) *Mod Law Rev* 582.

[51]"Economic growth is defined as an increase to the tools and products that will be used to meet the human needs in any country or region", see; Çalışkan HK "Technological Change and Economic Growth" (2015) 195 *Procedia* 649 650.

[52]ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 4.

[53]See Card D & Krueger AB "Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania" (1994) 84 *Am Econ Rev* 772; also refer to 3.5 of this proposal.

1.3 Rationale for minimum wage and compliance thereto

The introduction of a minimum wage (the SANMW) may arguably be a positive initiative in the fight against inequality, poverty,[54] and unemployment that is important considering the detrimental effects of these challenges as discussed in chapter 2.1. From a legal perspective, the SANMW may represent a more general pay determination system with greater coverage, which may result in "lower earning differentials".[55] This may be seen as a step towards social justice which desires a more balanced equitable society. A more equitable society may be an aspect of social justice intertwined with morality,[56] from which arguments for minimum wage may naturally emanate.[57] Adam Smith states that:

> "No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, cloath [*sic*] and lodge the whole body of people, should have a share of the produce of their own labor as to be themselves tolerable well fed, cloathed [*sic*] and lodged".[58]

When considering global inequality and the disproportional distribution of the labour share in the labour market (as indicated by figure 1) from a philosophical perspective, one may deliberate whether one person's labour can be valued above another's in such excessive extend. The well-known philosophers Plato and Aristotle may

---

[54]Rani et al (2013) *Int Labour Rev* 404.

[55]Tregenna F & Mfanafuthi T "Inequality, Unemployment and Poverty in South Africa" (2012) *TIPS* <http://tips.org.za/research-archive/inequality-and-economic-inclusion/second-economy-strategy-project/item/2597> (accessed 20-5-2018).

[56]"Rights also lend moral legitimacy and the principle of social justice to the objectives of human development", see Green D *From Poverty to Power: How Active Citizens and Effective States can Change the World* 2 ed (2012) 23.

[57]Stabile D The Political Economy of a Living Wage: Progressives, The New Deal and Social Justice (2016) 11.

[58]Smith A 1976 [1776] as mentioned in Stabile *The Political Economy* 11. Also see Smith A *Wealth of Nations* (2007) 83.

arguably have recognised and deliberated this occurrence because they advocated a maximum ratio between the highest-paid and the minimum (also see chapter 2.2).[59]

From an economic perspective, wages have not increased in correlation with increases in productivity, and the distribution of the labour share in the labour market has become increasingly unequal (refer to chapter 2.1). It is the top of the labour market that has reaped most of the rewards associated with the increases in productivity and profit.[60] As mentioned earlier in chapter 1, increases in the top income sphere in the labour market may not be beneficial for growth, which may not create a beneficial landscape to address the challenges of inequality, poverty and unemployment.

The rationale for minimum wage, therefore, originates (among others) from legal, philosophical and socio-economic arguments. These multidisciplinary aspects may often be interrelated, which indicates the complexity and possible necessity of minimum wage in our modern context characterised by the challenges of inequality, poverty and unemployment. The challenges are personified in developing nations, particularly in the South African context. The SANMW has an important role in alleviating the challenges of inequality, poverty and unemployment or the effects thereof.

A concerning aspect and threat to the success of the SANMW and minimum wage policies in other countries is the lack of compliance with minimum wage policies.[61] Literature suggests that every so often it is not the absence of legal minimum wage provisions that are problematic, but rather the lack of compliance with legal minimum

---

[59]Edling C & Rydgren J (eds) Sociological Insights of Great Thinkers: Sociology Through Literature, Philosophy and Science (2011) 34; Jowett B *Politics Aristotle* (1999) 32, 34; and Stabile *The Political Economy* 11.

[60]Jacobs M & Mazzucato M Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth (2016) 1 & 8.

[61]Garnero A "The Dog That Barks Doesn't Bite: Coverage and Compliance of Sectoral Minimum Wages in Italy" (2018) 7 *IZA Journal of Labor Policy* 1 2 <https://doi.org/10.1186/s40173-018-0096-6> (accessed 8-6-2020); Huysamen (2018) *De Jure* 275 & 291. DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" (2010) *NMW-RI* 9 <http://nationalminimumwage.co.za/wp-content/uploads/2015/08/0005DPRU-2010The-role-of-Sectoral-Determinations.pdf> (accessed 21-12-2020).

wage provisions.[62] The systematic underpayment of wages is often referred to as "wage theft".[63]

Non-compliance with minimum wage provisions has negative social consequences for workers and their families,[64] and when considered collectively, it may influence the economy.[65] Non-compliant employers may also benefit unfairly over compliant employers because of the possible cost advantage of non-compliance.[66] Literature suggests that weak enforcement of legislative tax and wage protection measures may result in non-compliant (minimum) wage payments that may lead to tax underpayment.[67] Taxation deficiencies may affect the national government's revenue that may influence government functioning. There is also evidence that enforcement of minimum wage results in a decline of poverty,[68] presumably because enforcement promotes compliance that enables minimum wage to make a difference in the labour market. It becomes clear that compliance is important for upholding the law, for effecting social protection, for respecting human rights and promoting fairness.[69]

---

[62]Rani et al (2013) *Int Labour Rev* 392, also see: Marinakis A "Non-Compliance With Minimum Wage Laws in Latin America: The Importance of Institutional Factors" (2016) 155 *Int Labour Rev* 133 133 and Garnero (2018) *IZA Journal of Labor Policy* 2. "Minimum wage is provided by law in 90% of the world's countries; however, its implementation varies highly in both approach and effectiveness across countries", Benassi C "The Implementation of Minimum Wage: Challenges and Creative Solutions" (2011) *Global Labour University* 2 <https://www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.12.pdf> (accessed 8-2-2017). Also see Ghosheh "Wage Protection Legislation in Africa" *ILO* 2; Huysamen (2018) *De Jure* 275. DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" *NMW-RI* 9.

[63]Thornthwaite L "The Living Wage Crisis in Australian Industrial Relations" (2017) 27 *Lab Ind* 261. Bright S, Fitzpatrick K & Fitzgerald A "Young Workers Snapshot: The Great Wage Rip-Off" (2017) *Young Workers Centre* <https://d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1493954358/Young_Workers_Snapshot_The_Great_Wage_Ripoff_final.pdf?1493954358> (accessed 2-3-2020). See Stewart A, Stanford J & Hardy T *The Wages Crisis in Australia: What it is and What to do About it* (2018) 63.

[64]Rani et al (2013) *Int Labour Rev* 398.

[65]Ghosheh "Wage Protection Legislation in Africa" *ILO* 3.

[66]Rani et al (2013) *Int Labour Rev* 398. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" (2020) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923118/national-minimum-wage-enforcement-policy-1-oct-2020.pdf> (accessed 6-1-2020) 13.

[67]Ghosheh "Wage Protection Legislation in Africa" *ILO* 4.

[68]DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" *NMW-RI* 7.

[69]Rani et al (2013) *Int Labour Rev* 398; also see Ghosheh "Wage Protection Legislation in Africa" *ILO* 4-5.

The ILO defines compliance as the "status of conformity to rules, standards and practices established by national and international labour standards".[70] Compliance is achieved through implementation, which entails putting a rule into practice.[71] This process can be divided into various steps, the main being: the establishment or creation of the rule (establishing of a minimum wage), the establishing or setting up of the institutions responsible for the implementation of the rule (departments, boards or commissions responsible for implementation of the rule), and the enforcement of the rule.[72]

Enforcement of the rule entails the execution of the rule. The execution of the rule may be done by ordering or forcing compliance with the rule, which is done on a legislative basis and may take on the form of hard or soft measures.[73] Soft measures may typically take on an informative, educational form that doesn't *per se* result in negative consequences to the transgressor. Hard measures may typically imply sanctions. Sanctions may hold negative consequences to the transgressor, which may take on the form of fines, penalties, boycotts, name and shame campaigns or even imprisonment.

Compliance with the minimum wage framework should not be assumed. The lack of compliance necessitates the need to monitor the application of the minimum wage framework in the labour market. Monitoring is an essential part of enforcement that oversees the minimum wage application in the labour market to ensure compliance.

A component of enforcement that is narrowly related to monitoring compliance is the legal sanctions and remedies available against non-compliance. Sanctions are

---

[70]ILO "ILO Approach to Strategic Compliance Planning for Labour Inspectorates" (2017) *ILO* 2 <http://ilo.org/wcmsp5/groups/public/--ed_dialogue/---lab_admin/documents/publication/wcms_606471.pdf> (accessed 9-7-2019).

[71]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 6.

[72]6.

[73]See Ayres I & Braithwaite J *Responsive Regulation: Transcending the Deregulation Debate* (1992), also see DPRU & CSDA "Investigating the Feasibility of a National Minimum Wage for South Africa" (2016) 201601 *DPRU Working Paper* <http://dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP201601.pdf> (accessed 28-01-2019).

typically utilised to deter non-compliance and may take on various forms, such as naming and shaming, monetary fines, and even criminal sanctions.

A further important aspect of enforcement is the legal remedies available to workers in non-compliance instances. These remedies refer to workers' rights to seek relief against the non-compliant employer based on minimum wage non-compliance. Remedies are important for various reasons, the main being to restore the worker's dignity and any lost monetary value.

Enforcement of minimum wage is a problematic issue for African countries[74] and numerous developing countries such as Russia, China, India, and Brazil.[75] Bhorat states that although data is scarce, there is an indication that minimum wage compliance and enforcement are low in developing countries.[76] Accordingly, "[M]any developing countries lack the capacity to ensure that these mechanisms (inspection, whistle-blowing and penalty imposition) function properly".[77] Like many other developing countries, South Africa encounters challenges "compliance with existing regulation"[78] of a minimum wage. In 2007, some 44% of workers under sectoral determinations received remuneration below the prescribed minimum wage.[79] In 2014, it was estimated that less than half of the South African workforce received wages below the legal minimum.[80] Therefore, it appears that South Africa has a

[74]Ghosheh "Wage Protection Legislation in Africa" *ILO* 2 & 3.

[75]SBP "National Minimum Wage: A Complicated Issue" (2014) *REBOSA* <http://www.rebosa.co.za/wp-content/uploads/2014/10/National-Minimum-Wage-Background-Paper.pdf> (accessed 1-6-2016), additional countries that also indicate relatively high rates of non-compliance with minimum wage are the Philippines, Indonesia and Turkey, Rani et al (2013) *Int Labour Rev* 382.

[76]Bhorat H "Compliance with Minimum Wage Laws in Developing Countries" (2014) 80 *IZA World of Labor* 3 <https://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries/long> (accessed 20-9-2017).

[77]Margolis DN "Introducing a Statutory Minimum Wage in Middle and Low Income Countries" (2014) 52 *IZA World of Labor* 1 <https://wol.iza.org/articles/introducing-a-statutory-minimum-wage-in-middle-and-low-income-countries/long> (accessed 15-10-2016).

[78]SBP "National Minimum Wage: A Complicated Issue" *REBOSA*.

[79]SBP "National Minimum Wage: A Complicated Issue" *REBOSA.*

[80]Bhorat (2014) *IZA World of Labor* 4-5. DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" *NMW-RI* 9.

relatively high rate of non-compliance with minimum wage[81] and that non-compliance may be escalating. This upsurge is reason for concern when considering the recent introduction of the SANMW.

Minimum wage compliance may also be of concern in more developed countries. In Italy, Garnero found that around 10% of workers were paid 20% less than the minimum wage established through collective agreements.[82] Gernero's findings were particularly present in micro firms as well as demographical areas and affected certain vulnerable workers.[83] Minimum wage non-compliance is also evident and increasing in Australia, where there are a growing number of workers receiving less than half of the sectoral determined minimum wage rates.[84] The United States also struggles with minimum wage non-compliance,[85] which, together with examples from other nations lead one to conclude that compliance with minimum wage should not automatically be assumed in any context.[86]

Literature suggests that there is a lack of data and the reliability thereof with reference to minimum wage compliance in developing and developed nations alike.[87] Traditional minimum wage research may to a large extent have overlooked compliance with minimum wage[88] by focussing on the quantitative effect of minimum wage on, for example, employment, inflation, productivity, poverty etc. Furthermore,

---

[81]Rani et al (2013) *Int Labour Rev* 394.

[82]Garnero (2018) IZA Journal of Labor Policy 2.

[83]Garnero (2018) *IZA Journal of Labor Policy* 2. In Garnero's study "Vulnerable workers" refers to women and temporary workers and workers at the bottom of the wage distribution.

[84]Thornthwaite (2017) *Lab Ind* 261. 1 in 5 young workers are not paid minimum wage which may coincide with other legislative labour transgressions; Bright et al "Young Workers Snapshot: The Great Wage Rip-Off" *Young Workers Centre*.

[85]Marinakis (2016) *Int Labour Rev* 134. Garnero (2018) IZA Journal of Labor Policy 2.

[86]Rani et al (2013) *Int Labour Rev* 382.

[87]Ritchie F, Veliziotis M, Drew H & Whittard D "Measuring Compliance with Minimum Wages" (2016) 1608 *UWE Economics Working Paper Series* 1 250 and Ghosheh "Wage Protection Legislation in Africa" *ILO* 1. In terms of developed nations see: Howe J, Hardy T & Cooney S "The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012" (2014) *Melbourne Law School* <http://law.unimelb.edu.au/__data/assets/pdf_file/0008/1556738/FWOReport-FINAL.pdf> (accessed 23-2-2021) and Garnero (2018) *IZA Journal of Labor Policy* 2. In terms of the scarcity of data of developed nations see Bhorat (2014) *IZA World of Labor* 6 & 8. Ghosheh "Wage Protection Legislation in Africa" *ILO* 7.

[88]Ghosheh "Wage Protection Legislation in Africa" *ILO* 3.

the limited research done in terms of minimum wage compliance predominantly considered minimum wage compliance at a national level with little consideration to wage floors established in terms of collective agreements[89] that may be more sector or industry specific. Garnero accurately states that collective agreements are the most important wage setting institution in several European countries.[90] The reason may be that collective agreements determine minimum wage rates with consideration of specific circumstances and factors relevant to certain trades, occupations, and sectors and may therefore be better suited to make a meaningful difference in the affected workers' lives.

Before considering the research methodology of this study, it is necessary to indicate that compliance with minimum wage is influenced by various elements that may directly or indirectly influence compliance. Elements directly impacting the compliance of minimum wage include institutional factors such as labour inspectors,[91] collective bargaining, and trade unions[92] that may be associated with the enforcement of minimum wage policies. Elements that directly influence compliance may (in some form or another) be mandated specifically to promote compliance with minimum wage.

Elements that indirectly affect compliance with minimum wage may not have a specific and exclusive mandate to promote minimum wage compliance. However, in the manner that these elements function, they influence compliance with minimum wage.[93] Examples may be found in the design elements of minimum wage policies including coverage, determination, and minimum wage review. The design of

---

[89]Garnero (2018) IZA Journal of Labor Policy 2.

[90]2.

[91]"The most important dimension of labour inspection as it relates to wage protection is to ensure compliance with the law and enforcing the law where it is necessary", Ghosheh "Wage Protection Legislation in Africa" *ILO* 6. Rodríguez AF "A Study on Labour Inspectors' Careers" (2020) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_739165.pdf> (accessed 23-2-2021) 12.

[92]In general trade unions "have the capacity and resources (greater than the individual worker's) to help ensure legal obligations are followed", Ghosheh "Wage Protection Legislation in Africa" *ILO* 8.

[93]DPRU & CSDA (2016) *DPRU Working Paper* 73.

minimum wage policies is not only important for establishing an effective holistic minimum wage model but also in terms of achieving compliance with minimum wage.

Because of the direct and indirect influence of various elements on compliance, it is necessary to consider the minimum wage framework from a holistic point of view, thus taking account of indirect elements while also focussing on elements that directly influence compliance with minimum wage. This study will therefore consider certain features (that will be clarified in the research methodology of the study) from a legislative position, that indirectly influence compliance, while also considering elements that directly influence compliance with minimum wages. As a theoretical background it is necessary to give a brief oversight of three general approaches to compliance.

1.3.1 Approaches to compliance

According to the literature, compliance is actualised through three main theoretical approaches that will be discussed briefly.

1.3.1.1 The method of persuasion[94]

The persuasive approach entails that stakeholders should be persuaded to change their views or norms to correlate with what is being promulgated to them.[95] The approach focusses on norms and values that correlate with the social responsibility principle. Accordingly, employers have a societal responsibility to do what is just and fair, that reaches further than the pursuit of profit. This approach arguably requires dialogue between stakeholders that may be facilitated by joining stakeholders to set a minimum wage.[96] Typical stakeholders would include both employers and

---

[94]Heppell E *Minimum Wages: A Legal Analysis with Reference to Examples From Developing Countries* LLM-dissertation NWU (2016) 40. Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" Global Labour University 7.

[95]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 8.

[96]"Through social dialogue trade unions can work with companies and government to develop labour policies, including wage policies that have implications for all workers in a country, Ghosheh "Wage Protection Legislation in Africa" *ILO* 8. "[E]stablishing a regulatory framework to set the level of a NMW (National Minimum Wage), which has been discussed and agreed on by social partners, is crucial for success of a NMW policy", DPRU & CSDA (2016) *DPRU Working Paper* 68.

employee representatives. It is important to involve these parties because they would, to a great extent, be responsible for the successful implementation of, and compliance with, the minimum wage.[97]

When the government imposes the minimum wage without consulting the main stakeholders, it is likely to be devalued by the public and subjected to additional public scrutiny and media attention.[98] A persuasive approach should form the basis of any strategy aimed at establishing compliance. In this context, persuasion is regarded as a preventative measure, which is much cheaper than "setting up monitoring and sanctioning mechanisms".[99]

1.3.1.2 The management approach

According to this approach, rule or legislative ambiguity and a lack of capacity are major contributing factors and reasons for non-compliance.[100] A strong emphasis is placed on creating awareness and assisting and educating the employer regarding the applicable rules and legislation.[101] Stakeholders such as unions or other authorities may assist in providing information to workers and in correcting possible ambiguity.[102]

Literature suggests that systems be put in place to deal with disputes among parties.[103] This may assist in providing clarity regarding certain issues and establish a better understanding of the relevant rules.[104] In the UK various information

---

[97]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 12.

[98]Margolis (2014) *IZA World of Labor* 3.

[99]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 10.

[100]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 7.

[101]8.

[102]Ghosheh "Wage Protection Legislation in Africa" *ILO* 9.

[103]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 8, also see Ghosheh "Wage Protection Legislation in Africa" *ILO* 8.

[104]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 8.

campaigns were facilitated to expand minimum wage knowledge and awareness.[105] In the UK, these campaigns were specifically directed at sectors most at risk for non-compliance.[106] Technical assistance in the working of the minimum wage needs to be available and accessible to those in need thereof across the broader spectrum of the labour market.[107]

The management approach also requires monitoring of the minimum wage system that is done for two reasons: Firstly, it allows for detection of a lack of capacity to implement a minimum wage;[108] and secondly, transparency is ensured, which in turn, makes it possible for the public to put social pressure on employers who are not compliant.[109]

1.3.1.3 The enforcement approach

According to this approach, the main reason for non-compliance is the economic benefit associated with non-compliance or the financial benefit attained by not paying workers the predetermined minimum wage.[110] The financial gain or benefits associated with non-compliance outweighs the cost of sanctions. According to the enforcement theory, implementing measures such as monitoring and sanctioning can help achieve achieving compliance.[111]

Monitoring is usually actualised using labour inspectors.[112] Monitoring allows for non-compliance detection and provides information for making decisions on sanctions.[113]

---

[105] 12.

[106] 12.

[107] 8.

[108] 8.

[109] 8.

[110] 8.

[111] 8.

[112] Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 12.

[113] Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 8.

Appropriate sanctions may then be determined, increasing the cost of non-compliance, which increases the incentive to comply with minimum wage provisions.

All three approaches should be utilised as part of an integrated holistic strategy to optimise compliance with minimum wage by supplementing each other.[114] Therefore, optimising compliance with minimum wage is not a simple task and requires a framework that integrates all three approaches. Ayres and Braithwaite[115] propose a hierarchical structure where the persuasion approach forms the basis, escalates to the management approach, and ends with the enforcement approach. The hierarchical structure is progressive in that compliance initiatives escalate with the seriousness and occurrence of the non-compliance.

The potential benefit of the SANMW in addressing its objectives (reducing poverty, inequality, and unemployment) and the associated threats are dependent on sufficient compliance with the SANMW. Establishing a legal minimum wage is important, but equally important is the compliance and obedience thereto. Without compliance, legal provisions may only be of academic value and limited to paper. Limited research has been done about compliance with minimum wage, particularly from a legislative viewpoint. Consequently, this research will consider compliance with minimum wage from a legislative viewpoint by deliberating the research questions set out in the subsequent paragraph.

---

[114]The literature indicates that a combination of these approaches may improve the performance of the compliance system. Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 9. Ayres and Braithwaite argue: "compliance is most likely when an agency displays an explicit enforcement pyramid", which is a combination of the persuasion, management and enforcement approaches, Ayres & Braithwaite *Responsive Regulation* 35.

[115]See Ayres & Braithwaite *Responsive Regulation* 35. Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 9-10.

1.4 Research methodology

1.4.1 Research questions

From the discussion on the introduction of minimum wage in South Africa and the desirability of compliance with minimum wage as the backdrop, the following questions arise:

Firstly, how is minimum wage compliance pursued and achieved through the South African legal framework? For this study, the following elements will be considered:

- the coverage of minimum wage,
- the determination of minimum wages, and
- legal enforcement of minimum wage including the sanctions and remedies for non-compliance.

Secondly, what weaknesses in legal regulation can be identified and based thereon, what recommendations can be made for more effective regulation and implementation of a minimum wage in South Africa?

Thirdly, what lessons good and bad can be learned from the foreign national comparative legal minimum wage compliance frameworks?

In satisfying the established research questions it is essential to set down the parameters of the study in terms of its aims and scope.

1.4.2 Research aims and scope

The introduction of the SANMW indicates that South Africa is developing and expanding its minimum wage policy. The development of the South African minimum wage policy holds that South Africa is currently entering unchartered territory, as we have never undertaken the implementation of minimum wage on this scale.

As is evident from the literature review of this study, South Africa and numerous other countries face high non-compliance rates with minimum wage provisions. This is a concerning aspect as non-compliance with minimum wage undoubtedly affects the

success of such strategy, which by implication affects its ability to address inequality, poverty, and unemployment reduction.

In contemplating the first research question of this study, the current South African legal minimum wage compliance framework will be analysed. According to the ILO, compliance with minimum wage depends on the level at which minimum wage is set, the number of minimum wage rates,[116] whether adequate consultation took place, and the general state of the economy. It can consequently be inferred that various elements play a role in determining the rate of compliance with minimum wage provisions,[117] and that is why the ILO recommends a comprehensive strategy. It is necessary to reiterate that a good, effective minimum wage model comprises various elements. For this study, the following elements will be considered as core aspects of a comprehensive strategy that may impact compliance with minimum wage:

1.4.2.1 The coverage of minimum wage

Coverage of minimum wage refers to the extent to which minimum wage applies to individuals in the labour market (i.e., personal scope of coverage). The coverage that minimum wage has is important because extended (broad) coverage may hold potential to benefit more people, but it does increase compliance challenges. Differentiated minimum wage coverage may mean that there are various minimum wage rates, that may complicate the minimum wage policy and have certain consequences in terms of compliance.[118] Paradoxically, a lack of differentiated minimum wage coverage may also result in non-compliance in certain sectors, industries or occupations where the work context may require a deviated minimum wage.[119] Included in "coverage" is that workers should be aware of coverage applicable to them.

---

[116]Minimum wage policies that are made up of numerous minimum wage rates may complicate the minimum wage system which may have a negative effect on compliance as the enforcement and the management of minimum wage is made more difficult, Margolis (2014) *IZA World of Labor* 5.

[117]Huysamen (2018) *De Jure* 291.

[118]Huysamen (2018) *De Jure* 291 & 293.

[119]Piek M & Von Fintel D "Sectoral Minimum Wages in South Africa: Disemployment by firm size and trade exposure" (2020) 37 *Dev S Africa* 642 643-644.

1.4.2.2 The determination of minimum wage

The determination, setting, or fixing of minimum wage rates are fundamentally important[120] in any minimum wage model because minimum wage rates that are too high may result in non-compliance or employment loss. Simultaneously, minimum wage rates that are too low may have little impact in alleviating inequality, poverty, and unemployment.[121] Also relevant under this aspect is the frequency and method of adjusting minimum wage. The determined minimum wage should be flexible because it should change in correlation with the context (economic, social, political etc.). An unyielding minimum wage may result in non-compliance or employment loss in tough economic times. It may also become irrelevant to wage earners if not adjusted regularly to protect the purchasing power.

1.4.2.3 Legal enforcement of minimum wage

Firstly, the legal enforcement of minimum wage will be made up of monitoring of compliance with minimum wage provisions. It entails supervising or overseeing the application of minimum wage to identify non-compliance.

Secondly, the legal sanctions and remedies applicable in non-compliance, avoidance, or partial compliance with minimum wage provisions will be considered. Legal sanctions and remedies focus on the consequence after non-compliance or possible non-compliance have been identified.[122]

---

[120]Belman D & Wolfson P "What does the Minimum Wage do in Developing Countries?" (2016) 62 *Conditions of Work and Employment Series* 1 23 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_463192.pdf> (accessed 8-2-2017); Huysamen (2018) *De Jure* 292, and 292; Adams "The EU Minimum Wage Directive: A Missed Opportunity?" *UK Labour Law Blog*; Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 2020.

[121]Rani et al (2013) *Int Labour Rev* 396; Huysamen (2018) *De Jure* 291; Dube A "Impacts of Minimum Wages: Review of the International Evidence" (2019) *Government UK* 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844350/impacts_of_minimum_wages_review_of_the_international_evidence_Arindrajit_Dube_web.pdf> (accessed 23-2-2021).

[122]Huysamen (2018) *De Jure* 291.

After the applicable elements of this study have been considered as part of the compliance analysis, the second research question can be considered by identifying weaknesses in the South African legal compliance framework and determines aspects that may be improved.

The third research question considers lessons good and bad that can be learned from the foreign national comparative legal minimum wage compliance frameworks about the elements as mentioned in this chapter. Two foreign national comparative legal minimum wage compliance frameworks will be analysed in the form of the UK and Australia. These countries are selected because they (similar to South Africa) all have legal roots in the common law important for comparative analysis purposes.[123]

The UK[124] and Australia[125] are developed nations[126] and may arguably provide good frameworks for how effective minimum wage compliance should be pursued. These nations are selected because they are diverse in terms of socio-economic conditions, and each nation has unique challenges about compliance with minimum wages. The advanced nature of the foreign jurisdictions considered may mean that work is increasingly being digitalised (so called digital platform workers) working remotely and being mobile that present additional challenges with regard to labour inspection.[127] The diversity of the nations included in the analysis broadens the scope

---

[123]McLachlin B "Bills of Rights in Common Law Countries" (2002) 51 *Int Comp Law Q* 197 197. In the case of Australia see: Gray A "The Common Law and the Constitution as Protectors of Rights in Australia" (2010) 39 *Common Law World Rev* 119 119. In South Africa, courts have the "general obligation" to develop the common law, Currie I & de Waal J *The Bill of Rights Handbook* (2013) 61.

[124]The UK has a relatively advanced minimum wage compliance framework which coincides with effective compliance. Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 4. Minimum wage in the UK may be regarded as successful. Among other beneficial effects, it raised wages while not having an adverse effect on employment, Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 10, 41, 42 & 56. Also see Manning A "The UK's National Minimum Wage" (2009) *CentrePiece 4 & 5* <https://cep.lse.ac.uk/pubs/download/cp290.pdf> (accessed 23-2-2021).

[125]"There were always employers who failed to comply with the legal minima of wages and conditions, but the basic standard largely held", Thornthwaite (2017) *Lab Ind* 261. Despite being a developed nation there has been concern regarding the compliance with wage provisions in Australia in recent years.

[126]ILO "World Employment Social Outlook: Trends 2018" (2018) *ILO 54* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_615594.pdf> (accessed 18-3-2019).

[127]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 24 & 25.

of the study and may be invaluable in terms of lessons; good and bad that can be learned from these nations.

Winston Churchill introduced the first minimum wages in the United Kingdom (hereafter referred to as the UK) in 1909.[128] The introduction of minimum wage was a first among the larger nations in the modern era and it "heralded waves of twentieth-century wage regulation around the world".[129] Despite the promising start, minimum wage was abolished during the early 1990s leaving the UK as the only European country without a formal or informal minimum wage system.[130] During the late 1990s the UK introduced a national minimum wage (hereafter referred to as a NMW) policies[131] that have since developed into a relatively progressive nature and coincides with effective compliance.[132] This development was achieved within approximately 30 years. South Africa and other nations could consider minimum wage policies in the UK because of the success attained in a relatively short period.

Australia will also be considered because it has a well-developed, albeit relatively complex, minimum wage system.[133] Legislation similar to minimum wage legislation was established in Australia as far back as the 1890s.[134] Despite being a first-world

---

[128]Deakin S & Green F "A century of minimum wages in Britain" (2009) *CentrePiece* 6 6 <https://cep.lse.ac.uk/pubs/download/cp291.pdf> (accessed 23-2-2021) and Machin S & Manning A "Employment and the Introduction of a Minimum Wage in Britain" (1996) 106 *Econ J* 667 668.

[129]Deakin S & Green F "A century of minimum wages in Britain" *CentrePiece* 6.

[130]Manning A "The UK's National Minimum Wage" *CentrePiece* 4.

[131]4.

[132]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 4. Wills J & Linneker B "In-work Poverty and the Living Wage in the United Kingdom: A Geographical Perspective" (2014) 39 *Trans Inst Br Geogr* 182 185.

[133]Bishop J "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" (2018) *Reserve Bank of Australia* 1-3 <https://www.rba.gov.au/publications/rdp/2018/pdf/rdp2018-06.pdf> (accessed 8-1-2019).

[134]Factory and Shops Act 1896; Hargreaves RJ *The Development of Minimum Wage Legislation in the United Kingdom* Master thesis Sheffield Hallam University (2017) 8. Bray JR "Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future" (2013) 1 *SPI Working Paper* 1 3.

developed nation, Australia still has challenges in compliance with minimum employment standards.[135]

Now that the parameters of the study have been established consideration will be given to the research approach that will be followed along with the allocation of chapters.

1.4.3 Research approach and overview of chapters

A critical comparative literature study will be undertaken. Primary sources will be utilised as far as possible and in the case of inaccessible foreign provisions due to language constraints, if any, multiple secondary sources will be utilised to ensure the validity of the findings.

This thesis is divided into six general parts or chapters. Chapter one sets out the rationale for the research and indicates the problem of inequality where minimum wage is proposed as a corrective legal measure that necessitates compliance with minimum wage.

The second chapter further examines inequality and specifically within the South African milieu. Within the context of addressing inequality, statutory interventions directed at the top part of the labour market is considered in contrast to statutory measures directed at the bottom part of the labour market (such as minimum wage). Within this narrative the notion of a maximum wage is considered along with its structural arrangements and arguments for or against its use. The notion of a maximum wage is briefly considered in the South African context. Later, there is progression to the international legal minimum wage compliance framework (as established by the ILO). An overview is given of the main international provisions applicable to this study before evaluating the application of these international measures with reference to the identified elements of this study to provide a

[135]McKenzie M "The Erosion of Minimum Wage Policy in Australia and Labour's Shrinking Share of Total Income" (2018) 81 *J Aus Pol Econ* 52 53 & 57; Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 10; also see Thornthwaite (2017) *Lab Ind* 261.

framework for effective minimum wage compliance. It is necessary to acknowledge that not all minimum wage models are necessarily equally effective or good.

The third chapter of this thesis focuses on the South African context. The chapter proceeds by examining the introduction of the SANMW in the South African labour market. Hereafter a deductive approach starts with a broad approach that identifies international legal measures adopted by South Africa to effect minimum wage compliance in line with the compliance elements of this thesis. The research will then be narrowed down to the national level by analysing the South African legal minimum wage compliance framework regarding the elements mentioned in the problem statement. The deductive analysis approach will identify weaknesses in the current SANMW compliance framework that will allow recommendations to be made in this regard. Sources will include, but not be limited to, legislation, policies, textbooks, case law and academic articles.

The fourth chapter contains the comparative element of this thesis by analysing the minimum wage compliance frameworks of the UK and Australia regarding the established elements of this thesis. The latter part of the chapter will identify the best and worst minimum wage compliance practises of the foreign jurisdictions analysed.

The consideration of best and worse practices in chapter 4 will facilitate the design and establishment of an effective minimum wage compliance model in line with the elements of this study. Chapter 5 will establish an effective minimum wage compliance model.

Chapter 6 is the final chapter that provides the conclusion to the thesis.

It is important to indicate that there are limitations to this study. It may be argued that current or existing research regarding a minimum wage framework and compliance with minimum wage is limited, and one should be mindful thereof.[136] Furthermore, in

[136]Bhorat H, Kanbur R & Mayet N "Minimum Wage Violations in South Africa" (2011) *NMW-RI* 4 <https://nationalminimumwage.co.za/wp-content/uploads/2015/08/0074-boorat-minimum-wage-violation.pdf> (accessed 23-2-2021), Rani et al (2013) *Int Labour Rev* 381-382; "minimum wage coverage and compliance are often overlooked in the literature, although they are important determinants of the effective level of protection provided to low-paid workers and their families", 381, and Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* iii.

terms of the comparative part of this study, countries may share various commonalities, but there may also be numerous differences in economic stature, legal framework and historical context that should be kept in mind. Due to limitations placed on the scope of doctoral theses, this research will be based on the hypothesis that minimum wage is a public good and necessary legal instrument to reduce poverty and inequality. However, chapter 1 and 2 of the research will nevertheless give attention to the rationale for an efficient minimum wage model.[137]

[137]As such this research builds upon my previous research completed for an LLM in Labour Law; Heppell *Minimum Wages*.

Chapter 2: Inequality and the International Minimum Wage Framework

The initial chapter of this thesis indicated structural inequality as a problematic occurrence. This chapter delves deeper into the notion of inequality and its consequences before considering inequality in South Africa. In addressing inequality from a holistic perspective, it is necessary to consider the labour market as a whole that includes both lower and high earners. Minimum wage is a statutory measure predominantly directed at the lower earners of the labour market. This chapter briefly considers statutory measures directed at the top of the labour market (high earners) to obtain a holistic perspective with the intent to address inequality.

Before considering legal minimum wage compliance on a national level in the subsequent chapters, this chapter establishes the international standard in terms of legal minimum wage compliance. The international standard will be established by identifying and providing an overview of the international legal measures applicable to minimum wage and compliance thereto before dissecting the core international provisions applicable to the elements of this study. Specific focus will be given to the identified elements of this study (coverage, determination and enforcement) together with additional elements that may also contribute to an effective minimum wage model.

2.1 Inequality and its consequences

The philosopher Aristotle refers to some of the perils of inequality in his writing of *Politics*[138] and states that

> "the desire of equality, when men think that they are equal to others who have more than themselves; or, again the desire of inequality and superiority, when conceiving themselves to be superior".[139]

It is fundamentally important to emphasise that inequality should not exclusively be seen as an adverse phenomenon. Inequality may be an unavoidable characteristic

[138] Jowett *Politics Aristotle* 62, 63, 109, 110 & 123.

[139] 110.

of life where humanity is born into inequality. Some level of income inequality is to be expected in any country and it is seen as a natural occurrence that can either be used as an incentive for individuals to find work, or to work harder and pursue an education[140] that may ultimately be beneficial in terms of growth.[141] Levels of inequality that may be beneficial typically range between a Gini coefficient[142] of 0,25 up to a Gini coefficient of 0,40 dependent on the specific country context and time period.[143] The range of beneficial inequality mentioned above is known as "efficient inequality",[144] "optimal inequality" or "just-right inequality".[145] This classification seems to be aligned with the principle of "substantive equality".

Inequality becomes problematic at excessive levels (high or low).[146] Very low inequality levels (as in some socialist regimes in the late eighties) bears a compacted wage distribution structure. This means that in the wage distribution structure, wage earners are positioned close together with little difference in wages between various workers with differing education, skills, and experience.[147] This conclusion may ultimately influence growth because productivity, different capabilities, and individual effort are not adequately rewarded which may erode the individual's incentive to

[140]ILO "Global Wage Report 2014/15: Wage and income inequality" *ILO* 19.

[141]Keeley B "How Does Income Inequality Affect Our Lives?" in Keeley B (ed) *Income Inequality: The Gap between Rich and Poor* (2015) 63 70; Cornia & Court *Inequality, Growth and Poverty 23 &* 66; Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 24.

[142]Gini coefficient is often used to measure inequality. 1 represents perfect inequality while 0 represents perfect equality.

[143]Cornia & Court Inequality, Growth and Poverty 23.

[144]23.

[145]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70; Cornia & Court *Inequality, Growth and Poverty* 66.

[146]Cornia & Court Inequality, Growth and Poverty 6 & 23.

[147]Prasad E & Keane MP "Consumption and Income Inequality in Poland during the Economic Transition" (1999) 14 *IMF Working Papers* 1: Poland historically also held a compacted wage distribution structure.

work.[148] The drive towards innovation may be curbed by excessively low inequality levels as the incentive to be innovative may dwindle.[149]

High-income inequality is associated with social unrest and crime[150] that may translate into political instability and various social problems.[151] As a result of these occurrences, investor confidence may be negatively affected on both domestic and international level that may have the effect that investors are hesitant to invest.[152] Poverty associated with high inequality[153] may lead to the misuse and abuse of natural resources and the environment.[154]

High inequality has been associated with the diminishing advancement in education and human capital development[155] that "reduces progress in fertility control".[156] South Africa and other developing countries typically have an oversupply of labour in the labour market accompanied by with weak economic growth figures that translate into a lack of employment opportunities. Therefore, it can be argued that fertility planning and control are important aspects of labour supply. Education is also of fundamental

---

[148]Cornia & Court Inequality, Growth and Poverty 22.

[149]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70; Cornia & Court *Inequality, Growth and Poverty* 68.

[150]Cornia & Court *Inequality, Growth and Poverty* 22; Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 76; also see Wills & Linneker (2014) *Trans Inst Br Geogr* 187.

[151]Cornia & Court *Inequality, Growth and Poverty* 22, "social cohesion and community life have weakened under the impact of widening income differences", Pizzigati S "Why Greater Equality Strengthens Society" (2011) 293 *Nation* 11 <https://nwulib.nwu.ac.za/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=69706295&site=eds-live> (accessed 3-11-2018) and Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70; Cornia & Court *Inequality, Growth and Poverty* 70. "High poverty levels, and the inherent inequality that comes with it, remain a great cause of concern, whether viewed from economic sustainability, social justice, or basic adherence to Constitutional imperatives such as dignity and equality for all" Huysamen (2018) *De Jure* 272.

[152]Cornia & Court *Inequality, Growth and Poverty* 22 & 70; Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70.

[153]ILO "Inequality, Income Shares and Poverty The Practical Meaning of Gini Coefficients" (2010) *ILO* 6 <http://ilo.org/travail/whatwedo/publications/WCMS_145695/lang--en/index.htm> (accessed 4-12-2018).

[154]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 24; Cornia & Court *Inequality, Growth and Poverty* 22.

[155]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70; Cornia & Court *Inequality, Growth and Poverty* 22.

[156]Cornia & Court Inequality, Growth and Poverty 22.

importance for South Africa and other developing countries because education may shape a more skilled and educated worker. The impact of education is of particular importance to South Africa and other developing countries because copious amounts of unskilled labour often characterise the labour markets in countries with a scarcity of skilled labour. Furthermore, as inequality rises, individuals from poorer backgrounds are less likely to graduate from university and more likely to endure unemployment periods.[157]

There may be a general correlation between overall wellbeing and inequality.[158] Overall wellbeing is positively correlated with low socioeconomic differences in wellbeing measured by income or educational inequality.[159] There is also a consensus in research that inequality is correlated with health and social problems.[160]

Excessive inequality may also have a political influence where there is the inclination for policy choices that may not be the best. Inappropriate policy choices may possibly "lead to populist measures with negative implications for economic efficiency, macroeconomic stability and growth".[161] Some individuals[162] may argue that the current move to amend the South African Constitution to enable land expropriation without compensation is an example of populist policy choices that may possibly be

---

[157]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70; Cornia & Court *Inequality, Growth and Poverty* 70.

[158]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 76.

[159]76-77.

[160]77. There is no consensus among researchers that income inequality causes health and social problems independently from other factors.

[161]Cornia & Court *Inequality, Growth and Poverty* 22 & 70; Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70.

[162]Mitchell DJ "South Africa's Land Seizure is Classic Populism" (2018) *FEE* <*https://fee.org/articles/south-africa-s-land-seizure-is-classic-populism/*> (accessed 2-4-2018), Cousins B "Land Reform in South Africa is Sinking: Can it be Saved?" (2016) *Nelson Mandela Foundation* 12 & 19 <*https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf*> (accessed 2-4-2018); Cousins B "Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope" (2013) *HSF* 12 & 19 <*https://hsf.org.za/publications/focus/focus-70-on-focus/focus-70-oct-b-cousins.pdf*> (accessed 2-4-2018); also see Żukowski A "Land Reform in the Republic of South Africa: Social Justice or Populism?" (2017) 12 *Werkwinkel* 71 71-84.

influenced by South Africa's excessive and persistent inequality. To this argument Cornia and Martorano contend that high inequality may erode property rights.[163]

There has also been links between high levels of inequality and so-called "rent-seeking".[164] The manifestation of rent-seeking can happen in politics (in democratic and authoritarian systems) where certain individual or business needs and interests may be promoted rather than the greater good of the collective.[165]

High inequality may also result in transaction as well as security and cost increase that may ultimately reduce growth.[166] Literature suggests that "high inequality correlates negatively with GDP growth".[167] There is a nexus between income inequality and unequal opportunities,[168] wasted productive potential and the inefficient resource allocation.[169] There is a correlation between economic growth and an increase in employment opportunities that may influence poverty positively.[170] Cornia and Martorano contend that high-income inequality has the additional threat that it may influence economic policies where states may be more inclined to source

[163]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 24; Cornia & Court *Inequality, Growth and Poverty* 22.

[164]Keeley refers to Joseph Stiglitz's definition of rent seeking; "efforts that people take to get a larger share of the pie rather than to increase the size of the pie", Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70.

[165]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70 & 71.

[166]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 24; Cornia & Court *Inequality, Growth and Poverty* 22.

[167]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 22; studies indicate that it is the inequality of the lower end of the income distribution scale that "matters for the observed negative link between inequality and growth" ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 4; Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 69.

[168]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 73 & 74.

[169]ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 4.

[170]Department for International Development "Growth: Building Jobs and Prosperity in Developing Countries" (2008) *OECD* 6 & 11 <http://www.oecd.org/derec/unitedkingdom/40700982.pdf> (accessed 18-6-2020).

international financial resources that may result in careless macroeconomic policies and consequently lead to the nonpayment of international debt.[171]

From the discussion in the previous paragraph, it is evident that wages play a decisive role in distributing income and therefore inequality. This analysis indicates the complexity of inequality, poverty and unemployment, and how these challenges influence each other.[172] The relationship between the challenges can be indicated by the notion that rising unemployment often results in fewer individuals receiving wages, thus growing inequality.[173] The contrasting notion is also true, in that growing employment opportunities may result in decreasing inequality.[174] As a result of inequality, workers at the bottom sphere of the labour market may be more likely to be trapped in poverty.[175] Inequality and poverty may dampen growth[176] in that consumption (demand) of goods and services may be reduced,[177] which holds that employment opportunities may be limited or even decreased. Employers may reduce employment because of the lowered demand for goods and services.

It is evident that inequality may be a normal occurrence across nations, and it may be utilised for constructive purposes. Inequality becomes problematic at excessive levels where it presents various detrimental threats to individuals, communities, and economies. Depending on the context, the use of the concept of inequality in this thesis may refer to the notion of inequality at excessive levels, where it presents problems. The following paragraph expands on inequality in the South African context.

---

[171]Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 24.

[172]Chibba & Luiz (2011) *Econ Pap* 307; National Minimum Wage Panel *A National Minimum Wage for South Africa 7*; "There is an inextricable link between low levels of wages, high unemployment rates, the great number of people living in poverty, and the massive inequality in South Africa".

[173]Tregenna & Mfanafuthi "Inequality, Unemployment and Poverty in South Africa" *TIPS*.

[174]Tregenna & Mfanafuthi "Inequality, Unemployment and Poverty in South Africa" *TIPS*; Cornia & Martorano "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" *UNCTAD* 33.

[175]Cornia & Court Inequality, Growth and Poverty 24 & 25.

[176]Cornia & Court *Inequality, Growth and Poverty* 24; Ghosheh "Wage Protection Legislation in Africa" *ILO* 3.

[177]Ghosheh "Wage Protection Legislation in Africa" *ILO* 3.

2.1.1 Inequality in South Africa

A particular concern in the South African context is the income disparity between the earnings of the top and the bottom of the labour market.[178] At the beginning of this study (chapter 1.1.1), it was indicated that wages have not increased in correlation to increases in productivity associated with globalisation. Various countries have seen a secular downward trend in labour shares[179] (in other words to the share of national income going to labour). Furthermore, the income share distribution within the labour market has been skewed in favour of the highest portion of the distribution who may have benefitted from the proceeds of productivity because it was not distributed to the lower part of the labour market.[180] Engler refers to an Oxfam report where it was indicated that:

> "the richest one per cent has increased its income by 60 per cent in the last 20 years".[181]

Globally there has been growing disproportionality between the income of the top portions of the distribution compared to the lower part of the distribution.[182] The distribution of the income share is indicative of the disproportionality that is not only present in South Africa but also globally as is indicated in figure 1.

---

[178]Rethink Africa & South Africa Network on Inequality "Mind the Gap: Assessing the Possibilities of a National Statutory Minimum Wage in South Africa to Address Inequality" (2014) *Oxfam* <https://www.oxfam.org.za/downloads/research/South-Africa-Mind-the-Gap_-Minimum-Wage.pdf> (accessed 2-8-2017) 2-7.

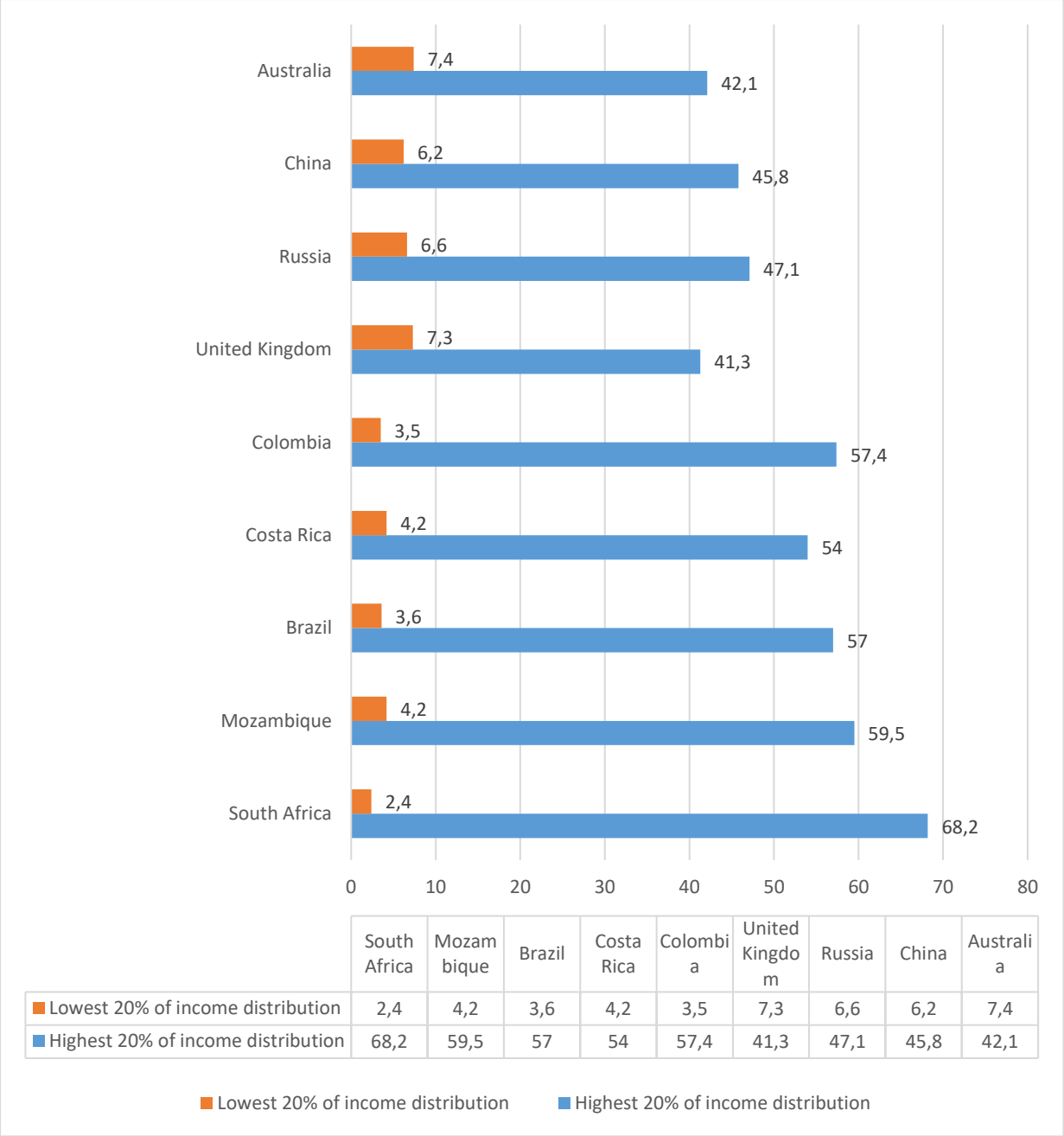
[179]ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 10.

[180]See Heppell E "The South African National Minimum Wage: Potential or Concern?" (2021) 6 *J Law Soc Dev* 1 12.

<http://web.a.ebscohost.com.ez.sun.ac.za/ehost/pdfviewer/pdfviewer?vid=1&sid=d532b56b-290f-4596-958b-a9726312af89%40sessionmgr4008>

[181]Engler (2013) *New Internationalist* 33. Also see Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 81. Consideration should be given to the distribution of income because wages and salaries are the main sources of household income and therefore assume an influenceable position in the distribution of income. Mohr et al *Economics* 278. See Heppell (2021) *J Law Soc Dev* 12. ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 2.

[182]See Heppell (2021) *J Law Soc Dev* 12.



	South Africa	Mozambique	Brazil	Costa Rica	Colombia	United Kingdom	Russia	China	Australia
Lowest 20% of income distribution	2,4	4,2	3,6	4,2	3,5	7,3	6,6	6,2	7,4
Highest 20% of income distribution	68,2	59,5	57	54	57,4	41,3	47,1	45,8	42,1

Figure 1: The distribution of the income share, compiled by the author using World Bank data for 2014.[183]

The inequality and income disproportion are very visible in the South African context where the top 10% of income earners had approximately 50% of the total income

[183] *The World Bank Data* "World Bank Open Data" (2019) *The World Bank Data* <https://data.worldbank.org/> (accessed 26-5-2019).

share, while the bottom 10% had less than 2% of the total income share of the income distribution in 2010.[184] Furthermore, the income share held by the highest 20% is substantial in relation to the modest portion of the income share held by the lowest 20% in South Africa. The disproportionality is acknowledged by considering the income share distribution of its neighbouring countries. In 2015,[185] Botswana's income share of the lowest 20% stood at 3,9%, while the income share of the highest 20% stood at 58,5%. Namibia's income share of the highest 20% was 63,7%, whereas the income share of the lowest 20% stood at 2,8% in 2015.[186] The data of another neighbouring country Mozambique (indicated in figure 1), also reinforces the disproportionate South African position.[187]

Figure 1 also indicates South Africa's income share disproportionality compared to other countries such as Brazil, China, Colombia and Costa Rica. These countries are also classified as emerging countries (upper-middle-income) according to the World Employment and Social Outlook Trends 2018.[188] The disproportionality faced in South Africa is more pronounced than developed nations such as Australia, the Russian Federation and the UK (as indicated in figure 1).

World Bank data indicates that the South African income share of the bottom 10% had generally decreased from 1993 until 2011, while the income share of the top 10% had generally increased in the same period.[189] Therefore, it may be that the wealthy are getting wealthier while the poor are staying poor or getting poorer. Some may

---

[184]The World Bank Data "Income share held by the lowest 10%: South Africa" (2019) *The World Bank Data* <https://data.worldbank.org/indicator/SI.DST.FRST.10?locations=ZA&start=2007> (accessed 26-5-2019) and Rethink Africa & South Africa Network on Inequality "Mind the Gap: Assessing the Possibilities of a National Statutory Minimum Wage in South Africa to Address Inequality" *Oxfam* 6. See Heppell (2021) *J Law Soc Dev* 13.

[185]Figure 1 utilises data from 2014 and data from 2015 is utilised in the subsequent paragraph. Comparison of statistics from different years should be done with caution and in this instance different years are utilised because of the lack of available data, to give indication of the context of the South African income share disproportionality compared to other countries. See Heppell (2021) *J Law Soc Dev* 13.

[186]14.

[187]14.

[188]ILO "World Employment Social Outlook: Trends 2018" *ILO* 54. See Heppell (2021) *J Law Soc Dev* 14.

[189]World Bank Data "Data From Database: World Development Indicators (2018) Last updated: 01/25/2018" (23-1-2018) *Personal email correspondence*. See Heppell (2021) *J Law Soc Dev* 14.

argue that this indicates the capitalistic nature of the South African and global economy where humans (labour) are dehumanised and reduced "to functions of production in the effort to make profit".[190] In 2018 the Chief Executive Officer (hereafter referred to as CEO) of Domino's Pizza Enterprises, Don Meij, was paid R436 970 000 for the financial year that took place in the context where multiple workplace law transgressions (including minimum wage) were identified by enforcement authorities twelve months before the payment.[191] A practical example in the South African context is the Marikana tragedy (that occurred August 2012 at the Lonmin mine in South Africa) where 44 people lost their lives, numerous were injured, and millions of rands worth of property were damaged as a result of a labour dispute. A predominant demand of workers was a higher monthly wage of R12 500 per month, which the employers considered absurd. This took place in the context where the media reported that the Lonmin CEO earned about R1 200 000 a month compared to the average earnings of a rock driller at R10 500 a month.[192] This disparity may be one of the greatest weaknesses of the free market, and it is contended that the bottom corner of the labour market requires statutory intervention in the form of minimum wage.[193]

---

[190]Boëttger JF & Rathbone M "The Marikana Massacre, Labour and Capitalism: Towards a Ricoeurian Alternative" (2016) 81 *Koers* 1 2. Piketty contends that inequality is one of the fundamental problems facing capitalism, which is especially relevant in the unequal South African context, Piketty T *Capital in the Twenty-First Century* (2014) 1. Also see Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 6. See Heppell (2021) *J Law Soc Dev* 14.

[191]37 million Australian dollars multiplied by the current exchange rate of 11,81 (one Australian dollar equals 11.81 Rand) equals: R436 970 000. Stewart et al *The Wages Crisis in Australia* 12.

[192]News24 "The Great R1.2m Divide" *City Press* (25-8-2012) <http://news24.com/Archives/City-Press/The-great-R12m-divide-20150429> (accessed 1-9-2017). "[B]etween 2000 and 2008 labour (workers) at the three large platinum producers (employers) only received 29% of value added produced, considerably lower than the average for the South African economy as a whole over this period (50%) and below the OECD average of 52%. At the same time, 61% of value produced went to profit, with just under half of this (28% of total value added) distributed to shareholders" Bowman A & Isaacs G "Demanding the Impossible? Platinum Mining Profits and Wage Demands in Context" (2014) 1 <http://wits.ac.za/PlatinumReport> (accessed 18-12-2017), this indicates not only that mine workers are receiving disproportionally low wages when compared to South Africa as a whole but also with reference to the OECD. It may be contended that profits should be redistributed towards wages of workers. See Heppell (2021) *J Law Soc Dev* 14.

[193]ILO "Towards a South African National Minimum Wage" *ILO* 4. Rethink Africa & South Africa Network on Inequality "Mind the Gap: Assessing the Possibilities of a National Statutory Minimum Wage in South Africa to Address Inequality" *Oxfam* 2-7; "In a free market (capitalist market) economy all decisions are made by

The disparity in income distribution is evident from the discussion above and explains why South Africa bears the greatest discrepancies and inequalities regarding income distribution in the world.[194] Mention should also be made of the income inequality between races in South Africa, where Caucasians generally earn considerably more than other population groups.[195] The persistent industrial and social unrest in South Africa is indicative of the unequal landscape evident in South Africa.[196]

In the South African context, income distribution is unequal between the top and bottom of the labour market and between men and women. In 2015, South African women received a median wage of only 77,1% of the wage for employed men across the income distribution spectrum.[197] Women are more exposed to poverty and unemployment, and gender inequality may create power imbalances in households.[198] The National Minimum Wage panel reported that a "lower household wealth index increases the chance of intimate partner violence".[199] The following statistics need to be highlighted to indicate the severity of the problem in South Africa: Husbands or boyfriends are the killers in 40% to 70% of female murders,[200] and "63603 cases of rape and sexual assault were recorded between 2010 and 2011".[201]

---

individual households and firms with no government intervention", technically the free market does not exist as there are always some form of government influence but the degree of government influence/involvement may vary, Mohr et al *Economics* 28. It is argued in this paper that government intervention is necessary in the form of minimum wage to assist in addressing inequality. See Heppell (2021) *J Law Soc Dev* 15.

[194]ILO "Towards a South African National Minimum Wage" *ILO* 8.

[195]ILO "Towards a South African National Minimum Wage" *ILO* 8, 19. See Heppell (2021) *J Law Soc Dev* 15.

[196]Rethink Africa & South Africa Network on Inequality "Mind the Gap: Assessing the Possibilities of a National Statutory Minimum Wage in South Africa to Address Inequality" *Oxfam* 29 & 32. See Heppell (2021) *J Law Soc Dev* 15.

[197]National Minimum Wage Panel A National Minimum Wage for South Africa 46. See Heppell (2021) *J Law Soc Dev* 15.

[198]See Heppell (2021) *J Law Soc Dev* 15.

[199]National Minimum Wage Panel A National Minimum Wage for South Africa 7. See Heppell (2021) *J Law Soc Dev* 15.

[200] RSA Department of Social Development *South African Integrated Programme of Action Addressing Violence Against Women and Children (2013-2018)* (2014) <https://www.saferspaces.org.za/uploads/files/Violence_Against_Women_and_Children-Low_Resolution.pdf> (accessed 7-8-2017) 10. See Heppell (2021) *J Law Soc Dev* 15.

[201]RSA Department of Social Development South African Integrated Programme of Action 10. See Heppell (2021) *J Law Soc Dev* 15.

For 2018-2019 52 420 sexual offences and 41 583 rape cases were reported to the South African police.[202]

What is even more concerning is the fact that these figures are considered conservative.[203] The instance of gender inequality illustrates the complexity and interconnectedness of poverty, inequality and unemployment regarding various other problems South Africa face today.[204]

The recognition of inequality and the various interconnected challenges as major stumbling blocks require the consideration and development of measures and approaches to deal with these challenges. Minimum wage may be utilised as one such approach in addressing the challenges of inequality, poverty, and unemployment by focussing on the bottom part of the labour market (low earners). In contrast to this approach, the top sphere of the labour market (high earners) also plays a role in the re-enforcement of inequality. On this premise and to ensure a holistic perspective in tackling inequality, it is necessary to consider statutory measures directed at the top part of the labour market.

2.2 Statutory interventions directed at the top part of the labour market

As mentioned in earlier sections of this study, minimum wage may be useful and may have a definite role in alleviating inequality, poverty and unemployment or the effects thereof, if institutionalised effectively. However minimum wage focusses specifically on the bottom part of the labour market and does not directly consider the top wage earners (sphere) of the labour market thus leaving these wage earners to earn freely and contribute to inequality.

---

[202]RSA National Strategic Plan on Gender-Based Violence & Femicide: Human Dignity and Healing, Safety, Freedom & Equality in our Lifetime (2020) 26 <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 17-12-2020). See Heppell (2021) *J Law Soc Dev* 15.

[203]RSA Department of Social Development *South African Integrated Programme of Action* 10. The underreporting of sexual violence to police is high that results in undermines the integrity of police statistics. See Heppell (2021) *J Law Soc Dev* 15.

[204]See Heppell (2021) *J Law Soc Dev* 15.

> "Government action to address inequality has concentrated on the poor and it seems that judgements about benefits conditional on personal desert and responsibility apply only to those at the bottom of society's pile. There is no equivalent reciprocal responsibility demanded from those in receipt of society's highest rewards".[205]

A perspective that requires (at the very least) consideration, is that of statutory intervention directed at the top earners (20%) in the labour market to manage excessively high earnings in this sphere. Statutory intervention directed at the top portion of the labour market (along with statutory measures directed at the bottom portion of the labour market through minimum wage) may be considered in a holistic attempt to address both sides of inequality (top and bottom portions of the labour market).

2.2.1 Utilisation of statutory measures directed at the top sphere of the labour market

On a philosophical level the notion of managing excessively high earnings may arguably already be present in the writings of the well renowned philosopher Plato, where he advocated the principle that the highest paid should never receive more than five times the minimum.[206] For Plato a just society has a rigid maximum and anything above that maximum becomes unjust. Plato held that competition in the marketplace (arguably a fundamental aspect of the free market or capitalism) was inimical to establishing a society based on moral behaviour.[207] The philosophical texts of Aristotle also bear suggestions that accumulation should not be allowed by more than five times the minimum.[208]

Statutory interventions directed at the top earners in the labour market to address inequality may take on various structures that will be further elaborated on in the

---

[205]Ramsay M "A Modest Proposal: The Case for a Maximum Wage" (2005) 11 *Cont Pol* 201 201.

[206]Edling & Rydgren Sociological Insights of Great Thinkers 34.

[207]Stabile The Political Economy 8.

[208]Jowett *Politics Aristotle* 32-34.

subsequent chapter. However, all share the basic characteristic of managing excessively high earnings. It is important to indicate that statutory measures addressed at high earners are not a far-fetched theoretical notion but rather a commonly used pragmatic concept used by most nations in some form. An example hereof is progressive earnings taxation.

One form of statutory intervention directed at top earners in the labour market, among many, is the idea of a maximum wage where a wage ceiling is established for the top earners in the labour market. The notion of a wage ceiling may commonly be referred to as the "capping" of wages where excessive wages are managed to a degree. The notion of a maximum wage was utilised in football in the UK from 1901 until 1961.[209] The maximum wage within the football context had two main objectives; firstly, to reduce wage bills and secondly to promote equality of competition:[210]

> "By limiting wages, it was hoped that the better players would have no financial motive to move clubs and thus the gap between rich and poor would be reduced".[211]

It is evident that the maximum wage within the UK's football context was used, at least partially to level the playing field so to speak and to decrease inequality. Some writers argue that the maximum wage reduced the unbalanced earning distribution in this context.[212] The maximum wage within UK's football context developed further during the 1920s where a sliding scale of wages was introduced (based on years of service) and football clubs were allowed some flexibility in terms of wages paid to selected and nonselected players.[213] Accordingly, players with more years of service and that were in form were allowed to earn above the maximum wage on a sliding scale.[214] The literature points to the fact that illegal or so-called "under the counter

---

[209]Taylor M "Beyond the Maximum Wage: The Earnings of football Professionals in England, 1900-39" (2001) 2 *Soccer & Society* 101 101.

[210]101.

[211]101.

[212]103.

[213]104.

[214]104.

payments"[215] were a problem and it is "likely that the inquiries and commissions instigated by the authorities touched only the tip of the iceberg".[216] It was not only soccer in the UK that at some point utilised a maximum wage but cricket also made use of maximum wage to limit the earnings of cricket professionals.[217]

Globally we find an increased voice in favouring a maximum wage with the UK, France, Spain, Australia, Canada, India, and New Zealand all being prominent in this regard.[218] Statutory measures directed at the top part of the labour market, including the notion of maximum wage or the capping of wages, may be structured in various ways and should not be interpreted in a narrow, limiting sense. Prominent structures to achieve this aim are now considered.

2.2.2 The structure for statutory measures directed at the top part of the labour market

Statutory measures directed at the top part of the labour market are predominantly structured in two main ways; firstly, income tax may be utilised to act as a wage ceiling where wage earners pay a most of their earnings over to the state at certain predetermined earning levels. This establishes a symmetric model where tax percentages are increased in relation to the increase in earnings, which may be called graduated taxation.[219] With graduated taxation one may find certain tax exemplifications for basic earners and graded tax above the basic earner threshold.

It is notable that taxes usually raise during periods of crises, turmoil, war, and economic depression.[220] For example, during the Second World War the United States of America had an income tax rate of 90% applicable to certain top earners. Graduated taxation may eventually reach a 100% tax bracket, therefore effectively

---

[215]Taylor (2001) *Soccer & Society* 110.

[216]110.

[217]113.

[218]Litvak D "Felix Adler: The Maximum Wage Prophet" (2010) *SSRN* <https://ssrn.com/abstract=1583248> (accessed 1-3-2019) 11.

[219]5.

[220]10 & 11.

establishing a ceiling for earnings. The contrary is also true since taxes may decline during periods of peace, stability and prosperity.[221]

The second structure used for the capping of wages is to determine a wage ceiling or maximum wage in a ratio to other wages. A fixed ratio may be determined between the maximum wage and either minimum wage (low end wages) or average wages. The positive aspect of the structure is that it does not limit or "cap" earnings of individuals at the top sphere of the labour market. Rather it:

> "merely puts to the test one of their most cherished claims: that the profits of a successful enterprise trickle down to benefit everyone".[222]

The ratio structure encourages top wage earners to increase wages throughout the hierarchal pay structure of their respective organisations if they themselves want to earn more. The ratio structure is flexible to a degree and not as restrictive as the tax structure may be. Provided the stipulated ratio is reached, it allows top wage earners to earn more that will be beneficial to workers in the lower hierarchy of organisations including companies.

Another version of the ratio structure becomes known in one of the writings of Pizzigati, where the traditional ratio structure (for example, CEO earning 120 times that of the minimum wage worker) is inverted.[223] The traditional ratio structure (top wage earners in relation to lower wage earners), is reversed so that lower wage earnings are indicated as a percentage of top wage earnings. An example of the inverted structure is where a lower wage worker earned 0,05% of the monthly earnings of the top earners in an organisation.

It is argued that organisations and companies have to remunerate top earners handsomely in order to attract and retain talent.[224] By inverting the ratio structure, individuals, companies and organisations are forced to "*defend the morally*

---

[221]Litvak D "Felix Adler: The Maximum Wage Prophet" *SSRN* 10-11.

[222]Engler (2013) *New Internationalist* 33.

[223]Pizzigati (2011) *Nation* 14.

[224]14.

indefensible notion that workers and their work have virtually no value".[225] The next section considers some of the arguments for and against maximum wage.

2.2.3 Arguments for and against statutory measures directed at the top part of the labour market

A common thread in the argument for a maximum wage usually centres on fairness.[226] On a philosophical level, one may deliberate whether one person or his/her employment and possibly both can truly be valued and/or regarded as more, superior in such excessive monetary extent to other lower hierarchy positions. Accordingly:

> "workers care not only about the absolute remuneration but rather about their relative compensation; hence, goes the line of reasoning, medium- and low-paid workers would benefit from knowing that their superiors' take would not exceed their lot substantially".[227]

One may contemplate why the bottom part of the labour market is often intervened with through statutory measures rather than the top or higher part of the labour market as both parts make up the concept of inequality. It may be argued that both parts or poles of inequality (higher and lower/bottom parts/poles) should be targeted by means of statutory measures as part of a holistic approach to address inequality.

Statutory measures directed at the top part of the labour market may manage earnings and create an earnings ceiling of sorts that may help prevent "social illnesses, namely pomp, pride and excessive power".[228] Excessive inequality in the distribution of income, wealth or power may "translate into unequal opportunities leading to wasted productive potential and to inefficient allocation of resources".[229]

---

[225]Pizzigati (2011) *Nation* 14.

[226]Blumkin T, Sadka E & Shem-Tov Y "A case for maximum wage" (2013) 120 *Econ Let* 374 374-378.

[227]377.

[228]Litvak D "Felix Adler: The Maximum Wage Prophet" *SSRN* 6.

[229]ILO et al "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" *OECD* 4.

Litvak states that it seems that "high taxes on the rich are good for the economy and for society's well-being in general".[230] It may be argued that the "capping" of wages in Japan positively affected inequality in Japan and the general economy, therefore contributing to a "good" society.[231]

Felix Adler was one of the prominent voices in favour of a maximum wage and for him the notion of a maximum wage is important in terms of justice,[232] which arguably has connotations with fairness, equality, and dignified existence. Adler states that:

> "I would protect the individual in his right to the private enjoyment of all that honestly belongs to him, of all that he can truly use for the humane purpose of life; and only that which does not rightfully belong to him, only that which is to him merely a means of pomp and pride and power – such power as no individual ought to possess – would I have remanded into the general fund of society, where, in the name of justice, it belongs".[233]

A maximum wage may have a redistributive effect in that employers, would rather redistribute earnings more equally in the workplace hierarchy than to allocate funds solely to executives or senior employees.

Another viewpoint is that the basis for increased pay, compensation of higher hierarchy positions in relation to lower hierarchy positions, may be vested in higher job demands[234] and higher productivity.[235] As such "job rank, job category and the (increased) responsibilities they have to fulfil in carrying out their jobs"[236] and

---

[230]Litvak D "Felix Adler: The Maximum Wage Prophet" *SSRN* 11.

[231]11.

[232]11.

[233]11.

[234]Aguinis H, Gomez-Mejia LR, Martin GP & Joo H "CEO Pay is Indeed Decoupled From CEO Performance: Charting a Path for the Future" (2018) 16 *Manag Res* 117 130 <http://www.hermanaguinis.com/CEOpaydecoupled.pdf> (accessed 8-1-2019), the demands in the form of "complexity, impact and human capital associated with a particular position" form part of internal equity.

[235]Huysamen (2018) *De Jure* 273. The marginal productivity theory is predicated on a identifiable link between higher income and higher productivity.

[236]Du Plessis AJ (ed) Human Resource Management and Employment Relations in SA (2015) 205.

increased productivity[237] may serve as basis or rationale for increased pay and compensation for higher hierarchy positions. Du Plessis refers to Du Plessis, Sumphonphakdy, Oldfield and Botha when explaining that:

> "In most cases, management is not paid for just 40 hours per week, but for the time spent overall in doing their jobs. If there is a crisis at the company or business, management is expected to be present. Management do not get paid overtime, even if they work 20 or 30 hours more for that specific week."[238]

One of the central aspects of this reasoning or argument is that normal or standard employment rules such as annual leave and working hours are not usually applicable to management (higher hierarchy positions) because they are remunerated more and expected to go beyond what is expected in terms of their job and in terms of normal or standard employment rules and productivity. In other words, normal or standard employment rules or practices do not in general apply to higher hierarchy workers (management) and as such these workers may come to deserve increased earnings. Also, higher hierarchy positions get paid in a particular manner because of the responsibilities associated with that position and they are accountable for the performance of their organisation or enterprise.[239]

A possible problem with this specific reasoning is that it is based on the presupposition that management or higher hierarchy workers go beyond the normal or standard employment standards, rules, practices, benchmarks and productivity. Consequently, higher hierarchy workers deserve increased earnings, compensation because of the assumption.

The presupposition may be unfounded as higher hierarchy workers may do less or equal to normal employment standards, rules, benchmarks, and practices where they may not be as productive as expected from their hierarchical position. They may not

---

[237]Huysamen (2018) *De Jure* 273.

[238]Du Plessis Human Resource Management 206.

[239]Aguinis et al (2018) 16 *Manag Res* 130.

meet the responsibilities associated with the position and organisational performance (for which higher hierarchy workers are responsible) may not be adequate. Similarly, they may qualify for more annual leave than workers in lower-ranked jobs based on more benefits to more senior employees. Research by Aguinis, Gomez-Mejia, Martin and Joo[240] indicates that CEO's (higher hierarchy workers) pay and performance do not go hand in hand and does not support distributive justice.[241] Various economic and social-institutional-psychological factors may play a role in the noncorrelation between CEO compensation and performance.[242]

On the other hand, those against the notion of a maximum wage will most likely embrace the principles associated with a free market and therefore oppose any statutory intervention in the labour market. From this point of view the maximum wage may be regarded as a:

> "insane socialistic tyranny that chains everyone into the same, lowly state of mediocrity".[243]

As referred to earlier, it is often submitted that it is necessary to remunerate the top end of the worker hierarchy handsomely to attract and retain the best talent. This argument follows the external equity rationale where pay, compensation for the higher hierarchy position, is matched with the labour market's going rate for similar positions.[244] Therefore, the argument implies that the best talent will seek other shores or lured by more generous earning offers if undervalued compensation is presented. The following section considers statutory measures directed at the top earners in the South African labour market.

---

[240]Aguinis et al (2018) 16 *Manag Res* 117-136

[241]Keeley "How Does Income Inequality Affect Our Lives?" in *Income Inequality* 70 & 71; In the corporate sector individuals may focus efforts on obtaining a larger share of the pie rather than to increase the size of the pie which may be referred to as rent seeking.

[242]Aguinis et al (2018) 16 *Manag Res* 117-136.

[243]Engler (2013) New Internationalist 33.

[244]Aguinis et al (2018) 16 *Manag Res* 130.

2.2.4 Statutory measures directed at the top earners in the South African labour market

It is important to emphasise that statutory measures directed at the South African labour market's top earners and the notion of a maximum wage are not merely idealistic ideas with no realisable potential. There are currently various direct and indirect statutory measures directed at top earners in the South African labour market that may arguably contain maximum wage characteristics.

At present, South Africa utilises two prominent statutory measures directed at top earners in the South African labour market. The first is a progressive taxation system that taxes personal income on a percentage thereof. This system works on a sliding scale that sees the tax percentage increase as income increases. Currently the maximum taxation percentage is 45% of personal income above R1 500 000 for a financial year.[245]

The second statutory measure directed at top earners in the labour market is so called “income differential statements”. The Employment Equity Act[246] determines that every designated employer must submit an income differential statement on the remuneration and benefits received in each occupational category and level of that employer’s workforce. If disproportionate income differentials are reflected in such statements, measures[247] need to be taken to redress the disproportionality.[248]

At present, the income differential statement has not been used constructively, other than for recording purposes. However, the income differential principle may be further developed and focused so that it covers most workers and establishes a system of sanctions for non-compliance to pursue a labour market remuneration structure that

---

[245]During this study the rate of tax was R532 041 plus 45% of the amount by which taxable income exceeds R1 500 000. South African Revenue Service “Taxation in South Africa” (2020) *SARS* <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf> (accessed 6-9-2020).

[246]Section 27 (1) of the Employment Equity Act 55 of 1998 (EEA).

[247]Section 27 (2) of the EEA; also see Heppell *Minimum Wages* 10.

[248]Section 27 (3) (b) of the EEA.

is more evenly structured. This approach and an effective minimum wage framework may constitute a holistic approach to tackling inequality, poverty, and unemployment.

Statutory measures directed at the top earners in the labour market may be especially relevant to the South African public sector where employment and wages are relatively high in relation to emerging economies.[249] Also, average remuneration is higher in the South African public sector compared to the private sector, and in the last decade, average remuneration growth was higher in the public sector.[250]

Figure two indicates that public sector employment represents a substantial percentage of overall employment in the South African context where it is more than the OECD average and more than some developed, more populated countries such as the United States of America and Great Britain. The substantial employment in the South African general government means that government employment assumes a prominent position in the labour market and may have a definite role in addressing labour market inequality. Even though remuneration distribution is more equitable in the South African public sector than in the whole economy, one may argue that there is still room for improvement.[251] Substantial employment in the public sphere may reduce general labour market inequality by first addressing top earners within the government's structures.

---

[249]OECD "OECD Economic Surveys: South Africa 2020" (2020) *OECD* 32 <https://www.oecd-ilibrary.org/sites/530e7ce0-en/index.html?itemId=/content/publication/530e7ce0-en> (accessed 27-9-2020).

[250]National Treasury "Medium Term Budget Policy Statement 2019" (2019) *National Treasury* 55 & 57 <http://www.treasury.gov.za/documents/mtbps/2019/mtbps/Prelims.pdf> (accessed 10-6-2020).

[251]The South African public sector has a Gini coefficient of 0.38 compared to a Gini coefficient of 0.6 for the whole economy. National Treasury "Medium Term Budget Policy Statement 2019" *National Treasury* 58. Two considerations must, however, be recognised: first that the public sector is more transformed than the private sector and wage regulation may therefore impact on the general income average of different demographic groups in the country; and secondly, due to the political alliances between the governing party and labour movements it will be difficult for government to introduce such measure.

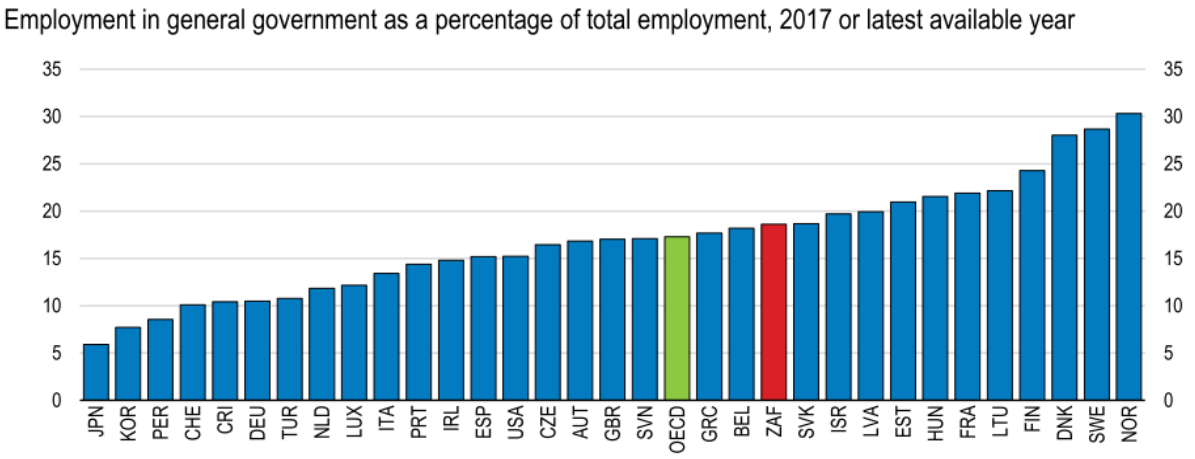


Figure 2: Employment in general government in relation to total employment.[252]

The substantial South African public sector employment contributes to a significant government wage bill. Figure 2 indicates the relatively large public sector employment contribution to a substantial government wage bill. However, employment growth in the public sector in the last two decades has been moderate.[253] Moderate employment growth means that high compensation in public sector positions is largely responsible for the substantial government wage bill and not additional public servants to improve service delivery.[254]

[252]OECD "OECD Economic Surveys: South Africa 2020" *OECD* 32.

[253]National Treasury "Medium Term Budget Policy Statement 2019" (2019) *National Treasury* 56.

[254]55 & 56.

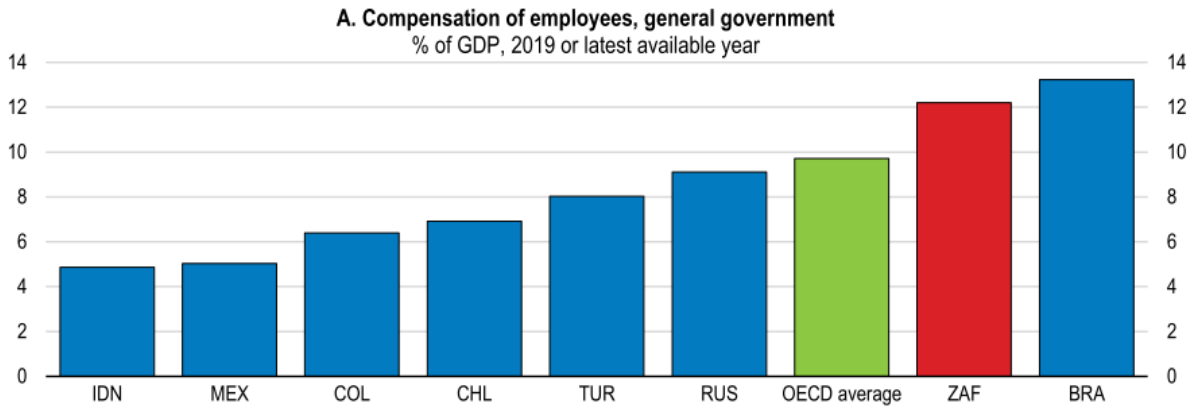


Figure 3: Compensation of general government employees in various nations.[255]

Figure 3 indicates the large South African government wage bill for government employees at 12% of the GDP[256] – a percentage that is significant in relation to other emerging nations. In this context it is not difficult to understand that employee compensation was the largest South African government spending item at 38% of the total consolidated government spending in 2019.[257]

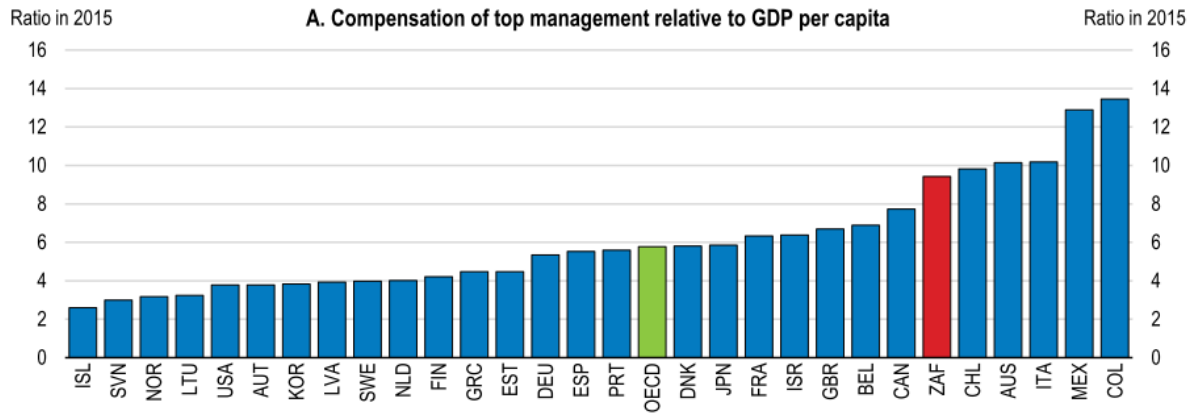


Figure 4: Remuneration of civil servant managers[258]

[255]OECD "OECD Economic Surveys: South Africa 2020" *OECD* 31.

[256]OECD "OECD Economic Surveys: South Africa 2020" *OECD* 11 & 31.

[257]31.

[258]33.

As indicated above, the main driver in the increased South African government compensation over the last decade was not increases in public employment but rather increases in public sector wages.[259] In the last decade, the South African government compensation spending increased an average of 11%, which is more than nominal GDP growth.[260] The public sector remuneration policy settled wage negotiations above inflation increases.[261] Also, promotional policies enabled the transition of many employees to higher salary levels that contributed to the South African government wage bill increases.[262] The increases in compensation has created significant spending pressures on the government.[263]

The relatively high compensation of top and senior management in the South African public sector and wage inequality may warrant the consideration of measures to align compensation to that of other emerging nations that may result in decreasing the government wage bill and may promote a more equitable labour market:[264]

> "More powerfully, the imposition of wage caps by governments (who are the largest single employers in the whole economy) sends a strong signal to participants in the broader labour market."[265]

As is considered in chapter 4.2, Australia utilises a system of "public sector wage caps" that places an arbitrary limit on the growth of public sector remuneration, effectively capping or limiting wage increases.[266] Within this context statutory measures directed at the top earners in the labour market may have a role to play in the South African landscape and in other nations facing high inequality.

---

[259]OECD "OECD Economic Surveys: South Africa 2020" *OECD* 31; National Treasury "Medium Term Budget Policy Statement 2019" (2019) *National Treasury* 55-56.

[260]OECD "OECD Economic Surveys: South Africa 2020" *OECD* 31.

[261]31.

[262]31.

[263]National Treasury "Medium Term Budget Policy Statement 2019" (2019) *National Treasury* 57.

[264]Stewart et al The Wages Crisis in Australia 63.

[265]63.

[266]119.

The ratio approach may be utilised where individuals in the top sphere of the remuneration hierarchy cannot be remunerated more than the ratio to minimum wage. This approach may help narrow the discrepancies between the earnings of the minimum wage earners and the earnings of the top sphere of the remuneration hierarchy while allowing a degree of elasticity where top earners can earn more contingent on realising the ratio. The central idea of a ratio approach is to regulate the remuneration relationship between the top and lower spheres of the labour market and ensure that the spheres do not drift too far apart. There are resemblances of the ratio principle in the so-called income differential statement in the South African context. However, the functioning of income differential statements is currently not functioning optimally. It may be rectified with the necessary political intent, but it will be a difficult task.

The succeeding parts of this chapter consider the international legal framework for minimum wage and compliance thereto.

2.3 Overview of international minimum wage compliance measures

The ILO is a specialised agency of the United Nations (UN) and was established in 1919 during the same decade as World War 1 and focuses on establishing and improving global labour standards.[267] The ILO utilises instruments in conventions, recommendations, and protocols to set labour standards.[268] A theory behind the utilisation of labour standards to intervene in labour markets may be predicated on the assumption that free and unregulated labour markets are imperfect and may result in workers' exploitation.[269] Conventions, recommendations, and protocols are international instruments that determine labour standards and do not replace more

[267]ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" (2019) *ILO* 7 & 8 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf> (accessed 30-12-2019).

[268]18.

[269]Huysamen (2018) *De Jure* 285.

favourable conditions to workers as contained in any "law, award, custom or agreement"[270] of the member.

Conventions are legally binding when ratified and recommendations are legal nonbinding guidelines.[271] Protocols are linked to conventions in that it assists in keeping conventions relevant and current by adding or amending certain provisions as contained in the convention.[272]

Members of the ILO are states who have admitted membership on the premise of acceptance of the obligations contained in the ILO Constitution.[273] Members that ratified Conventions have to take "such action as may be necessary to make effective the provisions of such Convention".[274] Recommendations need to be communicated to all members for their consideration with a view to the effect being given to it by national legislation or otherwise.[275] The nonratification of Conventions and the non-utilisation of Recommendation provisions through national legislation or otherwise still places obligations on the member to actively advance toward the realisation of the provisions contained in international legal instruments. The ILO Constitution states the following regarding the obligation of members:

> "report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the

[270]Article 19 (8) The Constitution of the International Labour Organisation 1919.

[271]Convention and Recommendations (instruments) may have certain statuses such as: being up to date, having interim status, to be revised, outdated or further information required. Applicable to this study is: "Being up to date", which means that the instrument can be recommended for active promotion and having "interim status" means that the instrument may be of temporary use. ILO "Rules of the Game: A Brief Introduction to International Labour Standards" (2005) *ILO* 15 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_084165.pdf> (accessed 3-1-2020); ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" *ILO* 18.

[272]ILO "Rules of the Game: A Brief Introduction to International Labour Standards" *ILO* 17.

[273]Membership of the ILO is elaborated on in Article 1 (2) to (4) of the Constitution of the International Labour Organisation 1919.

[274]Article 19 (5) (d) The Constitution of the International Labour Organisation 1919.

[275]Article 19 (6) (a) The Constitution of the International Labour Organisation 1919.

(international instrument), showing the extent to which effect has been given, or is proposed to be given, to":[276]

a) In terms of Conventions: "any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention"[277] and

b) with reference to Recommendations: "to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them".[278]

The ILO has established eight fundamental conventions utilised as the cornerstone for international labour standards.[279] There are also four conventions known as priority conventions that member states are encouraged to ratify because of their importance in the functioning of the international labour standard system.[280]

The author proceeds by identifying and giving a brief overview of the main international measures applicable to minimum wage, specifically the compliance elements (coverage, determination, sanctions and remedies for non-compliance) of this study.

---

[276]Article 19 (5) (e) & 19 (6) (e) The Constitution of the International Labour Organisation 1919.

[277]Article 19(5)(e) The Constitution of the International Labour Organisation 1919.

[278]Article 19(6)(d) The Constitution of the International Labour Organisation 1919.

[279]Labour standards are established with reference to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. ILO "Rules of the Game: A Brief Introduction to International Labour Standards" *ILO* 12 *&* 13; also see ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" *ILO* 18; Van Niekerk A, Smit N, Christianson M, McGregor M & Van Eck BPS *Law@work* 4 ed (2018) 31-36 and see ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998.

[280]ILO "Rules of the Game: A Brief Introduction to International Labour Standards" *ILO* 13; ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" *ILO* 19.

2.3.1 Conventions

a) The Minimum Wage Fixing Convention, 1928, no. 26: This is an interim status convention[281] where provision is made for the creation or establishment of "machinery whereby minimum wage rates of wages can be fixed for workers employed in certain of the trades[282] or parts of trades (and in particular in home working trades)"[283] where wages are very low and no effective regulation of wages is made by collective agreement or in any other manner.

b) The Labour Inspection Convention, 1947, no 81: This convention establishes a labour inspection framework that consists of various elements. The Convention applies to "all workplaces in respect of which legal provisions relating to conditions of work[284] and the protection of workers while engaged in their work are enforceable by labour inspectors"[285].

c) The Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87: This Convention establishes the right to freedom of association that enables workers and employers to join and establish organisations. These organisations may serve as a collaborative platform for workers or employers to engage in various employment relations related matters.

d) The Protection of Wages Convention, 1949, no. 95:[286] The Convention deals with various aspects about wages as well as minimum wage.[287] These aspects

---

[281]Convention may be denounced: 14 Jun 2020-14 Jun 2021.

[282]For the purposes of this Convention, the term includes manufacture and commerce. Article 1(2) The Minimum Wage Fixing Convention, 1929, no. 26.

[283]Article 1(1) The Minimum Wage Fixing Convention, 1929, no. 26.

[284]The ILO defines conditions of work as a concept that covers a broad range of topics and issues, from working time to remuneration (minimum wage) and physical conditions at work as well as the mental demands that exist in the workplace. ILO "Working conditions" (2021) *ILO* <http://ilo.org/global/topics/working-conditions/lang--en/index.htm> (accessed 23-02-2021).

[285]Article 2(1) The Labour Inspection Convention, 1947, no. 81.

[286]ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" *ILO* 68.

[287]Article 1 The Protection of Wages Convention, no. 95.

include but are not limited to the payment form of wages[288], the freedom to dispose of wages[289], the direct recipients of wages[290], deductions of wages[291] and the regularity of wages.[292] Provision is also made for the compliance of requirements of this convention.[293]

e) The Right to Organise and Collective Bargaining Convention, 1949, no. 98: The Convention protects the right of workers to join a union and not to be discriminated against for exercising this right. Collective bargaining relating to the terms and conditions of employment is promoted.[294]

f) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99: This instrument has interim status and requires the creation and sustainment of adequate machinery "whereby minimum rates of wages can be fixed for workers employed in agricultural undertakings and related occupations".[295]

g) The Equal Remuneration Convention, 1951, no. 100: This convention forms part of the eight other fundamental conventions and it promotes the principle of "equal remuneration for men and women workers for work of equal value".[296]

h) The Labour Inspection (Agriculture) Convention, 1969, no. 129: This convention contains similarities to The Labour Inspection Convention no. 81 with the main difference being its primary focus being the agricultural sector. The agriculture sector is the "cultivation, animal husbandry including livestock production and care, forestry, horticulture, the primary processing of

[288]Article 3-4 The Protection of Wages Convention, no 95.

[289]Article 6 The Protection of Wages Convention, no. 95.

[290]Article 5 The Protection of Wages Convention, no. 95.

[291]Article 8 The Protection of Wages Convention, no. 95.

[292]Article 12 The Protection of Wages Convention, no. 95.

[293]Article 15 The Protection of Wages Convention, no. 95.

[294]Article 4 The Right to Organise and Collective Bargaining Convention, 1949, no. 98.

[295]Article 1(1) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[296]Article 2 The Equal Remuneration Convention, 1951, no. 100.

agricultural products by the operator of the holding or any other form of agricultural activity".[297]

i) The Minimum Wage Fixing Convention, 1970, no. 131: This convention establishes minimum wages through the use of appropriate machinery to protect wage earners against unduly low wages. Measures are established which may influence compliance.

j) The Labour Administration Convention, 1978, no. 150: This instrument establishes a framework for labour administration[298] in the field of national labour policy that has a relation with the compliance with labour policy (minimum wages).

To gain perspective into the extent that these measures apply it is necessary to consider the ratification of these Conventions in the global sphere, particularly in developing nations, particularly in Africa.

2.3.1.1 Ratified Conventions in the global sphere

The following table indicates the ratification of the considered Conventions. Apart from Australia and the UK, table one indicates developing and emerging nations, most of which are in Africa.

[297]Article 1(1) The Labour Inspection (Agriculture) Convention, 1969, no. 129. Any Member may furnish a declaration for labour inspection to cover the following categories of persons working in agriculture: "tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers, persons participating in a collective economic enterprise and members of the family of the operator of the undertaking" Article 5(1) The Labour Inspection (Agriculture) Convention, 1969, no. 129.

[298]Labour administration means public administration activities in the field of national labour policy. Article 1 The Labour Administration Convention, 1978, no.150.

Table 1: Ratified international measures (Compiled by the author using ILO data 2019)[299]

	26	81	87	95	98	99	100	129	131	150
South Africa	X	X	X		X		X			
Botswana			X	X	X		X			
Egypt		X	X	X	X		X	X	X	X
India	X	X					X			
Lesotho	X	X	X		X		X			X
Mauritius	X	X	X	X	X	X	X			X
Nigeria	X	X	X	X	X		X			
Zimbabwe	X	X	X		X	X	X	X		X
Australia	X	X	X		X	X	X		X	X
UK		X	X		X		X			X

The African nations reflected in table 1, generally have ratified the majority of the considered Conventions, that is to say more than five Conventions. Botswana with four and South Africa with five ratifications are the only exceptions. In contrast, Zimbabwe, Mauritius and Egypt have ratified eight conventions. Two arguments can be highlighted; firstly, in the context of the high number of ratifications by other African nations and considering the level of legal and economic development of South Africa in relation to these nations, one may argue that additional ratifications by South Africa are possible and perhaps necessary to promote labour protection. India and the UK

[299]ILO "Ratifications by country" (2019) *ILO* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::> (accessed 12-2-2020).

may also be classified in this category, where additional ratifications may be possible. India has three and the UK has five ratified Conventions. In contrast with the UK, Australia has ratified 80% of the Conventions.

Secondly, the number of ratifications should perhaps not inevitably be regarded as an indication of the degree of labour protection offered by these nations. This argument may be supported by the fact that the UK has only ratified 50% of the Conventions, despite having a reputation for a nation with a relatively respectable degree of labour protection. Zimbabwe has ratified 80% of the Conventions, which is perhaps not necessarily an indication of adequate labour protection in Zimbabwe.

2.3.2 Protocols

a) Protocol of 1995 to the Labour Inspection Convention, 1947: This protocol extends the application of Labour Inspection Convention, 1947 provisions, to include the same or an equally effective framework to the non-commercial services sector.[300]

2.3.3 Recommendations

b) The Minimum wage Fixing Machinery Recommendation, 1928, no. 30: makes several recommendations which among others include principles regarding minimum wage fixing machinery,[301] such as: the minimum wage rates[302] and the compliance thereto.[303]

c) The Labour Inspection Recommendation, 1947, no. 81: contains various provisions concerning labour inspection including preventative duties, the collaboration between employers and workers concerning health and safety, the

[300]The non-commercial services sector in this instance refers to activities in all categories of workplaces that are not considered as industrial or commercial for the purposes of the Labour Inspection Convention, 1947, no 81; article 1(1) Protocol of 1995 to the Labour Inspection Convention, 1947.

[301]A and II The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[302]III The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[303]IV The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

functions of labour inspectors concerning labour disputes and the content of annual inspection reports.

d) The Labour Inspection (Mining and Transport) Recommendation, 1947, no. 82: determines that the competent authority should apply "appropriate systems of labour inspection to ensure the enforcement of legal provisions relating to conditions of work and the protection of workers"[304] while working in mining and transport undertakings.

e) The Labour Clauses (Public Contracts) Recommendation, 1949, no. 84: deals principally with the protection of rights of workers employed in terms of public contracts regarding wage rates,[305] the regulation of the working hours[306] and leave provisions,[307] using; laws, regulations, collective agreements, arbitration awards, or other recognised arrangements.

f) The Protection of Wages Recommendation, 1949, no. 85: makes provision for the maintenance of wage records which may assist in monitoring compliance with minimum wages. Further protection to workers is offered in terms of deductions from wages, the periodic payment of wages, and the notification of wage conditions.

g) The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89: contains various provisions concerning the determination[308] and the revision[309] of minimum wage rates, the operation of minimum wage machinery[310], and compliance with minimum wages[311] in agriculture.

---

[304]The Labour Inspection (Mining and Transport) Recommendation, 1947, no 82.

[305]Article 2 (a) Labour Clauses (Public Contracts) Recommendation, no. 84.

[306]Article 2 (b) Labour Clauses (Public Contracts) Recommendation, no. 84.

[307]Article 2 (c) Labour Clauses (Public Contracts) Recommendation, no. 84.

[308] I The Minimum wage Fixing Machinery (Agriculture) Recommendation, no. 89.

[309]III The Minimum wage Fixing Machinery (Agriculture) Recommendation, no. 89.

[310]II The Minimum wage Fixing Machinery (Agriculture) Recommendation, no. 89.

[311]IV The Minimum wage Fixing Machinery (Agriculture) Recommendation, no. 89.

h) The Labour Inspection (Agriculture) Recommendation, 1969, no.133: provides various provisions concerning labour inspection in agriculture such as; the broadening of the labour inspectorate role,[312] the competency of labour inspectors,[313] the contents of annual reports[314], and to inform the parties concerned of the applicable legal provisions.[315]

i) The Minimum Wage Fixing Recommendation, 1970, no. 135: states that the "fundamental purpose of minimum wage fixing should be to give wage earners necessary social protection" concerning the minimum levels of wages. As such, provision is made for the criteria in determining minimum wages, coverage of the minimum wage fixing system, minimum wage fixing machinery, adjustment of minimum wages, and enforcement.

j) The Labour Administration Recommendation, 1978, no. 158: makes numerous recommendations regarding the system of labour administration[316] which includes labour standards,[317] labour relations,[318] employment,[319] research,[320] co-ordination,[321] resources and staff,[322] internal organisation[323] and field services.[324]

---

[312]Articles 1-4 The Labour Inspection (Agriculture) Recommendation, 1969, no. 133.

[313]Articles 4-7 The Labour Inspection (Agriculture) Recommendation, 1969, no. 133.

[314]Articles 14 The Labour Inspection (Agriculture) Recommendation, 1969, no. 133.

[315]Articles 14 The Labour Inspection (Agriculture) Recommendation, 1969, no. 133.

[316]For the purposes of this recommendation; labour administration means public administrative activities in the field of national labour policy. Labour administration system entails all public administration bodies responsible for/engaged in labour administration which includes parastatal, regional, local or other forms of decentralised administration and "any institutional framework for the co-ordination of the activities of such bodies and for consultation with and participation by employers and workers and their organisations", Article 1 The Labour Administration Recommendation, 1978, no. 158.

[317]Article 5-6 The Labour Administration Recommendation, 1978, no. 158.

[318]Article 7-10 The Labour Administration Recommendation, 1978, no. 158.

[319]Article 11-17 The Labour Administration Recommendation, 1978, no. 158.

[320]Article 18 The Labour Administration Recommendation, 1978, no. 158.

[321]Article 19-21 The Labour Administration Recommendation, 1978, no. 158.

[322]Article 22-24 The Labour Administration Recommendation, 1978, no. 158.

[323]Article 25 The Labour Administration Recommendation, 1978, no. 158.

[324]Article 26 The Labour Administration Recommendation, 1978, no. 158.

k) The Transition from the Informal to the Formal Economy Recommendation, 2015, no. 204: has the main purpose of extending the formal economy which may increase the statutory protection offered to workers.[325]

Now that an overview of the main legal international measures relevant to this study's compliance elements has been established, it is useful to consider applying these measures on the minimum wage compliance elements of this study.

2.4 The international minimum wage compliance framework

The most prominent provisions in international legal measures applicable to the elements of this study will now be considered. This consideration is not isolated in nature, and there may be additional provisions that influence (directly or indirectly) the compliance elements of the study. One should also be aware that the provisions considered, may influence (in various degrees and ways) not only one but various compliance elements of the study.

2.4.1 Coverage

Coverage refers to who receives minimum wage through the relevant legal framework or the extent that minimum wage applies to individuals in the labour market (i.e., personal scope of coverage). As mentioned in chapter 1.4.2, broader coverage of minimum wage provision may increase the compliance challenges because the minimum wage may be applicable to more employees thus increasing the demands on the compliance framework.[326] Broader coverage may also help more employees in receiving a minimum wage (that represents an increased wage) that may represent a step towards a more dignified existence.

In terms of the extent of minimum wage coverage, the Minimum Wage Fixing Recommendation, 1970, no. 135 determines that a minimum wage system may be applied by using a single minimum wage (of general application) or a series of

[325]Article 1 The Transition from the Informal to the Formal Economy Recommendation, no. 204, 2015.

[326]Compliance framework is utilised to indicate the direct and indirect elements that effect compliance of minimum wage, which includes minimum wage design elements as well as institutional elements.

minimum wages (differentiated minimum wages) applying to certain groups of workers.[327]

A series of minimum wages provide minimum wage coverage centred around a differentiated application of minimum wage based on certain criteria; such as different regions, where rural areas have a lower minimum wage to the minimum wage in urban areas.[328] Minimum wage may also be differentiated based on the sector used in; for example, the mining sector may have a higher minimum wage than the agricultural sector. One may also find wage differentiation based on age, where younger workers are subject to a lower minimum wage than the minimum wage applicable to older workers.[329]

The criteria direct the differentiation of the minimum wage rate (minimum wage determination) and serves as the basis for differentiated application. Consequently, different minimum wage rates may be established for various groups in the labour market, thereby providing differentiated minimum wage coverage.[330] Cognisance should be taken of this relationship between minimum wage coverage and minimum wage determination. The differentiated minimum wage approach holds the benefit that it caters for unique individual needs and differences applicable to specific groups within the labour market but may hold difficulties in compliance.

The Minimum Wage Fixing Convention, 1929, no. 26 determines that each member undertakes to create and maintain a system where minimum wage rates can be determined in certain trades or parts thereof, where no effective regulation of wages exist by collective bargaining or where wages are exceptionally low[331]; thereby establishing minimum wage coverage to these trades or parts thereof. Workers who find themselves in occupations under any of these circumstances may be classified as vulnerable to exploitation in various forms, for instance, wages that are unjust and

---

[327]Article 5 (1) The Minimum Wage Fixing Recommendation, 1970, no. 135. Davidov (2009) *Mod Law Rev* 591.

[328]The differentiation may be based on differences in the cost of living, Belman & Wolfson (2016) *Conditions of Work and Employment Series* 8.

[329]Davidov (2009) *Mod Law Rev* 591.

[330]Davidov (2009) *Mod Law Rev* 591.

[331]Article 1 (1) The Minimum wage Fixing Convention, 1929, no. 26.

excessively low in the particular labour market context. Collective bargaining may be utilised to effect a change of wages in specific sectors or industries, by concluding collective agreements applicable to these sectors or industries.

A single minimum wage may be utilised on a national level thus covering a wide range of workers and ensuring extended minimum wage coverage. The Minimum Wage Fixing Recommendation, 1970, provides for the "simplification of legal provisions and procedures, and other appropriate means of enabling workers (effectively) to exercise their rights under minimum wage provisions".[332] The rationale behind this provision could be to keep provisions uncomplicated, easy to understand and enforce, which may hold benefits in compliance. The single minimum wage approach benefits from being less complicated. There is only one uniform minimum wage that makes it less troublesome to implement because it is less troublesome to ascertain and to inform the labour market of the single minimum wage. As a result, the single minimum wage approach has benefits in terms of compliance and from an enforcement point of view, it is easier to enforce.[333]

A single minimum wage system does not need to be incompatible with determining different minimum wage rates for different regions based on differences in the cost of living.[334] A single minimum wage should not "impair the effects of decisions, past or future, fixing minimum wages higher than the general minimum for particular groups of workers".[335] The possibility of a minimum wage higher than the general minimum wage that applies to certain groups, is therefore not excluded.

In terms of the discretion to decide on the coverage of minimum wage, Article 3 of the Minimum wage Fixing Convention, 1929, no. 26 as well as Article 3 of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 specify that each nation that ratified the Convention is "free to decide the nature and form of the

[332]Article 14 (d) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[333]Margolis (2014) *IZA World of Labor* 5 & Rani et al (2013) *Int Labour Rev* 397.

[334]Article 5 (2) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[335]Article 5 (2) (b) The Minimum Wage Fixing Recommendation, no. 135.

minimum wage-fixing machinery, and the methods to be followed in its operation",[336] provided that:

a) adequate consultation is done;[337]

b) workers and employers are associated in the operation of the minimum wage fixing machinery;[338] and

c) that determined minimum wage rates should be binding, except "with general or particular authorisation of the competent authority".[339]

Article I (1) of the Minimum Wage-Fixing Machinery Recommendation, 1928, no. 30[340] determines that each member should gather information for decision making regarding the application of minimum wage fixing machinery. Member states are given the discretion to decide the trades or parts of trades in which to apply minimum wage fixing machinery, and it is recommended that special regard be given to trades or parts of trades in which women are ordinarily employed.[341] Women generally classify as vulnerable workers because they are often employed in precarious employment.

In terms of the extent of coverage (application) of minimum wage, the Labour Administration Convention, 1978, no. 150 determines that subject to national conditions, the needs of the largest number of workers should be met and the functions of the labour administration system should be extended to activities that

---

[336]Article 3(1) The Minimum wage Fixing Convention, 1929, no. 26 as well as The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no.99. These two measures are also applicable to the determination element of this study.

[337]Article 3(2)(1) The Minimum wage Fixing Convention, 1929, no. 26 and Article 3(2) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no.99.

[338]Article 3(2)(3) The Minimum wage Fixing Convention, 1929, no. 26 and Article 3(3) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no.99.

[339]Article 3(2)(3) The Minimum wage Fixing Convention, 1929, no. 26 and Article 3(4) the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99. In *Zongo v. Owner of the Bataille du Rail Mobil garage*, the Labour Court in Burkina Faso utilised the Minimum Wage Fixing Convention, 1928, no. 26 to reiterate the fact that minimum wage is binding and should be respected.

[340]This particular provision could have been written clearer, according to the author.

[341]Article I(2) The Minimum Wage-Fixing Machinery Recommendation, 1928, no. 30.

include: “conditions of work and working life of appropriate categories of workers who are not, in law, employed persons”.[342] There may therefore be an inclination for labour policies (including minimum wage) to be as inclusive as reasonably possible, to optimise the beneficial effects of such policies. The significance of labour administration is further deliberated in chapter 2.4.2.

Article 1(1) of the Minimum Wage Fixing Convention, 1970 no. 131 determines that a system of minimum wages should be adopted “which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate”.[343] Article 1 of the Labour Clauses (Public Contracts) Recommendation, 1949, no.84 determines that substantially similar to labour clauses in public contracts should be applied, where private employers are granted subsidies or are licenced to operate a public utility. The rights of workers are protected regarding wages,[344] working hours[345] and leave.[346]

Article 1(2) elaborates further in determining that “the competent authority in each country shall, in agreement or after full consultation with the representative organisations of employers and workers concerned, where such exist, determine the groups of wage earners to be covered”.[347] Competent minimum wage fixing bodies should be involved in arranging the minimum wage in the labour market. This may include the application and coverage of minimum wage.[348] The functions and responsibilities of minimum wage fixing bodies are discussed in greater detail under chapter 2.4.2.

---

[342]Article 7 The Labour Administration Convention, 1978, no. 150.

[343]Article 1(1) The Minimum Wage Fixing Convention, 1970, no. 131, Article 7 of The Labour Administration Convention, 1978, no. 150 determines that the needs of the largest number of workers should be met by the labour administration system.

[344]Normal and overtime rate of wages. Article 2 (a) Labour Clauses (Public Contracts) Recommendation, 1949, no. 84.

[345]Article 2(b) Labour Clauses (Public Contracts) Recommendation, 1949, no. 84.

[346]Article 2(c) Labour Clauses (Public Contracts) Recommendation, 1949, no. 84.

[347]Article 1 (2) The Minimum Wage Fixing Convention, 1970, no. 131.

[348]Article 6 (2) The Labour Administration Convention, 1978, no. 150.

The Labour Administration Convention, 1978 no.150 provides for; “consultation, co-operation and negotiation between public authorities and the most representative organisations of employers and workers, or where appropriate; employers and workers representatives”.[349] With consideration of national practice, laws and regulations, arrangements should be done at a national, regional, and local level as well as the different sectors of economic activity.[350] Stakeholder involvement at various levels is important to establish positive and beneficial relationships that may promote commitment to the minimum wage that may in turn be beneficial in terms of compliance.

After consultation with the relevant workers and employer organisations, each member is free to decide the trades or parts thereof to which minimum wage machinery applies or provides coverage.[351] These provisions emphasise involvement and participation of stakeholders (employers and worker organisations) in the operation of the minimum wage machinery (system). Consequently, the minimum wage system may be structured to be suited for specific national conditions and circumstances which could be beneficial in terms of compliance. The freedom is, however, subject to consultation with employers and workers concerned before the application thereof. This involvement may contribute to a relevant minimum wage fixing model, which may also be beneficial in terms of compliance with the relevant provisions. The wage earners covered by minimum wage should be determined after agreement or consultation between the various parties (workers and representative organisations of employers).[352]

Any wage earners that are not covered by minimum wages should be reported to the ILO together with the reasons therefor[353] and the number of wage earners not covered in terms of article 1 of the Minimum Wage Fixing Convention, 1970 should

[349]Article 5 The Labour Administration Convention, 1978, no. 150.

[350]Article 5(2) The Labour Administration Convention, 1978, no. 150.

[351]Article 2 The Minimum Wage Fixing Convention, 1929, no. 26.

[352]Article 1(2) The Minimum Wage Fixing Convention, 1970, no. 131.

[353]Article 1(3) The Minimum Wage Fixing Convention, 1970, no. 131.

be kept to a minimum.[354] The rationale behind this may be to maximise the possible protection offered by minimum wage fixing by including as many people as possible under its provision. To this effect, the Transition from the Informal to the Formal Economy Recommendation, no. 204 aims to extend the protection offered by legal provisions (including minimum wage coverage) by facilitating the transition of workers from the informal economy to the formal economy. [355]

2.4.1.1 Exclusion from minimum wage coverage

Subsequent reports from the ILO member nations must state the: "positions of its law and practice in respect of the groups not covered, and the extent to which effect has been given or is proposed to be given to the Convention (referring to The Minimum Wage Fixing Convention, 1970 no. 131) in respect of such groups".[356] Progressive development in terms of application and coverage of minimum wage to include all groups of workers is therefore encouraged.

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 no.99 makes provision for the competent authority (such as a minimum wage fixing body) to "permit exceptions to the minimum wage rates in individual cases, where necessary, to prevent curtailment of the opportunities of employment of physically or mentally handicapped workers".[357] Exceptions should carefully be considered as to protect the integrity of an NMW.[358]

The competent authority may exclude categories of persons from the application of this Convention, whose: "conditions of employment render such provisions inapplicable to them, such as members of the farmer's family employed by him".[359]

---

[354]Article 4 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[355]Article 1 and 18 of The Transition from the Informal to the Formal Economy Recommendation, 2015, no. 204.

[356]Article 1(3) The Minimum Wage Fixing Convention, 1970, no. 131.

[357]Article 3(5) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[358]Simpson B "The Employment Act 2008's Amendments to the National Minimum Wage Legislation" (2009) 38 *Ind Law J* 57 60.

[359]Article 1(3) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 no. 99 determines that adequate minimum wage machinery should be created or maintained for workers in agricultural and related occupations, which imply that workers in these industries should be covered by minimum wage provisions.[360] Specific provision is made for these workers because they may be considered as vulnerable workers that require statutory minimum wage measures.

The Protection of Wages Convention, 1949, no. 95 is applicable to minimum wages[361] and applies to all persons to whom wages are paid to.[362] The exclusion of certain categories of persons from the application of all or certain provisions of the convention is provided for, after consultation with the organisations of employers and employed persons directly affected.[363] Such exclusion may occur if application would be inappropriate and if these persons are not employed in manual labour or are employed in domestic service or similar work.

Article 17(1) the Protection of Wages Convention, 1949, no. 95 provides for the partial, specific of complete exemption of the convention in certain territories where the competent authority considers it impractical to enforce the provisions of the Convention. Exemption may be made after consultation with the organisations of employers and workers concerned. Article 17(3) of the Protection of Wages Convention, 1949, no. 95 provides for reconsideration (at intervals not exceeding three years) in consultation with the organisations of employers and workers concerned, where such exist, the practicability of extending the application of the Convention to areas exempted in virtue of sections 17(3) of the same Convention.

Article 17(2) of the Protection of Wages Convention, 1949, no. 95 determines that any recourse to the provisions of this article should be reported in the first annual report together with reasons for which it proposes to have recourse thereto. This provision encourages nations to actively seek to apply the provisions of the

---

[360]Article 1(1) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[361]Article 1 The Protection of Wages Convention, 1949, no .95.

[362]Article 2(1) The Protection of Wages Convention, 1949, no .95.

[363]Article 2(2) The Protection of Wages Convention, 1949, no. 95.

Convention. No member (nation) must, after the date of its first annual report, have recourse to the provisions of this article except in respect of areas so indicated.[364]

2.4.1.2 Awareness of coverage

Informing employers of the applicable minimum wage is important because it may be difficult to achieve intended compliance, if there is no awareness or knowledge of the requirement to comply or of the standard that must be complied with (i.e., the applicable minimum wage rate).

The Minimum Wage Fixing Recommendation, 1970, no. 135 establishes various measures for the effective application of all provisions relating to minimum wage which is further elaborated under enforcement (chapter 2.4.3). Especially important to the element of coverage is: "giving publicity to minimum wage provisions in languages or dialects understood by workers who need protection, adapted where necessary to the needs of illiterate persons".[365] Published information that workers can understand, has a role to play in making workers aware of applicable minimum wages. The rationale behind this is that workers that are aware of rights (with respect to minimum wage) may be less subject to minimum wage violations.

Article 6 of the Protection of Wages Recommendation, 1949, no.85 determines that wage rates payable to workers should be brought to the attention of workers.[366] In other words, workers to whom the minimum wage applies should be notified of coverage the application if minimum wage. The recommendation specifies that workers should be notified of the conditions under which deductions of wages may be made. Any alteration or adjustment of the wages should be determined, and the worker should be informed of this determination. Unfortunately, the recommendation doesn't specify who bears the onus for this responsibility.

---

[364]Article 17(2) the Protection of Wages Convention, 1949, no. 95.

[365]Article 14(a) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[366]Article 6(a) The Protection of Wages Recommendation, 1949, no. 85.

Publicity of information should be provided in correlation with the characteristics of and the conditions in which the applicable workers find themselves.[367] Arup and Sutherland state that vulnerable workers need information that is accessible by being close to where they work and live that has to be provided at critical moments when they experience problems.[368] A instrument that may fulfil this role, is that of written statements that informs employees and informs employers of the risk involved in not complying with minimum wage.[369]

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 states that workers who are less likely to acquaint themselves with decisions made by the minimum wage fixing body, may be informed of minimum wage rates by requiring employers to display "full statements of the rates in force in readily accessible positions on the premises where the workers are employed, or in the case of home workers on the premises where the work is given out or returned on completion or wages paid".[370] The motivation behind these provisions is to promote accessibility of information about minimum wage provisions which could promote compliance to that.

To empower workers through the coverage of minimum wage, workers need to be aware of coverage. Article 14 of the Protection of wages Convention, 1949. no. 95 determines that: "effective measures shall be taken to ensure that workers are informed, in an appropriate and easily understandable manner;

a) before they enter employment and when any changes take place, of the conditions in respect of wages under which they are employed; and

[367]Arup C & Sutherland C "The Recovery of Wages: Legal Services and Access to Justice" (2009) 35 *Monash Uni Law Rev* 96 103-104.

[368]104.

[369]Arup & Sutherland (2009) *Monash Uni Law Rev* 104.

[370]IV(1) The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

b) at the time of each payment of wages, of the particulars of their wages for the pay period concerned, in so far as such particulars may be subject to change".[371]

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 also determines that necessary measures should be taken to ensure that employers and workers concerned should be informed of the minimum wage rates in force.[372] The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 states that arrangements should be made to publicise the applicable minimum wage rates, to inform employers and workers in the most appropriate manner with regard to national circumstances.[373]

Article 15(a) of the Protection of wages Convention, 1949, no. 95 determines that laws and regulations that give effect to the convention should be made available for the information of persons concerned. Workers covered by minimum wage provisions should therefore have access to information about laws and regulations that give effect to the convention.

As indicated earlier in this chapter, complicated or differentiated minimum wage structure with various minimum wage rates that are sector, regional, or age specific may make it more difficult to inform workers of their applicable minimum wage. Because of this difficulty, complicated or differentiated minimum wage structures may require additional resources (time, money, workforce, and infrastructural support) to ensure that workers are informed of their applicable minimum wage.

A simplified minimum wage structure (e.g., where there is one general minimum wage) may be less challenging to inform workers. An abridged minimum wage structure may demand the utilisation of fewer resources.

In reflecting about the most important principles of coverage, that ultimately influence compliance with minimum wage, it becomes clear that relevant stakeholders

[371]Article 14 The Protection of Wages Convention, 1949, no. 95.

[372]Article 4(1) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[373]Article IV(8) (a) The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89.

(employer and employee organisations) should be consulted to determine the appropriate coverage framework. The consultation process should typically emphasise active participation between the stakeholders which may assist in determining the most appropriate coverage framework in which stakeholders has an intrinsic contribution to, that may theoretically result in greater appreciation and acceptance of consequent legal measures in which stakeholders have responsibility in.

The introduction of a minimum wage (SANMW) requires that the workers (to whom the minimum wage are applicable) be informed of the minimum wage (SANMW) rate[374] or any amendments to that. This should be done in a manner that the worker understands. Complex and inappropriate wording should be avoided and the context of the worker in terms of education and skills must be kept in mind. Now that consideration has been given to the application of minimum wage the subsequent section will consider the international measures relevant to minimum wage determination.

2.4.2 Determination of minimum wage

As indicated in chapter 1.4.2, the determination, setting, or fixing of a minimum wage rate are fundamentally important[375] in any minimum wage model because the rate has to balance two sides. On the one hand, the minimum wage rate must be significant enough to alleviate inequality, poverty, and unemployment,[376] thus assisting vulnerable individuals. On the other hand, it should not be determined at an excessive rate that may result in non-compliance with minimum wage provisions or

[374]Article 14(a) and (b) The Protection of Wages Convention, 1949, no. 95; workers should be informed of the conditions in respect of wages under which they are employed and the particulars of their wages for the pay period concerned; included therein are wage rates or alterations thereof according to the author. Article 6 of The Protection of Wages Recommendation, 1949, no. 85 includes the rates of wages in the concept of wages conditions.

[375]Belman & Wolfson (2016) Conditions of Work and Employment Series 23.

[376]Rani et al (2013) *Int Labour Rev* 396.

increased unemployment.[377] Therefore, the minimum wage determination is a fine balancing act between these two distinct risks.

Article 1 of the Minimum Wage Fixing Recommendation, 1970, no. 135 gives insight into the purpose and scope of minimum wage fixing (determination), by stating that it is part of a policy designed to overcome poverty and to satisfy the needs of all workers and their families. Minimum wage determination should establish the minimum permissible wage level, thus providing necessary social protection[378] satisfying workers basic needs, which may be a step towards a dignified existence.

In terms of minimum wage determination, the Minimum Wage Fixing Convention, 131 provides for the establishment of minimum wage machinery that correlates with national conditions and requirements, where minimum wages can be determined and adjusted.[379] Therefore, minimum wage machinery must be established in accordance with national conditions or context.

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 provides for creating or maintaining adequate minimum wage fixing machinery in agricultural and related occupations.[380] Minimum wage fixing machinery broadly refers to the framework that enables minimum wage operation or functionality. The forms that minimum wage machinery can take is described in article 6 of the Minimum Wage Fixing Recommendation, 1970, no. 135, as follows:

a) “statute;
b) decisions of the competent authority, with or without formal provision for taking account of recommendations from other bodies;
c) decisions of wages boards or councils;

---

[377] Davidov (2009) *Mod Law Rev* 589.

[378] Article 2 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[379] Article 4 (1) The Minimum Wage Fixing Convention, 1970, no. 131 and article II (7) The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 makes provision for “a procedure for revising minimum wage rates at appropriate intervals”.

[380] Article 1(1) The Minimum Wage Fixing (Agriculture) Convention, 1951, no. 99.

d) industrial or labour courts or tribunals; or
e) giving the force of law to provisions of collective agreements".[381]

Provision is made for various forms, which may help the member share responsibility concerning minimum wage and the functioning thereof that may ultimately result in a better developed and more relevant minimum wage. The Minimum Wage Fixing Convention, 1928, no. 26, and with the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99, determine that countries who ratified the convention are free to "decide the nature and form of the minimum wage-fixing machinery, and the methods to be followed in its operation"[382] subject to:

a) consultation with various representatives,[383]
b) association of employers and workers in the operation of the machinery in equal numbers, terms, manner and extent as determined by national laws and regulations,[384]
c) minimum wage rates shall be binding on employers and workers to avoid abatement, except with authorisation of the competent authority.[385]

Member states are provided with the freedom to formulate and develop their own minimum wage machinery, which may help satisfy specific needs and take account of specific circumstances. However, freedom is contingent on certain provisions that may be divided into two main parts.

[381]Article 6 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[382]Article 3 The Minimum Wage Fixing Convention, 1928, no 26 as well as Article 3 The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[383]Article 3(1) The Minimum Wage Fixing Convention, 1928, no. 26 & Article 3(2) The Minimum Wage Fixing Machinery (Agriculture) Convention, no. 99.

[384]Article 3(2) The Minimum Wage Fixing Convention, 1928, no. 26 & Article 3(3) The Minimum Wage Fixing Machinery (Agriculture) Convention, no. 99.

[385]Article 3(3) The Minimum Wage Fixing Convention, 1928, no. 26 & Article 3(3) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

Firstly, specific emphasis is placed on collaboration and consultation with the various social partners, in other words those stakeholders that include "employers, unions, employees, the general public and other stakeholders in the labour market".[386]

The various stakeholders and social partners should actively determine the minimum wage that may result in greater acceptance of the minimum wage and ultimately, greater compliance with the minimum wage. It is also important to facilitate collaboration between the various stakeholders and social partners on equal ground. Failure to do so may lead to the interests of certain stakeholders, receiving preference over the interests of other stakeholders.

The second part aims to ensure that minimum wage applies to all employers and workers to benefit as many individuals as possible. However, there should still be a degree of flexibility allowed for minimum wage fixing machinery to allow for abatement or exclusions, provided that the necessary authorisation is granted. The next subsection will deliberate further on the involvement of stakeholders in the determination (fixing) of minimum wage.

2.4.2.1 Involvement of stakeholders

The stakeholders' involvement is provided for in the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99. It provides for consultation with worker and employer organisations in the agricultural and related occupations to establish and maintain minimum wage machinery.[387] Similarly, the Minimum Wage Fixing Convention, 1970, no.131, provides for the consultation of stakeholders (workers and representative organisations of employers) concerning adjustment, establishment,

[386]Heppell *Minimum Wages* 117.

[387]Article 1(2) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99. Also see Article 2 The Minimum Wage Fixing Convention, 1928, no. 26, Article 3 The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 no. 99 and Article 5 (1) The Labour Administration Convention, 1978, no. 150 provides for negotiation, consultation and cooperation between public authorities and employers, workers or their respective organisations.

and operation of minimum wage machinery.[388] Consultation should be done concerning the following matters:

a) "selection and application of the criteria for determining the level of minimum wages;
b) the rate or rates of minimum wages to be fixed;
c) the adjustment from time to time of the rate or rates of minimum wages;
d) problems encountered in the enforcement of minimum wage legislation;
e) the collection of data and the carrying out of studies for the information of minimum wage fixing authorities".[389]

The list of consultation matters is comprehensive, and consultation should already be initiated before determining of the minimum wage and should continue well after the introduction of the minimum wage.

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 determines that investigation should be made into the relevant conditions of the particular trade or part thereof and consultation between the relevant stakeholders should be facilitated.[390] This recommendation emphasises consultation with the affected employers and workers whose views on all matters relating to fixing the minimum wage rates should be sought and given equal consideration in the decisions of the minimum wage fixing body.[391] Workers and employers affected should (on an equal footing) be part of the deliberations and the decisions of the minimum wage fixing

[388]Article 4(2) & (3) The Minimum Wage Fixing Convention, 1970, no. 131, competent bodies must assist in attaining effective consultation and co-operation between employers and workers organisations and these organisations and public authorities, Article 6(2)(c) The Labour Administration Convention, 1978, no. 150. Also refer to Article 8 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[389]Article 7 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[390]II(1) The Minimum Wage Fixing Machinery Recommendation 1928 no. 30, article II(3) of the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has a similar provision with specific reference to the agriculture sector.

[391]Article II(2)(a) The Minimum Wage-Fixing Machinery Recommendation, 1928, no.30 also see: Article 3 of The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has a similar provision. Article 4 of the same recommendation determines that (where possible): "workers and employers concerned should be enabled to participate directly and on an equal footing in the operation of such machinery (minimum wage fixing machinery) through their representatives, who should be equal in number or in any case have an equal number of votes".

body through representatives.[392] To ensure that worker's and employer's representatives have the confidence of the individuals whose interests they represent, these individuals should have a say (as far as is practicable) in selecting their representatives.[393] In instances where there is a considerable proportion of women employed, provision should be made (as far as possible) to include women among the workers' representatives as well as one or more women among the independent individuals that should make up the wage fixing body.[394]

The minimum wage fixing body should be made up of one or more independent persons to promote effective decision-making in the event of employer and worker representative votes being equally divided.[395] These independent persons should (as far as possible) be selected with the assistance of employer and worker representatives on the wage fixing body.[396] Independent persons should have the necessary qualifications to fulfil their duties and should not have any interest in the part of trade concerned.[397]

Article 8 of the Minimum Wage Fixing Recommendation, 1970, no. 135 elaborates on the participation in minimum wage-fixing decisions. Membership of the minimum wage fixing bodies, mandated to advise the competent authority on minimum wage questions or to which government has delegated the responsibility of minimum wage decisions should be included in the participation of minimum wage fixing.[398] In terms of the individuals involved with the operation of minimum wage fixing machinery, article 9 of the Minimum Wage Fixing Recommendation, 1970, no. 135, determines that: these individuals should be suitably qualified independent and "may, where

---

[392]Article II(2)(a) The Minimum Wage-Fixing Machinery Recommendation, 1928, no.30. Article II(4) The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951 no. 89 has similar provisions.

[393]II(2)(b) The Minimum Wage-Fixing Machinery Recommendation, 1928, no.30. Article II(5) of The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has similar provisions.

[394]II(2)(d) The Minimum Wage-Fixing Machinery Recommendation, 1928, no.30. Article II(6)of the Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has similar provisions.

[395]II(2)(a) The Minimum Wage-Fixing Machinery Recommendation, 1928, no. 30.

[396]II(2)(a) The Minimum Wage-Fixing Machinery Recommendation, 1928, no. 30.

[397]Article II(2)(c) The Minimum Wage-Fixing Machinery Recommendation, 1928, no. 30.

[398]Article 8 The Minimum Wage-Fixing Recommendation, 1970, no. 135.

appropriate, be public officials with the responsibilities in the areas of industrial relations or economic and social planning or policy-making".[399]

If suitable to the nature of the minimum wage fixing machinery, provision should be made for participation in the operation of minimum wage fixing by:

a) "representatives of organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned, on a basis of equality;
b) persons having recognised competence for representing the general interests of the country and appointed after full consultation with representative organisations of employers and workers concerned, where such organisations exist and such consultation is in accordance with national law or practice".[400]

The value attached to consultation and participation in minimum wage determination is noticeable through the various international measures. Therefore, minimum wage should not be an authoritative measure forced onto the market. Instead, minimum wage determination, should be regarded as a collaborate effort with stakeholders to optimise the legitimacy and efficiency of the minimum wage. Labour administration has a central role to play in ensuring that parties work together (that parties collaborate).

2.4.2.2 Labour administration

Labour administration refers to public administration activities in the national labour policy[401] and is conducted by establishing a labour administration system. A system of labour administration:

---

[399]Article 9 The Minimum Wage-Fixing Recommendation, 1970, no. 135.

[400]Article 4(3) The Minimum Wage Fixing Convention, 1970, no. 131, this should be red together with article 8 of the Minimum Wage Fixing Recommendation, 1970, no. 135 that provides for participation in the operation of minimum wage fixing machinery should include membership of such bodies "in countries in which bodies have been set up which advise the competent authority on minimum wage questions, or to which the government has delegated responsibility for minimum wage decisions".

[401]Minimum wage sorts in the ambit of national labour policy which is why labour administration is important to minimum wage. Article 1(a) The Labour Administration Convention, 1978, no. 150.

> "covers all public administration bodies responsible for and/or engaged in labour administration--whether they are ministerial departments or public agencies, including parastatal and regional or local agencies or any other form of decentralised administration --and any institutional framework for the co-ordination of the activities of such bodies and for consultation with and participation by employers and workers and their organisations".[402]

The Labour Administration Recommendation, 1978, no. 158 establishes a functional framework for the national labour administration system. A brief overview of these functions will be provided:

a) Competent bodies within the labour administration system should consult with stakeholders[403] and in a manner appropriate with national legal, regulatory conditions, take an "active part in the preparation, adoption, application and review of labour standards, including relevant laws and regulations".[404]

b) The services of competent bodies should also be available to employer and worker organisations with the intent to "promote the regulation of terms and conditions of employment by means of collective bargaining".[405]

c) A system of labour inspection should be included in the system of labour administration.[406]

d) Within the labour inspection system, competent bodies should take part in the determination and application of measures to ensure free exercise of employers and workers' right of association.[407]

---

[402]Article 1(b) The Labour Administration Convention, 1978, no. 150.

[403]Stakeholders in this instance refers to organisations of employers and workers.

[404]Article 5(1) The Labour Administration Recommendation, 1978, no. 158.

[405]Article 5(2) The Labour Administration Recommendation, 1978, no. 158.

[406]Article 6 The Labour Administration Recommendation, 1978, no. 158.

[407]Article 7 The Labour Administration Recommendation, 1978, no. 158.

e) There should be labour administration programmes for the promotion, establishment and pursuit of labour relations that encourages "progressively better conditions of work and working life and which respect the right to organise and bargain effectively".[408]

f) Competent bodies in the labour administration system should help improve labour relations by providing or strengthening advisory services to; undertakings, employer and worker organisations that request such services under programmes established based on consultation with such organisations.[409]

g) Competent bodies should promote the development and utilisation of machinery for voluntary negotiation.[410]

h) Competent bodies should provide conciliation and mediation facilities (in cases of collective disputes) which are appropriate to national conditions.[411]

i) Competent bodies should participate in or be responsible for "the preparation, administration, co-ordination, checking and review of national employment policy".[412]

j) The activities of various authorities and bodies (concerned with employment policy) should be coordinated by a central body of the labour administration system by taking appropriate institutional measures.[413]

k) The competent authority should be involved with various employment programmes, services and schemes that should be done by implementing general employment policy measures.[414]

---

[408]Article 8(1) The Labour Administration Recommendation, 1978, no. 158.

[409]Article 8(2) The Labour Administration Recommendation, 1978, no. 158.

[410]Article 9 The Labour Administration Recommendation, 1978, no. 158.

[411]Article 10 The Labour Administration Recommendation, 1978, no. 158.

[412]Article 11(1) The Labour Administration Recommendation, 1978, no. 158.

[413]Article 11(2) The Labour Administration Recommendation, 1978, no. 158.

[414]Article 12 The Labour Administration Recommendation, 1978, no. 158.

l) Competent bodies should be responsible for determining and promoting methods and procedures for consultation between stakeholders regarding employment policies and promoting their co-operation in implementing such policies.[415]

m) Competent bodies should participate in human resource planning.[416]

n) A free public employment service should be included in the labour administration system.[417]

o) Under national laws, regulations and practice, competent bodies should have or share responsibility for the management of public funds allocated to counter underemployment and unemployment, regulating the regional distribution of employment, or promoting and assisting the employment of particular categories of workers, including sheltered employment schemes.[418]

p) Competent bodies should (under national laws, regulations and practice) participate in the developing comprehensive policies and programmes of human resources development.[419]

q) Research should be carried out and encouraged by the labour administration system in order to fulfil its social objectives.[420]

The functions of the national administration system indicate that the labour administration system structure should normally comprise specialised units (competent bodies) that deal with major labour administration programmes such as

---

[415]Article 13 The Labour Administration Recommendation, 1978, no. 158. Stakeholders in this context refers to employer and worker organisations or employer and worker representatives.

[416]Competent bodies should: participate in workforce planning through participating in functioning thereof, institutional representation and the provision of technical information and advice, participate in co-ordination and integration of workforce plans with economic plans and together with public authorities promote joint action of employers and workers regarding short- and long-term employment policies. Article 14 The Labour Administration Recommendation, 1978, no. 158.

[417]Article 15 The Labour Administration Recommendation, 1978, no. 158.

[418]Article 16 The Labour Administration Recommendation, 1978, no. 158.

[419]Article 17 The Labour Administration Recommendation, 1978, no. 158. Vocational- guidance and training is included policies and programmes of human resource development.

[420]Article 18 The Labour Administration Recommendation, 1978, no. 158.

working conditions of employment, labour inspection, and minimum wage legislation.[421] The management of these programmes is entrusted to specialised units by national laws or regulations[422] that may exist at different levels of government. The different specialised units (competent bodies) are under the authority of a central body, usually the ministry (department) of labour responsible for coordinating functions and responsibilities of the specialised units. With consideration of international labour standards, competent bodies have a particular responsibility to:

a) "participate in the preparation, administration, co-ordination, checking and review of national employment policy, in accordance with national laws and regulations, and national practice;

b) study and keep under review the situation of employed, unemployed and underemployed persons, considering national laws and regulations and national practice concerning conditions of work and working life and terms of employment, draw attention to defects and abuses in such conditions and terms and submit proposals on means to overcome them;

c) make their services available to employers and workers, and their respective organisations, as may be appropriate under national laws or regulations, or national practice, with a view to the promotion at national, regional and local levels as well as at the level of the different sectors of economic activity of effective consultation and cooperation between public authorities and bodies and employers and workers organisations, as well as between such organisations;

d) make technical advice available to employers and workers and their respective organisations on their request".[423]

---

[421]Article 25 The Labour Administration Recommendation, 1978, no. 158. "The system of labour administration should include a system of labour inspection", Article 7 The Labour Administration Recommendation, 1978, no. 158.

[422]Article 25(1) The Labour Administration Recommendation, 1978, no. 158.

[423]Article 6(2) The Labour Administration Convention, 1978, no. 150.

Competent bodies should assume an active role within the labour administration system. The general responsibility and contribution of competent bodies should be to administrate, co-ordinate, check and review national labour policy (which includes minimum wage policy) and be the "instrument within the ambit of public administration for the preparation and implementation of laws and regulations giving effect thereto".[424] These responsibilities are wide-ranging and important in any labour administration system. Consequently, labour administration assumes an important role in the compliance elements of this study.

Each of the labour administration services competent in the functional framework for the national labour administration system (as mentioned in previous paragraphs) should provide periodic reports or information on its activities, to the labour ministry or other comparable body[425] and worker and employer organisations.[426] The referred to information or reports should be technical and include statistics, an indication of problems, and (if possible) results that may allow an evaluation of current trends and future developments in areas of the labour administration system.[427] Information of general interest should be evaluated, published and disseminated by the labour administration system.[428]

In correlation with national conditions, each member should ensure that a labour administration system is effectively operated in its territory.[429] Therefore, the labour administration system should have sufficient resources in the form of qualified, experienced and talented personnel with the necessary infrastructure and financial

---

[424]Article 6(1) The Labour Administration Convention, 1978, no. 150. Also see Article 11 The Labour Administration Recommendation, 1978, no. 158 which states that the competent body in the labour administrative system should be part of or responsible for the preparation, administration, co-ordination, checking and review of national employment policy.

[425]Competent bodies determined by national laws or regulations or national practice.

[426]Article 20(1) The Labour Administration Recommendation, 1978, no. 158.

[427]Article 20(2) The Labour Administration Recommendation, 1978, no. 158.

[428]Article 20(3) The Labour Administration Recommendation, 1978, no. 158. International comparability should be improved by establishing models for publication (in consultation with the International Labour Office), Article 20(4) The Labour Administration Recommendation, 1978, no. 158.

[429]Article 4 The Labour Administration Convention, 1978, no.150. Also see Article 4 The Labour Administration Recommendation, 1978, no. 158.

resources to effectively fulfil its responsibilities.[430] Labour administration staff should receive continuous training that correlates with their work levels throughout their careers.[431]

International co-operation in the form of "exchanges of experience and information and of common initial and further training programmes and facilities, particularly at the regional level" should be considered in supplementing national programmes and facilities.[432] Specific labour administration system staff should possess certain qualifications, as determined by the appropriate authority, that may be required for the job.[433]

Within the labour administration system and suitable to national conditions, arrangements should be made regarding "consultation, co-operation and negotiation between the public authorities and the most representative organisations of employers and workers, or where appropriate employers and workers representatives".[434] These arrangements should be made at various levels (including; national, regional and local) of the economy and within different sectors.[435] The national labour administration structures should continuously be reviewed while being in consultation with the most representative employer- and worker organisations.[436]

The labour administration system's field services system should be appropriately arranged for the effective organisation and operation thereof.[437] Field services may be especially important in promoting the labour administration mandate in rural or

---

[430]Due consideration should be taken of the importance of the duties performed, material means at the disposal of staff, the conditions under which functions must be carried out to be effective. Article 22 The Labour Administration Recommendation, 1978, no. 158.

[431]Article 23(1) The Labour Administration Recommendation, 1978, no. 158.

[432]Article 24 The Labour Administration Recommendation, 1978, no. 158.

[433]Article 23(2) The Labour Administration Recommendation, 1978, no. 158.

[434]Article 5(1) The Labour Administration Convention, 1978, no. 150.

[435]Article 5(2) The Labour Administration Convention, 1978, no. 150.

[436]Article 20(4) The Labour Administration Recommendation, 1978, no. 158.

[437]Article 26(1) The Labour Administration Recommendation, 1978, no. 158.

less metropolitan areas that may be difficult to reach by the main labour administration institutional activities, arguably centred in more metropolitan areas. Arrangements should ensure that:

a) the placing of field services corresponds to the needs of various areas, representative worker and employer organisations concerned being consulted thereon,[438]

b) field services are provided with adequate resources,[439] and

c) "field services have sufficient and clear instructions to preclude the possibility of laws and regulations being differently interpreted in different areas".[440]

Subject to national laws, regulation and practice, a member may delegate or entrust certain labour administration activities to: "non-governmental organisations, particularly employers and workers organisations or where appropriate to employers and workers representatives".[441]

Measures should be taken or initiated by the Ministry of Labour or any comparable body as determined by national laws, regulation and practice to ensure "appropriate representation of the system of labour administration in the administrative and consultative bodies in which information is collected, opinions are considered, decisions are prepared and taken and measures of implementation are devised concerning social and economic policies".[442] Emphasis on representation is important to ensure input from labour administration which may ultimately influence outcomes. The involvement of stakeholders is important within the labour administration context because it may assist in providing a labour administration system that is relevant and correlated with the needs of the labour market.

---

[438]Article 26(2)(a) The Labour Administration Recommendation, 1978, no. 158.

[439]Resources in this context refer to: "adequate staff, equipment and transport facilities for the effective performance of their duties". Article 26(2)(b) The Labour Administration Recommendation, 1978, no. 158.

[440]Article 26(2)(c) The Labour Administration Recommendation, 1978, no. 158.

[441]Article 2 The Labour Administration Recommendation, 1978, no. 158.

[442]Article 19 The Labour Administration Recommendation, 1978, no. 158.

2.4.2.3 Methodology of minimum wage determination

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30[443] and the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89[444] recommend considering the methodology utilised in minimum wage determination should be given to a suitable standard of living when determining the rates of minimum wages. Consideration should be given to wage rates being:

> "paid for similar work in trades where the workers are adequately organised and have concluded effective collective agreements, or, if no such standard of reference is available in the circumstances, to the general level of wages prevailing in the country or in the particular locality".[445]

In the international instruments two predominant methods are apparent in the methodology of minimum wage determination: Firstly, consideration should be given to the basic needs of workers, this is important in terms of a dignified existence.[446] Secondly, consideration should be given to wage rates of well organised comparable trades or to general wages in the country or area, which implies a benchmarking exercise.[447]

It is important to consider relevant wages in corresponding sectors or trades in order to ensure a market related and relevant minimum wage. Similarly, consideration of average wages or wages in terms of locality helps ensure a relevant minimum wage that is suitable within the bigger context of wages in that country. In other words,

---

[443]Article III The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[444]Article I The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89.

[445]Article III The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[446]Article III The Minimum Wage-Fixing Machinery Recommendation, no. 30. Minimum wage fixing mechanisms should consider a minimum wage that can maintain a suitable standard of living, which may have associations with a dignified existence. Eyraud F & Saget C *The Fundamentals of Minimum Wage Fixing* (2005) 24 & Heppell *Minimum Wages* 28.

[447]Article III The Minimum Wage-Fixing Machinery Recommendation, no. 30.

minimum wage should not be determined in isolation to other wages, but rather in context to ensure a realistic and meaningful minimum wage.

Various factors need to be considered to strike a balance between a meaningful wage determination and a wage determination that still encourages compliance. The Minimum Wage Fixing Convention, 1970, no. 131[448] lists the following factors that should be considered in determining the level of minimum wages:

a) The needs of workers and their families considering:
    - the general level of wages in the country,
    - cost of living,
    - social security benefits,
    - the relative living standards of other social groups.

b) Economic factors including:
    - the requirements of economic development,
    - the levels of productivity,
    - the desirability of attaining and maintaining a high level of employment.

These elements are made up of workers' needs and economic considerations. Article 3 of the Minimum Wage Fixing Recommendation, 1970, no. 135 establishes the following criteria (among others) that should be taken into account in determining the level of minimum wages:

a) "the needs of workers and their families;
b) the general level of wages in the country;
c) the cost of living and changes therein;
d) social security benefits;
e) the relative living standards of other social groups and

[448]Article 3 The Minimum Wage Fixing Convention, 1970, no. 131.

f) economic factors including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."[449]

The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89[450], provides the following factors that should be considered in the fixing of minimum wage rates:

a) the cost of living,[451]
b) the reasonable and fair value of services rendered,
c) "wages paid for similar or comparable work under collective bargaining agreements in agriculture and
d) the general level of wages for work of a comparative skill in other industries in the area where the workers are sufficiently organised".[452]

Mention should be made about the need for reliable, accurate and current information and statistics used as underpinning in determining a minimum wage. Each member should obtain the necessary information to decide in terms applying minimum wage fixing machinery.[453]

The establishment of effective institutions is necessary to fulfil this need.[454] The collection of statistics is an important element in the analytical studies of the relevant

[449]Article 3 The Minimum Wage Fixing Recommendation, 1970, no. 135. Also see Heppell *Minimum Wages* 29.

[450]Article 2 The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89.

[451]This provision shows similarities to Article 3 The Minimum Wage Fixing Recommendation, 1970, no. 135, and Article 3 The Minimum Wage Fixing Convention, 1970, no. 131 in that both also refer to the cost of living.

[452]Article I(2) The Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89. This provision shows similarities to Article 3 The Minimum Wage Fixing Recommendation, 1970, no. 135, and Article 3 The Minimum Wage Fixing Convention, 1970, no. 131, in that both also refer to the general level of wages in the country, also see III of the Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[453]Such information should indicate prima facie that no arrangement exists for the effective regulation of wages and that wages are exceptionally low. Article I(1) The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[454]Examples of such institutions are Dieese in Brazil, De Melo FLB, Figueiredo A, Mineiro AS & Mendonça "Rescuing the Minimum Wage as a Tool for Development in Brazil" (2012) 4 *Int J Lab Res* 27 27. Statistics South Africa (Stats SA) in South Africa and The Federal State Statistics Service in Russia, Bolsheva A "Mapping gaps

economic factors in determining minimum wages and as such adequate resources should be provided, with due consideration of national circumstances.[455] The Labour Administration Recommendation, 1978, no. 158 recommends that the labour administrative system should research as part of its functions, and it should also encourage research by others to meet its social objectives.[456] The next subchapter considers international measures applicable to the frequency and method of adjusting the determined minimum wage.

2.4.2.4 Adjustment of minimum wage

Once the monitory value of the minimum wage has been determined it is imperative that the minimum wage stays relevant, current and useful within the context that it is used and for the beneficiaries thereof. Inflation may cause prices to increase, including basic goods, resulting in the purchasing power eroding overtime. The effect of increased prices may lead to the minimum wage not reaching its intended goals of alleviating inequality, poverty and the effects of unemployment. Therefore, the adjustment of minimum wage over time is necessary to ensure that the purchasing power of the minimum wage is not lost:

> "Minimum wage policies represent an intervention in the labour market. The Influence or consequences of such intervention is determined by the conditions and context of the labour market. Because the labour market is not stagnant but ever-changing, the interventions in relation to the

---

and challenges in building effective wage policies in the Russian Federation" (2014) 7 ILO Working Paper <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-moscow/documents/publication/wcms_357964.pdf> (accessed 23-02-16).

[455]Article 10 The Minimum Wage Fixing Recommendation, 1970, no. 135. It may be argued that an additional administrative provision is contained in Article 5 The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 that determines: each member that ratified the Convention should communicate annually to the International Labour Office the "methods and the results of the application of the machinery and, in summary form, the occupations and appropriate numbers of workers covered, the minimum rate of wages fixed, and the more important of the other conditions, if any, established relevant to the minimum rates".

[456]Article 18 The Labour Administration Recommendation, 1978, no.158.

> labour market context need to be reviewed and adjusted accordingly to still be relevant and current within the context to which it applies".[457]

In terms of the monetary adjustment of minimum wage it is important to promote stability, transparency, and consistency. Stability and consistency are important so that various stakeholders in the labour markets including employers, companies and employees may know what to expect in terms of adjustments of minimum wage to plan accordingly, to mitigate any possible negative consequences associated with minimum wage adjustments. As such, programmes and schedules must preferably be utilised to adjust minimum wage.[458]

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 recommends that provision be made for the review of minimum wage rates, when desired by workers or employers who are members of the minimum wage fixing body.[459] The Minimum Wage Fixing Recommendation, 1970 determines that minimum wage rates should be adjusted occasionally (on regular intervals or whenever such review is considered appropriate)[460] to take account of economic conditions and changes in living costs.[461]

Without scheduled adjustments of the minimum wage, there may be a situation where political factors and public pressure are the main initiators in adjusting minimum

---

[457]Heppell *Minimum Wages* 35; OECD "Focus on Minimum Wages After the Crisis" (2015) *OECD* <http://www.oecd.org/social/Focus-on-Minimum-Wages-after-the-crisis-2015.pdf> (accessed 8-9-2016).

[458]OECD "Focus on Minimum Wages After the Crisis" (2015) *OECD*.

[459]Article III The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[460]Article 12 The Minimum Wage Fixing Recommendation, 1970, no. 135.

[461]Article 11 The Minimum Wage Fixing Recommendation, 1970, no. 135, "a review might be carried out of minimum wage rates in relation to the cost of living and other economic conditions either at regular intervals or whenever such a review is considered appropriate in the light of variations in a cost-of-living index", Article 12 The Minimum Wage Fixing Recommendation, 1970, no. 135, Article III The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 similarly makes provision for the review of minimum wage rates when it is desired by workers or employers.

wage.[462] Minimum wage adjustments in this context may be unpredictable and not aligned with the current conditions of the market.[463]

Research has an important role in adjusting minimum wage: "periodical surveys of national economic conditions, including trends in income per head, in productivity and in employment, unemployment and underemployment, should be made to the extent that national resources permit".[464] National conditions should be considered in determining the frequency of surveys.[465]

Once the minimum wage rate is established, the Protection of Wages Convention, 1949, no. 95 determines that workers should be informed in appropriate and understandable language of any changes in employment conditions[466] or particulars of their wages for the pay period.[467] The provision empowers workers to embrace their rights by making workers aware of their rights.

The next subchapter considers the legal enforcement of minimum wage through the framework as provided by international measures.

2.4.3 Legal enforcement

As referred to in chapter 1.4, compliance with minimum wage should not be assumed. There should be enforcement, also known as execution, of the minimum wage done on a legislative basis. In this context, enforcement is directly responsible for achieving minimum wage compliance. However, compliance can be achieved through various methods (both law and nonlaw methods). Legal enforcement will be divided into two parts: First, monitoring compliance with minimum wage. Monitoring supervises the

---

[462]OECD "Focus on Minimum Wages After the Crisis" (2015) *OECD*; without a scheduled adjustment framework, trade unions may be inclined to induce pressure to force change, adjustments which may go apart with social unrest and strike action that is not beneficial to economic growth; Margolis (2014) *IZA World of Labor* 6.

[463]OECD "Focus on Minimum Wages After the Crisis" (2015) *OECD*.

[464]Article 13 (1) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[465]Article 13 (2) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[466]Article 14(a) The Protection of wages Convention, 1949, no 95.

[467]Article 14(b) of the Protection of wages Convention, 1949, no 95. The author argues that minimum wage rate or the adjustment thereof is included in the interpretation of the convention.

minimum wage application in the labour market to ensure compliance. The second part of legal enforcement concerns the legal sanctions and remedies applicable to minimum wage non-compliance.

2.4.3.1 Monitoring compliance

Once the legal minimum wage framework has been established, it should be monitored to ensure its compliance related objectives. Therefore, monitoring compliance aims to correlate the legal minimum wage framework and practice by monitoring the labour market.

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30[468] and the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89[469] recommend the following measures (among other) should be taken, to ensure that wages are not paid at less than the minimum wage, to guard against unfair employer competition and to protect the wages of employees:

a) arrangements should be made for informing employers and workers of the applicable minimum wage, and for
b) "official supervision of the rates actually being paid".[470]

The Minimum Wage Fixing Convention, 1928, no. 26, and the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 no. 99 has similar provisions providing for a system of supervision and sanctions to ensure that workers and employers are, firstly, informed[471] of the applicable minimum wage rates (see chapter 2.4.1.2) and

[468]Article IV The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30.

[469]Article 8 the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89.

[470]Article IV The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30; also see article IV 8 (a) and (b) The Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89.

[471]Article 4(1) The Minimum Wage Fixing Convention, 1928, no. 26 and article 4(1)of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99. Article 15 (a) The Protection of Wages Convention, 1949, no. 95 provides that information be made available to all persons concerned. Article 14 (a) The Minimum Wage Fixing Recommendation, 1970, no. 135 determines that arrangements should be made for publicity of minimum wage provisions in languages or dialects understood by workers who need protection, adapted where necessary to the needs of illiterate persons.

secondly, to ensure that wages are not paid at less than the applicable minimum wage rates.[472]

Because minimum wage compliance is frequently absent, supervision is required. As such, any effective minimum wage model requires supervision. Supervision in the minimum wage context is mainly actualised through labour inspections, by labour inspectors, in the labour market. Article 5 of the Minimum Wage Fixing Convention 1970, no.131, determines that:

> "appropriate measures, such as adequate inspection reinforced by other necessary measures, shall be taken to ensure the effective application of all provisions relating to minimum wages".[473]

Similarly, the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 provides for "supervision, inspection and sanctions as may be necessary and appropriate to the conditions obtaining in agriculture in the country concerned".[474] Article 15 (b) The Protection of Wages Convention, 1949, no. 95, states that laws or regulations should "define the persons responsible for compliance"[475] with the provisions of the convention.

As referred to in chapter 2.4.2, the Labour Administration Convention, 1978, no. 150 determines that the competent body within the labour administration system is responsible for preparing and implementing of laws and regulations giving effect to national labour policy.[476] As indicated in chapter 2.4.2, the Labour Administration Recommendation, 1978, no. 158, determines that the labour administration system

---

[472]Article 4(1) The Minimum Wage Fixing Convention, 1928, no. 26 & Article 4 (1) of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[473]Article 5 The Minimum Wage Fixing Convention, 1970, no. 131.

[474]Article 4(1) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[475]Article 15 (b) The Protection of Wages Convention, 1949, no. 95. Provision is also made for the "maintenance, in all appropriate cases, of the adequate records in an approved form and manner.

[476]Article 6 (1) The Labour Administration Convention, 1978, no. 150, Article 3 Protocol of 1995 to the Labour Inspection Convention, 1947, determines that national laws, regulations, and other means shall be drawn up after consultation with stakeholders with respect of protocol implementation.

should include a labour inspection system.[477] Therefore, the labour administrative system has an important role in providing the institutional framework to establish a competent body responsible for compliance with national labour policy (minimum wage).

The Labour Inspection (Agriculture) Convention, 1969, no, 129 provides examples in terms of the functioning of labour inspection in agriculture. These examples may arguably also be utilised in the broader functioning of labour inspection:

a) "by a single labour inspection department responsible for all sectors of economic activity;
b) by a single labour inspection department, which would arrange for internal functional specialisation through the appropriate training of inspectors called upon to exercise their functions in agriculture;
c) by a single labour inspection department, which would arrange for internal institutional specialisation by creating a technically qualified service, the officers of which would perform their functions in agriculture; or
d) by a specialised agricultural inspection service, the activity of which would be supervised by a central body vested with the same prerogatives in respect of labour inspection in other fields, such as industry, transport and commerce".[478]

These examples illustrate various possibilities in structuring labour inspection in agriculture and more generally. Choosing the most appropriate functioning structure will depend on the context it will be utilised in (e.g., the available financial, infrastructural and human resources, and socio-economic context of the member).

The Labour Inspection Convention, 1947, no. 81 and the Labour Inspection (Agriculture) Convention, 1969, no. 129 determine that labour inspection shall be placed under the supervision and control of a central authority.[479] The authority

[477]Article 6 The Labour Administration Recommendation, 1978, no. 158.

[478]Article 7(3) The Labour Inspection (Agriculture) Convention, 1969, no. 129.

[479]As far as it is compatible with the administrative practice of the Member. In the case of federal State, the term central authority may mean either a federal authority or a central authority of a federal unit. Article 4 The Labour Inspection Convention, 1947, no. 81 and Article 7 The Labour Inspection (Agriculture) Convention, 1969, no. 129.

should promote effective cooperation between labour inspection and other government services and private institutions,[480] and collaboration between officials of the labour inspection system and employers, workers and organisations.[481]

The central authority assumes a central role within labour inspection and should be adequately equipped in terms of sufficient and competent human resources, efficient leadership and infrastructure, and monetary resources to fulfil this role.

The Labour Administration Convention, 1978, no. 150 provides that certain activities of labour administration can be entrusted and delegated to "non-governmental organisations, particularly employers' and workers' organisations, or where appropriate to employers' and workers' representatives".[482] On this basis, it may be argued that nongovernmental organisations, employers' and workers' organisations may be entrusted with shared responsibility with government departments, regarding certain compliance elements with minimum wage.

The Minimum Wage Fixing Recommendation, 1970, no. 135 refers to "the association of employers and workers organisations in efforts to protect workers against abuses", as a measure to ensure the effective application of all provisions relating to minimum wages.[483] These organisations can assist the official government compliance structures fulfilling their responsibilities and duties regarding compliance with minimum wage.

---

[480]Article 5 (a) The Labour Inspection Convention, 1947, no. 81, Article 12 The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector. co-ordinate the functions and responsibilities of the labour administration system in accordance with national laws, regulations and practice, the ministry of labour or another comparable body shall have the means to ascertain whether any agencies responsible for labour administration, are operating in accordance with national laws and regulations and adhering to the objectives assigned to them, Article 9 The Labour Administration Convention, 1978, no.150.

[481]Article 5 (b) The Labour Inspection Convention, 1947, no. 81, Article 13 The Labour Inspection (Agriculture) Convention, 1969, no. 129, has similar provisions applicable to the agriculture sector, Article 4 to 7 The Labour Inspection Recommendation, 1947, no. 81 also emphasises the importance of collaboration between employers and workers, although reference is specifically made to health and safety.

[482]Article 2 The Labour Administration Convention, 1978, no. 150.

[483]Article 14 (e) The Minimum Wage Fixing Recommendation, 1970, no. 135.

The Labour Administration Convention, 1978, no. 150 determines that the competent bodies within the labour administration system should take account of national laws and regulations regarding terms of employment, working conditions and working life review and study circumstances of the unemployed, employed and underemployed to identify abuses and defects and to give proposals or recommendations as possible solutions to that.[484] Competent bodies have a duty to identify compliance abuses and defects and improving these issues by providing proposals and recommendations.

The Labour Administration Convention, 1978, no. 150 determines that any parastatal and or local or regional agencies with responsibilities and functions of the labour administration system should be assessed to establish whether the objectives assigned to them are adhered to and whether these entities are operating in accordance with national laws and regulations.[485] This provision ensures that these agencies are held accountable and responsible for pursuing their responsibilities and functions and may promote their effectivity.

In terms of the *utilisation of the labour inspectorate*, one may deliberate whether labour inspection applies to only certain parts in the labour market and whether other parts/sectors of the labour market or to all. To this end the Labour Inspection Convention, no. 81 provides that:

[484]Article 6 (2) (b) The Labour Administration Convention, 1978, no. 150.

[485]Article 9 The Labour Administration Convention, 1978, no. 150.

> "each member of the ILO for which this convention is in force shall maintain a system of labour inspection in industrial workplaces".[486]

A system of labour inspection in industrial workplaces applies to:

> "all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors".[487]

Therefore, the Convention provides a broad application of its labour inspection framework, but provision is made for exemption of the mining and transport undertakings, or parts thereof, by national laws or regulations.[488] Based on the population sparseness or the development stage, the competent authority may grant exemption from applying this Convention in general or concerning specific activities or occupations as it deems fit.[489]

The Labour Inspection Convention, 1947 no.81 also establishes a labour inspection system in commercial workplaces[490] with application to "workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors".[491] The Labour

---

[486]Part I Article 1 The Labour Inspection Convention, 1947, no. 81 & Heppell *Minimum Wages* 37.

[487]Article 2(1) The Labour Inspection Convention, 1947, no. 81. For the purposes of this Convention legal provisions included: "in addition to laws and regulations, arbitration awards and collective agreements upon which the force of law is conferred, and which are enforceable by labour inspectors", Article 27 The Labour Inspection Convention, 1947, no. 81.

[488]Article 2(2) The Labour Inspection Convention, 1947, no. 81.

[489]Article 29(1) The Labour Inspection Convention, 1947, no. 81. Any areas in respect of which a member proposes to have recourse to the provisions of Article 29, "shall give the reasons for which it proposes to have recourse thereto; no member shall, after the date of its first annual report, have recourse to the provisions of the present article except in respect of areas so indicated"; Article 29(2) The Labour Inspection Convention, 1947, no.81. Also see Article 29(3) The Labour Inspection Convention, 1947, no. 81, in terms of renouncement of the right to have recourse to the provisions of Article 29.

[490]Article 22 The Labour Inspection Convention, 1947, no. 81.

[491]Article 23 The Labour Inspection Convention, 1947, no. 81. Article 24 of The Labour Inspection Convention, 1947, no.81 states that the requirements as determined in Articles 3 to 21 of The Labour Inspection Convention, 1947, no. 81, is applicable to commercial workplaces, as far as they are applicable. Accordingly: the enforcement of Minimum wage through labour inspectors is included in the commercial sector; refer to Article 3. These provisions (as contained in Part II. Labour Inspection in Commerce) may be excluded from the acceptance of the Convention, Article 25 The Labour Inspection Convention, 1947, no. 81.

Inspection (Agriculture) Convention, no. 129 provides for a labour inspection system in agriculture[492] as determined in legal provisions and enforced by labour inspectors.[493]

The 1995 Protocol to the Labour Inspection Convention, 1947, expands the application of the Labour Inspection Convention, 1947, no. 81 to include activities in the non-commercial services sector,[494] but partial or whole exclusion may be effected after consultation with stakeholders,[495] if it will create special problems of a substantial nature in the following categories:

a) essential national government administration,
b) armed services (military or civilian),
c) police and other public security services,
d) prison services (prison staff or prisoners performing work).[496]

It may be argued that labour inspectors are predominantly utilised in the formal sector of the economy. Notice should, however, be taken of the Transition from the Informal

[492]Article 3 The Labour Inspection (Agriculture) Convention, 1969, no. 129. It is the responsibility of the competent authority to determine the parameters which separates agriculture from industry and commerce after consultation with the most representative organisations of employers and workers concerned, in such a manner not to exclude any agricultural undertaking from the national system of labour inspection, Article 1(2) The Labour Inspection (Agriculture) Convention, 1969, no. 129. The competent authority is also responsible for settling any uncertainty regarding an undertaking or part of an undertaking to which The Labour Inspection (Agriculture) Convention applies, Article 1(3) The Labour Inspection (Agriculture) Convention, 1969, no. 129.

[493]Article 2 The Labour Inspection (Agriculture) Convention, 1969, no. 129. For this Convention legal provisions include laws, regulations, arbitration awards and collective agreements upon which the force of law is conferred.

[494]Article 1(1) Protocol of 1995 to the Labour Inspection Convention, 1947.

[495]Article 2(2) Protocol of 1995 to the Labour Inspection Convention, 194; stakeholders are “the most representative organisations of employers and workers or in the absence of such organisations, the representatives of the employers and workers concerned”.

[496]Article 2(1) Protocol of 1995 to the Labour Inspection Convention, 1947. As mentioned in later parts of this section, Article 2(3) Protocol of 1995 to the Labour Inspection Convention, 1947, places certain obligation on members who utilise exclusions. Article 3(1) determines that the “provisions of this Protocol shall be implemented by means of national laws or regulations, or by other means that are in accordance with national practice”.

to the Formal Economy Recommendation, 2015, no. 204 that makes provision for efficient and effective labour inspections[497] and determines that there should be an:

> "adequate and appropriate system of inspection, extend coverage of labour inspection to all workplaces in the informal economy in order to protect workers, and provide guidance for enforcement bodies, including on how to address working conditions in the informal economy".[498]

Therefore, the importance of labour inspection should not be overlooked in the informal economy. This may be particularly useful to developing countries that may have larger informal economies in relation to more developed nations. Developed countries may typically find an inversion of this position in that their formal economies are far larger than their informal economies.

Regarding the regularity and degree of workplace inspections, the Labour Inspection Convention 1947 no. 81 states that inspections should be done thoroughly and often to ensure "effective application of the relevant legal provisions".[499]

2.4.3.1.1 Rights of workers and labour inspectors

The role of workers in achieving compliance with minimum wage provisions should not be undervalued. Workers should feel safe (i.e., legally protected) to speak out against non-compliance with minimum wage provisions without fear or negative employment consequences. The Minimum Wage Fixing Recommendation, 1970, no. 135 protects workers by providing for measures to ensure the effective application of all provisions relating to minimum wage, includes "adequate protection of workers against victimisation".[500] The Labour Administration Recommendation, 1978, no. 158 states that competent bodies should take part in the determination and application of measures that ensure the free exercise of employers' and workers' right of

[497]Article 11(q) The Transition from the Informal to the Formal Economy Recommendation, no. 204, 2015.

[498]Article 27 The Transition from the Informal to the Formal Economy Recommendation, no. 204, 2015.

[499]Article 16 The Labour Inspection Convention, 1947, no. 81, Article 21 of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

[500]Article 14(f) The Minimum Wage Fixing Recommendation, 1970, no. 135.

association.[501] Labour relations that promote progressively better conditions of work, working life and the right to organise and collective bargaining, should be promoted through labour administration programmes.[502]

From the preceding discussion it is evident that compliance is not the exclusive responsibility of one department or authority but rather a joint responsibility between various stakeholders, including but not limited to the central authority of labour inspection, worker and employer organisations, workers and other competent bodies and non-government authorities. The roles and significance of stakeholders in compliance should be acknowledged and promoted to allow for the optimisation of these roles.

Labour inspectors assume a central position in enforcing minimum wage because of the functions associated with the profession. The Labour Inspection Convention, 1928, no. 81 stipulates the following functions of a labour inspection system:[503]

a) "the enforcement of legal provisions relating to conditions of work and the protecting of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors"[504],
b) labour inspectors should provide information and advice to employers and workers regarding the most effective manner to comply with legal requirements,[505]
c) abuse or wrongdoing not stipulated in legal provisions need to be reported by labour inspectors to the competent authority[506] and

---

[501]Article 7 The Labour Administration Recommendation, 1978, no. 158.

[502]Article 8(1) The Labour Administration Recommendation, 1978, no. 158.

[503]Part I Article 3(1) The Labour Inspection Convention, 1947, no. 81, Article 6 of The Labour Inspection (Agriculture) Convention, 1969, no. 129, embraces the same functions the primary difference being the application to the agriculture sector.

[504]Article 3(1)(a) The Labour Inspection Convention, 1947, no. 81.

[505]Article 3(1)(b) The Labour Inspection Convention, 1947, no. 81.

[506]Article 3(1)(c) The Labour Inspection Convention, 1947, no. 81.

d) "any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers".[507]

These functions may indicate both hard and soft enforcement measures (see chapter 1.3). Harder measures may be embodied by provision "a" of the functions of the labour inspection system where enforcement possibly coincides with negative, punitive consequences. Provision "b" may represent softer enforcement measures where labour inspectors assume an advisory and educational role in providing information and advice to employers.

The Labour Inspection Recommendation, 1947, no. 81 determines that labour inspectors' functions "should not include that of acting as conciliator or arbitrator in proceedings concerning labour disputes".[508] This provision guards against the overlapping of roles that may result in bias or prejudice against the parties involved in the labour dispute. The powers of labour inspectors and mediators and arbitrators should be separated to ensure the fair and impartial deliberation of disputes.

Along with the mentioned functions of a labour inspection system, there is a preventative duty on the labour inspection system. Any person who proposes to open "an industrial or commercial establishment, or to take over such an establishment, or to commerce in such an establishment the carrying on of a class of activity specified by a competent authority as materially affecting the application of legal provisions enforceable by labour inspectors",[509] should give notice thereof in advance to the labour inspection authority.[510] The labour inspection system may give an opinion regarding the feasibility of compliance with laws and regulations,[511] which is

[507]Article 3(2) The Labour Inspection Convention, 1947, no. 81.

[508]Article 8 The Labour Inspection Recommendation, 1947, no. 81.

[509]Article 1 The Labour Inspection Recommendation, 1947, no 81.

[510]Notice can be given either directly or through another designated authority. Article 1 The Labour Inspection Recommendation, 1947, no 81.

[511]Specific provision is made to health and safety of the workers, Article 2-3 the Labour Inspection Recommendation, 1947, no. 81.

preventative and designed to deal with compliance difficulties before they arise proactively.

Labour inspectors have an important function to provide data to the central inspection authority that can then be analysed and utilised to make informed decisions regarding various aspects of minimum wage compliance that includes the coverage, determination, and enforcement of minimum wage.

Information systems may be utilised as a part of technological tools in order to collect and analyse data that can be useful to various elements of minimum wage compliance.[512] The establishment and maintenance of these technological information systems can be costly but can contribute to the effectiveness and safe costs over the long term.[513]

The Labour Inspection Convention, 1947, no. 81 requires labour inspectors to submit reports to the central inspection authority regarding the result of their inspection activities which should be completed in the manner prescribed by the central authority and should contain certain subjects as prescribed by the central authority.[514] The frequency of these reports should be prescribed by the central inspection authority but should not exceed a yearly frequency.[515]

The central inspection authority should then publish an annual general report regarding the inspection services under its control within twelve months after the end of the year.[516] Copies of the annual general report should be transmitted to the

[512]Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 4.

[513]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 28.

[514]Article 19 The Labour Inspection Convention, 1947, no. 81. Article 15 (d) of The Protection of Wages Convention, 1949, no. 95 states that laws and regulations should require the maintenance of records with reference to the payment of wages to all persons and Articles 25 to 27 of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

[515]Article 19(2) The Labour Inspection Convention, 1947, no. 81.

[516]Article 20(1) & (2) The Labour Inspection Convention, 1947, no. 81.

Director-General of the International Labour Office within twelve months after the publication.[517]

The Labour Inspection Recommendation, 1947, no. 81[518], establishes the following details that should be included in annual reports:

a) "a list of the laws and regulations bearing on the work of the inspection system not mentioned in previous reports";[519]
b) details about labour inspection staff about: the aggregate number of inspectors, number of inspectors in different categories, the number of female inspectors, the geographical distribution of inspection services;
c) "statistics of workplaces liable to inspection and of the number of persons therein employed, including:"[520] the number of workplaces liable to inspection, the average number of workers employed in such workplaces, details about the classification of employees;
d) Statistics on the number of workplaces visited, classification of the inspection visits according to visits made during the day or night, the number of employees employed at the workplaces visited, the number of workplaces visited more than once a year;
e) "statistics of violations and penalties, including:"[521] the number of infringements reported on, "particulars of the classification of such infringements according to the legal provisions to which they relate"[522], the number of convictions, details about the nature of the penalties imposed;
f) industrial action statistics about the; industry and occupation, cause, the degree/severity of the accident; and

[517]Article 20(3) The Labour Inspection Convention, 1947, no. 81. "There shall be included in the annual reports to be submitted under Article 22 of the Constitution of the International Labour Organisation full information concerning all laws and regulations by which effect is given to the provisions of this Convention"; Article 27 The Labour Inspection Convention, 1947, no.81.

[518]Article 9 The Labour Inspection Recommendation, 1947, no. 81.

[519]Article 9 (a) The Labour Inspection Recommendation, 1947, no. 81.

[520] Article 9 (c) The Labour Inspection Recommendation, 1947, no. 81.

[521]Article 9(e) The Labour Inspection Recommendation, 1947, no. 81.

[522]Article 9(e)(ii) The Labour Inspection Recommendation, 1947, no. 81.

g) occupational disease statistics about: the number of occupational diseases, classification particulars of occupational diseases about occupation and industry and also the cause, nature thereof.

Considering these prescribed details, it is apparent that the content of annual reports is comprehensive, which may provide useful information to be utilised to improve and promote the compliance framework nationally and internationally.

Article 16 of the Protection of Wages Convention, 1949, no. 95 determines that the annual report that must be submitted, should contain information concerning the measures by which effect is given to the provisions of the Convention. This provides for reporting on the state departments' measures instituted in realising the Convention's provision.

According to the Protocol of 1995 to the Labour Inspection Convention, 1947,[523] members should indicate in the report, the reasons for any exclusions made and as far as possible provide for alternative arrangements for any categories excluded from the application of the Labour Inspection Convention, 1947, no. 81, to any of the categories, mentioned under article 2(1) of the Protocol of 1995 to the Labour Inspection Convention, 1947. The prerequisite to report on exclusions and the reasons may arguably ensure awareness by the member states of any exclusions and simultaneously ensure accountability from members. Members are held accountable for any exclusions which theoretically may place a degree of pressure on members to keep exclusions to a minimum.

In fulfilling their functions, labour inspectors have certain rights that may enable them to carry out their functions. The Labour Inspection Convention, 1947, no. 81 establishes the following rights of labour inspectors:[524]

---

[523]Article 2(3) Protocol of 1995 to the Labour Inspection Convention, 1947.

[524]Article 12 The Labour Inspection Convention, 1947, no. 81, Article 16 of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector, IV (2) of the Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 as well as article 9 of the Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 determines that labour inspectors should have the power to investigate compliance with minimum wage provisions and to take steps "as may be authorised to deal with infringements of the rates".

a) to enter any workplace liable to inspection without notice at any time,
b) any premise may be entered during daytime where there is reasonable cause to believe such premise is liable to inspection,
c) labour inspectors may do any examination, test or enquiry they deem necessary in order to satisfy themselves that legal provisions are adhered to in particular;
    i. To interrogate the employer or staff regarding the application of legal provisions,
    ii. to request and to make copies of books, other documents and registers which keeping is established by national laws or regulations,
    iii. to "enforce the posting of notices required by the legal provisions",[525]
    iv. to confiscate "for purposes of analysis samples of materials and substances used or handled, subject to the employer or his representative being notified of any samples or substances taken or removed for such purpose".[526]

During a labour inspection visit, the inspectors or representatives should notify the employer of their presence, unless they consider such notification to be prejudicial to the performance of their duties.[527]

In terms of provision "ii" of the Labour Inspection Convention, 1947 no. 81, labour inspectors may request various articles from the employer that may include wage records. Wage records may be used to determine compliance with minimum wage provisions. The Protection of Wages Recommendation, 1949, no. 85 provides for the maintenance of records of each worker employed, indicating various information about workers' wages.[528] Similarly, the Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 and the Minimum Wage Fixing Machinery (Agriculture) recommendation, 1951, no. 89 makes provision for the maintenance of

[525]Article 12(1)(iii) The Labour Inspection Convention, 1947, no. 81.

[526]Article 12(iv) The Labour Inspection Convention, 1947, no. 81.

[527]Article 12(2) The Labour Inspection Convention, 1947, no. 81.

[528]Article 8 The Protection of Wages Recommendation, no. 85.

authentic records about wages which may then be utilised to ascertain compliance with minimum wage rates.[529]

The rights of labour inspectors should be clear and unambiguously utilised by members. Labour inspectors should know their rights and these rights should be protected in order to enable labour inspectors to do their functions effectively contributing to an effective compliance model. Employers and their representative organisations should also acquaint themselves with these rights. The rights of labour inspectors may be regarded as the basis for labour inspectors to fulfil their functions, but these rights are not unqualified.

Protocol of 1995 to the Labour Inspection Convention, 1947, gives members the authority to regulate the powers of labour inspectors (mentioned in Article 12 of the Labour Inspection Convention, 1947, no. 81) for the inspection of workplaces of essential government administration, armed services, prison services, police services and public security services concerning:

a) "inspectors having appropriate security clearance before entering,
b) inspection by appointment,
c) the power to require the production of confidential documents,
d) the removal of confidential documents from the premises,
e) the taking and analysis of samples of materials and substances".[530]

Also, this protocol also determines the following limitations on labour inspections of workplaces of the armed services, the police and other security services:

---

[529]In the case of home workers it might be required to: "keep a list of the workers with their addresses and provide them with wage books or other similar record containing such particulars as are necessary to ascertain it the wages actually paid correspond to the rates in force", IV (2) The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 also see article IV(10) of the Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 that holds similar provisions.

[530]Article 4(1) Protocol of 1995 to the Labour Inspection Convention, 1947. Article 4(3) of this Protocol determines that special arrangements may be made to restrict the powers of labour inspectors with reference to prison services during periods of tension. Article 5 of this Protocol has restrictive inspection measures with reference to the workplaces of fire brigades as well as other rescue services during firefighting or other rescue, emergency services. Article 4(4) of this Protocol emphasises the importance of consultation between stakeholders in the restrictions of the powers of labour inspectors.

a) "restriction of inspection during manoeuvres or exercises;
b) restriction or prohibition of inspection of front-line or active service units;
c) restriction or prohibition of inspection during declared periods of tension;
d) limitation of inspection in respect of the transport of explosives and armaments for military purposes."[531]

These limitations may be necessary for various reasons but mainly to ensure the safety of labour inspectors and other affected individuals, to ensure the effective functioning of other departments or authorities, and to ensure the protection and retention of confidential information.

2.4.3.1.2 Labour inspectorate ethos and infrastructure

In terms of working context, labour inspector staff should "be composed of public officials whose status and conditions of service are such that they are assured of stability of employment"[532] and should be independent, so as not to be influenced by "changes in government and improper external influences".[533] Stable employment is important in any employment context and, particularly, for labour inspectors because of the important role they must fulfil in the labour market. The work environment of labour inspectors should lend itself to their main objective, which is to uphold labour standards.

The Labour Inspection Convention, 1947, no. 81 elaborates on the ethos associated with the relationships fostered by labour inspectors. The Convention sets out the following prohibitions, subject to exceptions made by national laws and regulations:

[531]Article 4(2) Protocol of 1995 to the Labour Inspection Convention, 1947. Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 14.

[532]Article 6 The Labour Inspection Convention, 1947, no. 81. Article 8 The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions.

[533]Article 6 The Labour Inspection Convention, 1947, no. 81, Article 8(1) of The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to labour inspection in agriculture, Article 10 of the Labour Administration Convention, 1978, no. 150 also refers to the independence of labour administration staff to improper external influences.

a) labour inspectors should not have indirect or direct interest in the tasks under their supervision;[534]
b) labour inspectors "shall be bound on pain of appropriate penalties or disciplinary measures not to reveal, even after leaving the service, any manufacturing or commercial secrets or working processes which may come to their knowledge in the course of their duties",[535] and
c) confidentiality should also be upheld in terms of the notice of non-compliance of legal provisions.[536]

Nations are responsible for establishing the extent of direct or indirect interest. However, it is recommended that it includes not only material or financial advantages but also personal interests of a psychological, emotional, or political nature that may influence a labour inspector to fulfil their functions. When considering the ethos of labour inspectors, it is important to mention the Global Code of Integrity for Labour Inspection as adopted by the International Association of Labour Inspection (hereafter referred to as the IALI), where six general values are established for the labour inspectorate:

- knowledge and competence;
- honesty and integrity;
- courtesy and respect;
- objectivity, neutrality, and fairness;
- commitment and responsiveness; and
- consistency between personal and professional behaviour.[537]

[534]Article 15 (a) The Labour Inspection Convention, 1947, no. 81, Article 20 (a) of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector. Also see Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 15.

[535]Article 15 (b) The Labour Inspection Convention, 1947, no. 81, Article 20 (b) of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

[536]Article 15 (c) The Labour Inspection Convention, 1947, no. 81, Article 20 (c) of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

[537]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 18.

The values established by the IALI, holds labour inspectors to a high standard which should be integrated in the guidelines and codes of conduct of nations. Because of the central role that labour inspectors fulfil in generally achieving compliance with minimum wage and labour standards there is a need for qualified personnel. Quality personnel may be obtained through effective recruitment.

The recruitment of labour inspectors is referred to in the Labour Inspection Convention, 1947, no. 81, where labour inspectors should be subjected to recruitment conditions as may be described by national laws or regulations. More specifically, labour inspectors should be "recruited with sole regard to their qualifications for the performance of their duties"[538] and should be adequately trained for their duties.[539] Therefore, labour inspectors should be qualified individuals able to fulfil the specialised role of labour inspectors. The competent authority should determine the qualifications mentioned above.[540]

Furthermore, labour inspectors should be adequately trained to fulfil their duties (as determined in the Minimum Wage Fixing Recommendation, 1970, no. 135).[541] Based on labour inspectors' comprehensive functions, adequate training is a necessity. Training should not necessarily be regarded as a once-off occurrence or a rarity. However, it may best be utilised regularly to keep inspectors updated with changes in the labour market, work environment, legislation, and regulations for inspectors to be updated with the latest national and international labour inspection trends that include changes in practices and technology.

---

[538]Article 7(1) The Labour Inspection Convention, 1947, no. 81, Article 9(1) of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to labour inspection in agriculture, Article 10 (1) of the Labour Administration Convention, 1978, no. 150 also refers to the fact that labour administration staff should be "suitably qualified for the activities to which they are assigned, who have access to training necessary for such activities". Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 30.

[539]Article 7(3) The Labour Inspection Convention, 1947, no. 81. Article 9(3) The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions.

[540]Article 7(2) The Labour Inspection Convention, 1947, no. 81. Article 9(2) The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions.

[541]Article 14(b) The Minimum Wage Fixing Recommendation, 1970, no 135.

The Labour Inspection Convention, 1947, no. 81 and the Labour Inspection (Agriculture) Convention, 1969, no. 129 determine that both men and women are eligible for appointment as part of labour inspection staff, and where necessary, special duties may be assigned to the respective inspectors based on gender classification.[542] Eligibility of both genders to be part of the labour inspection staff is a provision that may assist in breaking down any perception of the profession as male-orientated.

For labour administration, the Labour Administration Convention, 1978, no. 150 determines that the staff of labour administration should be independent of improper external influence, suitably qualified for the activities to which they are assigned, and access to the necessary training required to do the work.[543] The labour inspection system takes place within the larger domain of labour administration, and it is not only the labour inspection staff that requires training and appropriate qualifications (as indicated in previous paragraphs) but also the labour administration staff. This is to say that the larger labour administration domain requires competent staff that are suitably qualified and trained for the profession. Labour administration staff need to be independent of external influences that may lead to prejudice and affect their ability to fulfil their mandate effectively.

The Labour Inspection Convention, 1947, no. 81 and the Labour Inspection (Agriculture) Convention, 1969, no. 129 state that specialists and qualified technical experts should be utilised in a manner deemed to be most appropriate under national conditions to enforcing legal provisions.[544]

---

[542]Article 8 The Labour Inspection Convention, 1947, no. 81 and Article 10 The Labour Inspection (Agriculture) Convention, 1969, no. 129.

[543]Article 10(1) The Labour Administration Convention, 1978 no.150.

[544]Article 9 The Labour Inspection Convention, 1947, no. 81 determines this provision relating to the health and safety of workers. This provision may not apply specifically to minimum wage, however the utilisation of specialist within certain sectors and occupations is insightful, and the same specialised approach may be of use in the enforcement of minimum wage. Article 11 The Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to labour inspection in agriculture. Also see Article 13 of the Labour Inspection Convention, 1947, no. 81 which deals with the remedial steps available to labour inspectors regarding health and safety of workers. These steps are subject to the right of appeal to judicial or

The Labour Inspection Convention, 1947, no. 81 emphasises the importance of infrastructural support to labour inspectors by stating that labour inspectors must have access to offices and be equipped adequately for the requirements of service.[545] Furthermore, labour inspectors should have access to transport facilities to fulfil their duties and should be reimbursed for any travel or incidental expenses necessary for the performance of their duties.[546]

The Minimum Wage Fixing Recommendation, 1970, no.135 determines that labour inspectors should be "equipped with the powers and facilities necessary to carry out their duties".[547] The Labour Administration Convention, 1978, no. 150 follows the emphasis on infrastructure by determining that labour administration staff shall have:

> "the status, the material means and the financial resources necessary for the effective performance of their duties".[548]

Inadequate infrastructural support and resources may severely hamper the effectivity of labour inspection that may ultimately have a detrimental effect on compliance with minimum wage and labour standards in general. Unfortunately, this may typically be the situation in developing countries where there is a general scarcity of resources and, paradoxically, these countries may typically have a significant need for an effective labour inspection system because of labour standard compliance difficulties.

In terms of the size of the labour inspectorate staff, the Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 determines that "a sufficient" staff of inspectors should be employed to investigate among the employers and workers

---

administrative authority but include the issuing of orders calling for alterations or changes (to the installation or plant) to be affected within a stated time. Orders may also be given regarding measures with immediate executory force in the event of imminent danger to workers.

[545]Article 11(1)(a) The Labour Inspection Convention, 1947, no. 81, Article 15(a) of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

[546]Article 11(1)(b) & (2) The Labour Inspection Convention, 1947, no. 81 and Article 15(b) and (c) of the Labour Inspection (Agriculture) Convention, 1969, no. 129. Also see Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 48.

[547]Article 14(b) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[548]Article 10(2) of the Labour Administration Convention, 1978, no. 150.

concerned whether the minimum wage rates are being paid, where applicable, take steps to deal with non-compliance.[549]

The Labour Inspection Convention, 1947, no. 81 provides the following guiding principles regarding the number of labour inspectors:

a) "the importance of the duties which inspectors have to perform, in particular-
   (i) the number, nature, size and situation of the workplaces liable to inspection;
   (ii) the number and classes of workers employed in such workplaces; and
   (iii) the number and complexity of the legal provisions to be enforced;
b) the material means placed at the disposal of the inspectors; and
c) the practical conditions under which visits of inspection must be carried out in order to be effective".[550]

See chapter 3.3.3.1.1 for a further examination of the number of labour inspectors. Now that enforcement of minimum wage has been considered from a monitoring perspective, it is necessary to consider sanctions and remedies applicable to non-compliance instances.

2.4.3.2 Legal sanctions and remedies for non-compliance with minimum wage provisions

Legal sanctions may take on various forms that may depend on the transgression and the incidence thereof. Legal sanctions and remedies may typically be utilised after non-compliance with minimum wage has been established. It is utilised to penalise the transgressing employer and provide some form of judicial relief to the aggrieved worker.

---

[549]Article IV (2) of The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30, article IV(9) of the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has similar provisions. Article 14(b) The Minimum Wage Fixing Recommendation, 1970, no. 135 determines that there should be enough adequately trained inspectors employed equipped with the powers and facilities necessary to carry out their duties.

[550]Article 10 the Labour Inspection Convention, 1947, no. 81, Article 14 of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

Legal sanctions and remedies may have a dual role to play in terms of being a preventative and a reactive compliance instrument. Preventative, in the sense that appropriate sanctions and remedies may offer an increased incentive for employers to comply with minimum wage, thus acting as a deterrent for non-compliance with minimum wage.[551] It may also be reactive in the sense that it penalises transgressing employers and offers judicial relief to workers whose (minimum wage) rights have been violated.

The Minimum Wage Fixing Convention 1928, no. 26 enables members to take the necessary measures in terms of a system of sanctions, to ensure that wages are not paid below the legally determined rates.[552] The convention allows workers "to recover, by judicial or other legalised proceedings, the amount by which he has been underpaid, subject to such limitation of time as may be determined by national laws or regulations".[553] The member must establish a legal system whereby workers can seek reimbursement of the wages they have been underpaid.

To this end, the Protection of Wages Convention, 1949, no. 95 determines that laws or regulations giving effect to the payment of wages to all persons should "prescribe adequate penalties or other appropriate remedies for any violation thereof".[554] The Minimum Wage Fixing Convention, 1970, no. 131, ensures the validity of minimum wage by determining that: "minimum wages shall have the force of law and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions".[555] The Minimum Wage

[551]"The penalties exist primarily for regulatory purposes to encourage compliance with the Act, Arup & Sutherland (2009) *Monash Uni Law Rev* 110.

[552]Article 4(1) The Minimum Wage Fixing Convention, 1928, no. 26.

[553]Article 4(2) The Minimum Wage Fixing Convention, 1928, no. 26. Article IV(11) of the Minimum Wage Machinery (Agriculture) Recommendation, 1951, no.89 has similar provisions.

[554]Article 15 (c) The Protection of Wages Convention, 1949, no. 95.

[555]Article 2(1) The minimum wage fixing Convention, 1970, no. 131. Sub article 2 of the Convention ensures that collective bargaining should be respected subject to the provisions of sub article 1.

Fixing Recommendation, 1970, no. 135 makes provision for "adequate penalties for infringement of the provisions relating to minimum wages".[556]

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 provides for "penalties for infringements of the rates in force and measures for preventing such infringements" in the form of a system of supervision and sanctions. The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 also makes provision for penalties as well as measures preventing infringements.[557]

The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99 determines that the necessary supervision, inspection and sanctions which are appropriate to the conditions applicable in agriculture in the country concerned may be utilised to ensure compliance with minimum wage provisions.[558] Provision is made for judicial and legalised proceedings in order to recover any amount workers have been underpaid (meaning any wage amount workers received less than the minimum wage rate), subject to national laws or regulations.[559]

In the 2009 case of *Worokuy Esaie v. Clinique des Genêts*,[560] the Labour Court in Burkina Faso applied the Minimum Wage Fixing Convention, no. 26[561] in determining that a worker paid less than the rates applicable to them would be entitled to recover, by judicial proceedings, the amount by which his wages have been underpaid. National laws or regulations should determine adequate penalties for non-compliance with provisions enforceable by labour inspectors as well as penalties for obstructing labour inspectors in performing their duties.[562]

---

[556]Article 14(c) The Minimum Wage Fixing Recommendation, 1970, no. 135.

[557]Article IV(c) The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30. Article IV(8)(c) of the Minimum wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has similar provisions.

[558]Article 4(1) The Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[559]Article 4(2) The Minimum Wage Fixing Convention, 1928, no. 26 & Article 4 (2) of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99.

[560]8 January 2009, Judgment No. 008.

[561]Article 4 (2) The Minimum Wage Fixing Convention, 1928, no. 26.

[562]Article 18 The Labour Inspection Convention, 1947, no. 81, Article 24 of the Labour Inspection (Agriculture) Convention, 1969, no. 129 has similar provisions applicable to the agriculture sector.

The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30 protects individual rights of workers by determining that other measures (as may be considered effective for preventing infringements) should furthermore be provided, to prevent infringements of underpayment of legal rates, where workers cannot recover wages due to them at minimum wage rates through judicial or other legal proceedings.[563]

The Labour Inspection Convention, 1947, no. 81 determines that transgressors of legal provisions enforceable by labour inspectors are liable to prompt legal proceedings without previous warning, subject to exceptions that may be provided by "national laws or regulations in respect of cases in which previous notice to carry out remedial or preventive measures is to be given".[564] Labour inspectors are given discretion in fulfilling their duties to decide whether to provide advice and warning, or institute further proceedings against the transgressor.[565] The Labour Inspection (Agriculture) Convention, 1969, no. 129 gives labour inspectors in agriculture (who are not authorised to institute proceedings) the authority to refer non-compliance with legal provisions directly to the competent authority to institute proceedings.[566]

In promoting the effective application of all provisions relating to minimum wage, the Minimum Wage Fixing Recommendation, 1970, no. 135 provides for the "simplification of legal provisions and procedures, and other appropriate means of enabling workers effectively to exercise their rights under minimum wage provisions, including the right to recover amounts by which they may have been underpaid".[567] Complicated and prolonged processes in recovering underpaid minimum wage may discourage workers from initiating the remedy, which may be why public policy is

[563]Article IV (3) The Minimum Wage Fixing Machinery Recommendation, 1928, no. 30, article IV(11) of the Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89 has a similar provision.

[564]Article 17(1) The Labour Inspection Convention, 1947, no. 81, Article 22 of the Labour Inspection (Agriculture) Convention, 1969 no. 129 has similar provisions applicable to the agriculture sector.

[565]Article 17(2) the Labour Inspection Convention, 1947, no. 81, article 22 (2) of the Labour Inspection (Agriculture) Convention, 1969 no. 129, has similar provisions applicable to the agriculture sector. Also see Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 14.

[566]Article 23 of the Labour Inspection (Agriculture) Convention, 1969, no. 129.

[567]Article 14(d) The Minimum Wage Fixing Recommendation, 1970, no. 135.

sceptical of litigation as means to enforce compliance.[568] Alternative dispute resolution processes may be utilised as a solution, where lawyers are generally excluded from participating in the proceedings.[569] Remedies to recover the underpayment of minimum wage should be uncomplicated and should be finalised promptly to allow effective relief to workers and their families or dependents.

Labour Clauses (Public Contracts) Convention, 1949, no. 94 provides for the "withholding of contracts or otherwise, for failure to observe and apply the provisions of labour clauses in public contracts",[570] which can be used as sanction against non-compliance. The withholding of payments under the contract is mentioned as a measure to use to enable workers to receive their entitled wage.[571]

Minimum wage is arguably most effective when used in conjunction with other social support measures. Therefore the next section briefly considers the role of supplementary social support measures and minimum wage.

2.4.4 The role of supplementary social measures

Social support measures take on various forms such as healthcare services, education, and grants to name but a few. The role of supplementary social support measures is important especially when utilised together with a minimum wage to maximise the positive influence of the minimum wage. Minimum wage and social support measures may work together because minimum wage:

[568]Arup & Sutherland (2009) *Monash Uni Law Rev* 107.

[569]107.

[570]Article 5(1) Labour Clauses (Public Contracts) Convention, 1949, no. 94.

[571]Article 5 (2) Labour Clauses (Public Contracts) Convention, 1949, no. 94.

> "raises gross earnings received for work done in low paying positions, whilst social measures or benefits aim to 'top up' income received for low paying work".[572]

Minimum wage and social support measures offer support to the vulnerable and lower end of the labour market from two distinct perspectives. First, minimum wage as statutory provision requires employers to compensate employees at a certain minimum, thus offering monetary relief to the employer's vulnerable workers. Second, the state's social support measures, rather than the employer, providing certain protection to the vulnerable and needy is also relevant. When these two measures are utilised in conjunction with one another, they may offer optimised support and relief to those who particularly need it.

Brazil is an example of a country where there is a close relationship between minimum wage and social support measures. The purchasing power of the elderly, for example, is ensured by the symmetric relationship between minimum wage and social support measures. Accordingly, social or retirement benefits (or both) of the elderly are adjusted with the increase in the minimum wage.[573]

Supplementary social measures and minimum wage provisions (some would also include maximum wage regulation here) are essential in a holistic targeted approach tackling inequality, poverty, unemployment, and its effects. These measures should be utilised complementary to one another to provide a framework most constructive to vulnerable individuals. Supplementary social measures are arguably always part of an effective or good minimum wage model. This insight should be kept in mind throughout this study; however, it will not be further addressed here because of this study's limited scope.

---

[572]Heppell *Minimum Wages* 34; Stancanelli EGF, Keese M & Gittleman M "Making the Most of the Minimum: Statutory Minimum Wages, Employment and Poverty" in OECD (ed) *Employment Outlook* (1998) 31 57.

[573]Eyraud & Saget Fundamentals of Minimum Wage Fixing 42; Heppell Minimum Wages 55.

Now that an oversight has been established regarding the international legal framework regarding minimum wage compliance the next chapter will analyse the South African minimum wage compliance framework.

Chapter 3: The South African minimum wage compliance framework

The South African minimum wage compliance framework will be analysed in this chapter. It starts with a broad approach by identifying the international legal measures ratified by South Africa. Then, the underlying relevant provisions in the South African Constitution is considered followed by a systematic consideration of the South African minimum wage legal framework. The legal framework will be divided into three subsections, namely the SANMW, sectoral determinations, and collective agreements. Each subsection will methodically be considered in correlation with the elements identified in this study as necessary for an effective minimum wage.

3.1 An introduction to South African minimum wages

Up to now, South Africa instituted minimum wage through sectoral determinations, bargaining council agreements, and collective agreements. Sectoral determination involves determining the minimum wage for specific sectors in the labour market identified as vulnerable.[574] Bargaining council agreements refer to collective wage agreements made by employer associations and trade unions in a particular sector.[575] Therefore, bargaining council agreements are concluded between the representatives of the employee and the employer.[576] It should also be mentioned that bargaining council agreements can be extended to include any non-parties (within the council's scope) to the agreement mentioned above.[577] Collective agreements are written agreements concluded directly between registered trade

[574]Rani et al (2013) *Int Labour Rev* 387. Sectoral determinations were determined by the Minister of Labour with the assistance of ECC, see Heppell *Minimum Wages* 3.3.3.1 on the determining of sectoral determinations. Huysamen (2018) *De Jure* 290.

[575]National Minimum Wage Research Initiative "National Minimum Wage in South Africa: The Basics: Fact sheet 1" (2015) *NMW-RI* <http://nationalminimumwage.co.za/wp-content/uploads/2015/04/NMW-Fact-Sheet-1.pdf> (accessed 23-2-2021); Huysamen (2018) *De Jure* 290.

[576]Grogan J *Workplace Law* 12 ed (2017) 373, "Apart from the state, employers may become parties to bargaining councils only if they are members of employers' organisations" and Van Niekerk et al *Law@work* 429.

[577]Section 32 LRA. See Van Niekerk et al *Law@work* 421.

unions and employer (or employers) concerning employment terms and conditions, including wage agreements.[578]

Minimum wage has traditionally only been available to certain groups within the South African labour market with no general minimum wage coverage. The notion of a SANMW has been contemplated since the 1930s with various stakeholders driving the notion of a NMW governing all sectors in South Africa.[579] South Africa and many other developing nations are in a precarious position where it is problematic to compete with low-income, low-wage economies on the one side and more advanced economies with specialised skills and innovation on the other side.[580] This precarious position is known as the middle-income trap that may arguably leave workers exposed to the risk of exploitation[581].

At the 2014 State of the Nation Address, the South African president identified unemployment, inequality, and poverty as major challenges facing South Africa and the possibility of utilising a NMW in addressing some of these challenges.[582] Accordingly, a panel was elected to consider the application of the SANMW after which the National Minimum Wage Panel Report was published late in 2016.[583] The report makes recommendations regarding the practical institution of the SANMW and near the end of 2018, the South African President Cyril Ramaphosa signed the National Minimum Wage Act No. 9 of 2018 (hereafter referred to as the NMWA) which was set for implementation on the 1st of January 2019 at a rate of R20 (1.27 euro).[584] for each ordinary hour worked or R3 440 per month (219.80 euro).[585]

---

[578]Heppell *Minimum Wages* 69.

[579]ILO "Towards a South African National Minimum Wage" *ILO* 1.

[580]Huysamen (2018) *De Jure* 272 & 280.

[581]292.

[582]ILO "Towards a South African National Minimum Wage" *ILO* 2, 4 & 33.

[583]The National Minimum Wage Bill (draft) in GG 41257 of 17-11-2017 268.

[584]Calculation: 1 Euro=15,65 South African Rands. Also see Forestry in South Africa "National Minimum Wage Agreement has now been signed" (13-2-2017) *Forestry in South Africa* <https://www.forestry.co.za/national-minimum-wage-agreement-has-now-been-signed/> (accessed 2-1-2019).

[585]Schedule 1(1) NMWA.

Although the introduction of the SANMW originates from noble intentions, some bear scepticism towards such measure.[586] There is a traditional perception that minimum wage is related to employment loss where there is a trade-off between minimum wage and employment.[587] This perception is still alive today,[588] and it may be the overriding economic issue raised against minimum wage. The influential research of Card and Krueger,[589] however, challenged the perceptions regarding minimum wage to such an extent that the research even suggested increases in employment in these contexts (refer to the UK influence chapter 4.1.3).[590]

More recent research also challenged the negative employment effects of minimum wage and ultimately found little to no employment losses associated with minimum wage in developing countries.[591] It is important to emphasise that the argument is not that there are absolutely no employment losses if instances minimum wage applies,

---

[586]Huysamen (2018) *De Jure* 274 & 275.

[587]Isaacs "A National Minimum Wage for South Africa" *NMW-RI* 34; Huysamen (2018) *De Jure* 278.

[588]National Minimum Wage Panel *A National Minimum Wage for South Africa* 61 also see The National Minimum Wage Bill (draft) in GG 41257 of 17-11-2017 278.

[589]See Card & Krueger (1994) *Am Econ Rev*. The jurisdictional focus of this research was conducted within the American context and it was period, sector and geographically specific. The focus may be regarded as secular to a degree; however, this research played an important part in challenging the traditional negative perceptions associated with minimum wage which would later be validated in developing nations on a broader scale. Davidov (2009) *Mod Law Rev* 590.

[590]See DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" *NMW-RI* 26 & 27.

[591]Broecke S, Forti A & Vandeweyer M "The Effect of Minimum Wages on Employment in Emerging Economies: A Literature Review" (2015) *NMW-RI* 1-2 <http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf> (accessed 23-2-2021). "The empirical debate continues, but it seems fair to conclude from the evidence that the impact of minimum wages on employment is minimal, if it exists at all". Davidov (2009) *Mod Law Rev* 581-606. Literature indicates a similar position in developed nations; Sargeant M "The UK National Minimum Wage and Age Discrimination" (2010) 31 *Pol Stud* 351 354 and Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 1-2; Mudronova J "The International Experience of the Relationship Between Inequality, Poverty and Minimum Wages" (2016) 3 *NMW-RI Working Paper Series* 7-8 <http://www.nationalminimumwage.co.za/wp-content/uploads/2016/08/NMW-RI-Inequality-and-Poverty-Final.pdf> (accessed 23-2-2021). Schmitt J "Why Does the Minimum Wage Have no Discernible Effect on Employment?" (2013) *CEPR 5* < https://cepr.net/documents/publications/min-wage-2013-02.pdf> (accessed 23-2-2021); Huysamen (2018) *De Jure* 279; Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 2. Wilson S "The Politics of 'Minimum Wage' Welfare States: The Changing Significance of the Minimum Wage in the Liberal Welfare Regime" (2017) 51 *Soc Pol Admin* 244 254 & 256.

but should there be employment losses, such losses will be limited in numbers and specific groups.

In the South African context, it may be argued that should there possibly be any employment loss resulting from the introduction of the SANMW, the South African social security system will act as a safety buffer for these individuals.[592] The social security system is recommended not as a solution to the possible loss of employment associated with the SANMW, but as a method to minimise the negative effects of employment loss – should there be any. In this regard mention should be made of the Unemployment Insurance Amendment Act that was drafted to promote access to the Unemployment Insurance Fund (hereafter referred to as UIF) for categories of unemployed workers who were previously excluded from the unemployment insurance scheme. Under the unemployment insurance scheme, the beneficiaries have therefore been expanded,[593] as well as the extent[594] and duration[595] of financial assistance in certain circumstances. However, one must immediately acknowledge that social insurance coverage remains for a limited duration and at a relatively low rate of benefits.

Moreover, there may be a fear that the South African social security framework may become overburdened. One could contemplate the framework's ability to accommodate more individuals if there were employment loss associated with the introduction of the SANMW. (During 2020, the impact of COVID-19 certainly had a detrimental effect on the scheme's liquidity.) Seeing that the UIF is funded by contributions from employers and employees, large-scale unemployment impacts negatively on the scheme's finances.

---

[592]The Unemployment Insurance Amendment Act 10 of 2016 and the Unemployment Insurance Act 63 of 2001.

[593]Section 9 The Unemployment Insurance Amendment Act 10 of 2016; a contributor who has a miscarriage during the third trimester or bears a still-born child is entitled certain benefits.

[594]Section 4 The Unemployment Insurance Amendment Act 10 of 2016; also see section 10; application for maternity benefits can be made any time before and within 12 months after childbirth and section 11; if certain conditions are met the nominated beneficiary of the deceased may claim the dependents benefits.

[595]Section 5 The Unemployment Insurance Amendment Act 10 of 2016; extends the period of benefit also see section 7 that extends the UIF application period.

During the formulation of the NMWA, the SANMW represented an increased wage to approximately 6.2 million workers or 47,3% of the workforce.[596] These workers are likely to spend more due to the increased wage that the SANMW represents.[597] The implication is that the state will accumulate more money through value-added tax (VAT).[598] Mention should also be made of the VAT increase from 14% to 15%, yielding a projected R22,9 billion more to the state coffers from 2018 to 2019.[599] The increase in VAT together with the increased consumer spending associated with the introduction of the SANMW allows the state to increase various government department budgets including that of the South African Social Security Agency (SASSA), which may assist in lessening the financial burden on the South African social security institutions.[600]

Stepping outside the debate for and against minimum wage and specifically the SANMW – however difficult it may be – the SANMW is a reality for the foreseeable future.[601] Therefore, in this study, let us accept the growing consensus regarding the potential positive influence of minimum wage and look at ways in which one can improve the positive effect that the SANMW may have by focussing on compliance.

---

[596]National Minimum Wage Panel A National Minimum Wage for South Africa.

[597]Broecke et al "The Effect of Minimum Wages on Employment in Emerging Economies: A Literature Review" *NMW-RI* 1; the increased income as a result of minimum wage, results in increased consumption.

[598]Recipients of the SANMW may spend more on basic food items (Stats SA "Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011" (2014) *Stats SA* 54 <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf> (accessed 15-7-2017)) which are not subject to the 15% VAT provisions, see Ensor L "Budget 2018 in a Nutshell: First VAT Increase in 25 Years" *BusinessDay* (21-2-2018) <http://businesslive.co.za/bd/economy/2018-02-21-budget-2018-in-a-nutshell-first-vat-increase-in-25-years> (accessed 19-4-2020). However, it is argued that the recipients of the national minimum wage will contribute to higher VAT collections to the state because at least some part of the increased wage (national minimum wage) will be spent on goods or services that are subject to VAT.

[599]See Ensor L "Budget 2018 in a Nutshell: First VAT Increase in 25 Years" BusinessDay (21-2-2018) <http://businesslive.co.za/bd/economy/2018-02-21-budget-2018-in-a-nutshell-first-vat-increase-in-25-years> (accessed 19-4-2020).

[600]See South African government has increased the budgetary allocations towards social grants by 7,9% per year for the next three years, Ensor *BusinessDay* (21-2-2018).

[601]The adoption of the SANMW arguably structures the discussion on minimum wage on how to best regulate instead of whether to regulate. Huysamen (2018) *De Jure* 282.

In the context of the recent introduction of the SANMW, it is necessary to consider the economic composition of the workforce in South Africa.

3.1.1 The formal and informal economy

The informal economy is "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements".[602]

The ILO defines informal employment as:

> "all remunerative work (i.e. both self-employment and wage employment) that is not registered, regulated or protected by existing legal or regulatory frameworks, as well as non-remunerative work undertaken in an income-producing enterprise. Informal workers do not have secure employment contracts, workers' benefits, social protection or workers' representation."[603]

A relatively large informal economy is often associated with underdevelopment[604] and it may often be linked with developing countries.[605] The informal economy is seen by some as a significant component in expanding economic participation and therefore serving as a social safety net for the poor and vulnerable.[606] Others regard the informal economy from a less optimistic perspective by contending that it may indicate of a struggling or collapsing formal economy where individuals are looking

---

[602]ILO "Minimum Wage Policy Guide" (2016) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_508566.pdf> (accessed 21-12-2018).

[603]ILO "Minimum Wage Policy Guide" *ILO* 40. Statistics South Africa regards informal employment as individuals who are "in precarious employment situations irrespective of whether or not the entity for which they work is in the formal or informal sector. Persons in informal employment therefore comprise all persons in the informal sector, employees in the formal sector, and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions from their employer, and who do not have a written contract of employment", Stats SA "Quarterly Labour Force Survey: Quarter 4: 2016" (2016) *Stats SA* 22 <https://www.statssa.gov.za/publications/P0211/P02114thQuarter2016.pdf> (accessed 21-12-2018).

[604]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 6 & 7.

[605]"Employment in small informal enterprises tend to fall as income per capita rises", Altman "Formal-Informal Economy Linkages" *HSRC Repository* 9; also see Chen MA "The Informal Economy: Definitions, Theories and Policies" (2012) 1 *WIEGO Working Paper* 1 2.

[606]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 6.

to evade regulation and tax,[607] within a context of low productivity employment, therefore a survivalist strategy.[608] From this view, the informal economy has a "passive role in development and acts as a temporary substitute for social protection during the formal-sector-led growth process".[609]

The formal economy dominates the formal and informal economic structure in the South African structure.[610] The formal sector has not been able to keep up with increases in labour force participation.[611] Because of the formal sector's inability to accommodate these individuals, some of these individuals turned to the informal sector, which consequently holds that traditionally informal employment increased the most.[612] Despite the growth in informal employment, South Africa has a relatively small informal sector compared to countries with similar income levels, partly explaining South Africa's high unemployment rate of 30,8% in the 3rd quarter of 2020.[613]

---

[607]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 5.

[608]2 & 5; Huysamen (2018) *De Jure* 287.

[609]Davies R & Thurlow T "Formal-Informal Economy Linkages and Unemployment in South Africa" (2009) 00943 *IFPRI Discussion Paper* 1 2.

[610]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 5, 13 & 14; and see DPRU "Monitoring the Performance of the South African Labour Market" (2017) *DPRU* 9 <http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Other/2018-11-29%20Factsheet%2022%20-%20Year%20ended%202017Q3.pdf> (accessed 23-12-2018); the South African formal sector made up nearly three quarters (74.5%) of total employment.

[611]Davies & Thurlow (2009) *IFPRI Discussion Paper* 1 also see Kay DD *The Relationship Between Formal and Informal Employment in South Africa* MSc Thesis University of Illinois (2011) 7 and Strauss I, Isaacs G, Rosenberg J & Passoni P "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" (2020) *ILO* 7 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_754443.pdf> (accessed 23-2-2021).

[612]Davies & Thurlow (2009) *IFPRI Discussion Paper* 1, the Eastern Asian countries, the Soviet Union, Central and Eastern Europe were all parts of the globe that throughout history experienced individuals turning to the informal economy in moments of unemployment and economic transition periods, Chen (2012) *WIEGO Working Paper* 3.

[613]Davies & Thurlow (2009) *IFPRI Discussion Paper* 1 and see DPRU "Monitoring the Performance of the South African Labour Market" *DPRU* 9 as well as Kay *The Relationship Between Formal and Informal Employment* 11. The official unemployment rate increased by 7,5 percentage points to 30,8% in Q3: 2020 compared to Q2: 2020, Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 13.

The relatively small South African informal economy may be because of various informal economy barriers such as high crime rates,[614] high capital intensive structure of production and services,[615] low demand,[616] past trade liberalization,[617] the lack of training and access to infrastructure and business services.[618] Altman refers to Ranchhod to identify two additional factors contributing to the relatively small South African informal economy: poor access to credit and "a reservation wage" inflated by social transfers.[619]

The South African informal sector comprises predominantly males with a high percentage (48%) of youth workers aged between 15 and 19 years.[620] Female informal employment shrunk by 25,2%, year on year, due to the economic downturn associated with the COVID-19 pandemic compared to a decrease of 13,5% for men for the same period.[621] The data, therefore, suggests that it is females that are particularly vulnerable and susceptible to employment risks in the informal sector compared to their male counterparts. The informal sector is also characterised by workers with low education levels that may coincide with low skilled labour.[622]

As indicated in this thesis, the main purpose of minimum wage is to protect the vulnerable and poor by determining a minimum wage floor. Often workers in the informal economy are excluded from minimum wage protection as many of them are

---

[614]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 17.

[615]17.

[616]18.

[617]17; Trade liberalization in simple terms refers to the relaxation of regulations and restrictions pertaining to the exchange of goods and services between countries.

[618]Kay The Relationship Between Formal and Informal Employment 11.

[619]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 1.

[620]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" (2020) *UNDP* <https://www.za.undp.org/content/south_africa/en/home/library/socio-economic-impact-of-covid-19-on-south-africa.html> (accessed 23-2-2021). Also see Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 26 & 27.

[621]Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 26 & 27. Statistics based on population age between 15 and 64 years and excludes the agricultural informal sector employment.

[622]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 52.

'self-employed',[623] but another reason may be because of more widespread minimum wage non-compliance in informal economies.[624] More often than not, formal economy workers earn more[625] than informal workers. Informal workers "face higher risks, are less likely to enjoy economic opportunities and legal protections and are less able to exercise economic rights and collective voice".[626] The year on year decrease of 18% in the informal sectors employment compared to the 8,1% in the formal sector, due to COVID-19, indicates the vulnerability of the informal sector employment.[627]

Internationally there is an undertaking to extend social protection coverage of minimum wage by facilitating workers' the movement of from the informal to the formal economy,[628] which may hold beneficial results in terms of compliance with minimum wage. The year 2020 will most likely be remembered for the effect of the COVID-19 virus on the global sphere where everyone was affected in some form either directly or indirectly. The subsequent section of this chapter considers the influence of COVID-19 on the South African labour market and the SANMW.

3.1.2 The effect of the Coronavirus on the South African labour market

The Coronavirus pandemic (hereafter referred to as the pandemic) is the worst global crisis since the Second World War.[629] The pandemic occurred during a period characterised by an already weak South African economy with real GDP growth of

---

[623]ILO "Minimum Wage Policy Guide" *ILO* 32.

[624]56.

[625]Altman "Formal-Informal Economy Linkages" *HSRC Repository* 21; ILO "Women and Men in the Informal Economy: A Statistical Picture" (2002) *ILO* *14* <https://www.wiego.org/sites/default/files/publications/files/ILO-Women-Men-Informal-2002.pdf> (accessed 22-12-2018); Chen (2012) *WIEGO Working Paper* 20.

[626]Chen (2012) *WIEGO Working Paper* 20; ILO "Women and Men in the Informal Economy: A Statistical Picture" *ILO* 14.

[627]Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 1.

[628]See The Transition From the Informal to the Formal Economy Recommendation, 2015, no. 204, the occurrence of workers moving from the informal economy to the formal economy forms part of a phenomenon called formalization and it aims to offer workers the benefits and protections of the formal economy. Chen (2012) *WIEGO Working Paper* 15.

[629]ILO "ILO Monitor: COVID-19 and the World of Work. Third edition: Updated estimates and analysis" (2020) *ILO* 2 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_743146.pdf> (accessed 15-10-2020).

0.3% and 0.9% for 2019 and 2020.[630] The South African government implemented a nationwide lockdown to mitigate the impact of the pandemic.[631] Nonetheless, the pandemic resulted in a GDP decline of 3.6% according to optimistic calculations and 6.4% according to more pessimistic calculations.[632] The economic effects of this pandemic will be long-lasting, and therefore it is necessary to take it into account when considering the South African minimum wage framework.

The pandemic and the resultant lockdown have created a scenario where certain sectors are better off than others because they were operational and functioning during lockdown while others were not. Globally, the services sector (wholesale and retail trade, repair of motorised vehicles) and the manufacturing sectors were impacted the most detrimentally in terms of economic output.[633] Human health, social work activities, education, utilities, public administration, defence and compulsory social security were the global sectors the least affected by the pandemic in terms of economic output.[634]

---

[630]Arndt C, Davies R, Gabriel S, Harris L, Makrelov K, Modise B, Robinson S, Simbanegavi W, Van Seventer D & Anderson L "Impact of Covid-19 on the South African Economy: An Initial Analysis" (2020) 111 *SA-TIED Working Paper* 1 1.

[631]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 16. Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 7 3.

[632]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 19. Also see Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 2.

[633]ILO "ILO Monitor: COVID-19 and the World of Work. Third edition: Updated estimates and analysis" *ILO* 6. UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 19, states that; "the losing sectors include textiles, glass products, footwear, education services, catering and accommodation (which contains tourism as per the United Nations System of National Accounts classification), beverages and tobacco sectors".

[634]ILO "ILO Monitor: COVID-19 and the World of Work. Third edition: Updated estimates and analysis" *ILO* 7. UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 19, states that the sectors that were better off than other sectors are considered essential sectors that include the health sector, the food and agriculture sector, financial and insurance service sector and telecommunication sector. Also see year on year employment losses in specified industries. Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 6.

The most at-risk sectors of the South African economy are the service and agriculture sectors because they are the most driven by consumption spending.[635] The pandemic caused income falls resulting from the labour market adjusting to the pandemic. Low skilled workers were the most affected by income falls and increased already excessive, income inequality in South Africa.[636] Decreasing income affects consumer spending that, in turn, reduces the demand for goods and services.[637] Strauss et al predict that a 10% initial once-off shock to final demand for goods and services result in 1.77 million jobs at long-term risk for being affected by the pandemic in the South African context.[638] The economic decline associated with the pandemic affected the South African labour market where 47 082 people lose their jobs in an optimistic scenario, and 80 712 people lose their jobs according to the pessimistic scenario in 2020.[639]

The role of minimum wage and other legislative protective measures may be especially important during and after the pandemic because vulnerable low wage workers may be most affected by the pandemic.[640] Ensuring workers (with consideration of their dependents) have access to minimum wage is important for

---

[635]Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 4.

[636]Globally the pandemic resulted in growing inequality and there is indication that low skilled vulnerable workers were the most adversely effected by the pandemic. Fana M, Torrejón Pérez S & Fernández-Macías E "Employment Impact of Covid-19 Crisis: From Short Term Effects to Long Terms Prospects" (2020) 47 *J Ind Bus Econ* 391 392. UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 20. Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 2 & 4. Only 87,3% of all employed persons indicated that they received salaries for the 3rd quarter of 2020. Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 10.

[637]Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 2.

[638]Jobs at risk means jobs that "may not be "lost" permanently when an economic shock hits an economy. Moreover, the labour market will adjust through other mechanisms in addition to outright job losses, such as furloughs, reduced hours, pay cuts, and so on", Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 4.

[639]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 19.

[640]Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union Brussels, 2020.

sustainable and inclusive economic recovery.[641] The South African government introduced certain measures as part of a stimulus package to mitigate the negative effects of the pandemic on the economy. One such measure applicable to the labour market is the Temporary Employee/Employer Relief Scheme (TERS) that expands entitlement to (UIF) benefits and assists employers to pay their employees for three months.[642] TERS pays a percentage of the employee's salary based on a determined sliding scale where the highest earners receive up to 38% and lowest earners up to 60% of their salaries with the minimum corresponding with the level of the SANMW at R3 500 per month.[643]

According to Strauss and others, South Africa as a developing nation may have a more static labour market with more traditional employment and business practices with possibly weak technological innovation and a lack of technological sophistication in the production structure.[644] The pandemic in the context of the fourth industrial revolution has forced nations to become more digital in order to remain operational (e.g. platform work).[645] Digitalisation may hold enforcement challenges and requires adjusted enforcement practices, see chapter 5.4.1. The pandemic also forced the South African labour market to become more elastic and robust in a relatively short time to stay economically viable.[646]

---

[641]Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union Brussels, 2020.

[642]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 47. Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 20. Another relief measure is the disaster management fund that applies to businesses that close temporarily because of the pandemic. It offers a flat rate equal to the SANMW to each employee for a maximum period of three months.

[643]UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" *UNDP* 51. Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 20.

[644]Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 6.

[645]See World Economic Forum "Strategies for the New Economy Skills as the Currency of the Labour Market" (2019) *World Economic Forum* <http://www3.weforum.org/docs/WEF_2019_Strategies_for_the_New_Economy_Skills.pdf> (accessed 11-10-2020).

[646]Changing work practices to work remotely is indicative of the changes in the labour market due to the COVID-19 pandemic. See Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 9.

Technological transformation, development and innovation are important because it plays a central role in economic growth.[647] It opens new opportunities, to previously unattainable markets and labour practices.[648] The shift from traditional commerce to e-commerce during the pandemic is an example of technological transformation into new markets. The shift from traditional onsite labour practices to remote working is an example of changing labour practices.[649] The elasticity of the labour market through the increased use of technology may naturally have occurred in the South African labour market over a long period. However, the pandemic may accelerate this occurrence because the labour market has to adjust to the pandemic in order to stay operational.

With the introduction to South African minimum wages as backdrop, the following part of this study focusses on international minimum wage compliance instruments adopted by South Africa.

3.2 South Africa: Ratified International legal measures and the Constitution

Out of 189 ILO conventions, South Africa has ratified 27 ILO conventions, consisting of eight out of eight fundamental conventions, two out of four governance conventions and seventeen out of 177 technical conventions. South Africa has ratified the following conventions which have reference to minimum wage compliance, as considered within the scope of this thesis:

- the Minimum Wage Fixing Convention, 1928, no. 26.
- the Labour Inspection Convention, 1947, no. 81.
- the Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87.
- the Right to Organise and Collective Bargaining Convention, 1949 no. 98.

---

[647]Çalışkan (2015) *Procedia* 649-650. Also see Mellet A "The role of technology in the economic growth of South Africa: The case of frequency allocations to cellular operators" (2007) 3 *J Trans Res S Africa* 351.

[648]"... e-commerce made on Internet; the dimensions of commerce have changed. The producers and consumers could meet with each other in international markets through e-commerce and make commerce. Technological advances develop competition among nations", Çalışkan (2015) *Procedia* 653.

[649]See the work location of workers in the South African labour market. Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" *Stats SA* 9.

- the Equal Remuneration Convention, 1951, no. 100.

An overview of each of these conventions is provided in chapter 2.3. South Africa has ratified 50% of the conventions that apply to the compliance elements of this study. To bring this number of South African ratifications into perspective, one must consider global ratifications of these conventions, particularly of developing and emerging nations in Africa. To this end, table 1 (see chapter 2.3.1.1) should be utilised.

From the nations considered in table one, South Africa has one of the lowest ratified conventions applicable to this study. The only African nation that ratified less of the applicable conventions of this study is Botswana. India, part of BRICS, has also ratified fewer than South Africa.

Numerous African nations have ratified more of the relevant conventions than South Africa has. Against this background, South Africa may be able to ratify additional conventions, which may promote national labour standards, especially in compliance with minimum wage. As indicated in chapter 2.3.1.1, South Africa may be one of Africa's leaders in legislative and economic development, which arguably reiterates South Africa's ability and responsibility to ratify more conventions.

The South African Constitution is considered the cornerstone of the South African democracy, and it sustains the core values of human dignity, equality and freedom, applicable to all people in South Africa.[650] Specific provision to promote equality through "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".[651] "Everyone is equal before the law and has the right to equal protection and benefit of the law".[652] International law is important in the South African context as section 39 of the South African Constitution places an obligation on a court, tribunal or forum to consider international law in the interpretation of the Bill of Rights.

---

[650]Section 7 (1) The Constitution of the Republic of South Africa, 1996.

[651]Section 9 (2) The Constitution of the Republic of South Africa, 1996.

[652]Section 9 (1) The Constitution of the Republic of South Africa, 1996.

The right to dignity is further elaborated on in the South African Constitution in stating that everyone has inherent dignity and the right to have their dignity respected and protected.[653] Davidov states that: "[R]espect for the dignity of the worker as a human being dictates that human labour should not be sold for less than a certain minimum. The idea that labour should not be regarded merely as a commodity or article of commerce". The SANMW may be seen as a method by which the constitutional values of dignity, equality and freedom can be promoted and protected while advancing fair labour practices.

The South African Constitution makes specific provision for labour relations in section 23. Accordingly, everyone has the right to fair labour practices. The rights of workers, employers, trade unions and employers' organisations are protected as follows: Every worker has the right to join or form a trade union, to participate in activities and programmes of a trade union and to strike.[654] Excluding the right to strike, every employer is ensured the same rights.[655] Every trade union and employers' organisation has the right to:

a) "determine its own administration, programmes and activities;
b) to organise; and
c) to form and join a federation".[656]

Although national legislation may be enacted to regulate collective bargaining, the Constitution protects the right of trade unions, employers' organisations and employers to engage in collective bargaining.[657] The Basic Conditions of Employment

[653]Section 10 The Constitution of the Republic of South Africa, 1996.

[654]Section 23 (3) The Constitution of the Republic of South Africa, 1996.

[655]Section 23 (3) The Constitution of the Republic of South Africa, 1996.

[656]Section 23 (4) The Constitution of the Republic of South Africa, 1996.

[657]Section 23 (5) of The Constitution of the Republic of South Africa, 1996, "legislation may limit a right in this Chapter, the limitation must comply with section 36(1)". Section 23 (6) of The Constitution of the Republic of South Africa, provides that union security arrangements contained in collective agreements may be recognised by national legislation subject to possible legislative limitation in accordance with Section 36(1) of The Constitution of the Republic of South Africa, 1996.

Act of 1997 (hereafter referred to as the BCEA) and the LRA, among other things, are utilised to give effect to section 23 of the South African Constitution.

Subject to the limitations of section 36, the Constitution places an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[658] From the recognition of South Africa as a notoriously unequal society with huge income disparities in the national labour market, and noting "the need to eradicate poverty and inequality" along with the state's constitutional obligation to respect, protect, promote and fulfil the right to fair labour practices, the SANMW was developed.

The legislative basis of the SANMW will be considered in the subsequent sub-chapter.

3.3 The South African National Minimum Wage

With the South African socio-economic context, together with the traditional South African approach towards minimum wages in mind, a systematic overview of the SANMW will follow in line with the elements of this study.

To fully comprehend and appreciate the provisions of the NMWA and what it intends to achieve, its purpose should be considered. Its purpose is to advance economic development and social justice by:

a) "Improving the wages of lowest paid workers;
b) protecting workers from unreasonable low wages;
c) preserving the value of the national minimum wage;
d) promoting collective bargaining; and
e) supporting economic policy".[659]

To have any reasonable chance of realising the NMWA's purpose, there has to be compliance with the legislative framework underlying the NMW. The legislative framework underlying the NMW will now be considered.

---

[658]Section 7 (2) & (3) The Constitution of the Republic of South Africa, 1996.

[659]Section 2 NMWA.

3.3.1 Coverage of the South African National minimum wage

The NMW is by no means intended to represent a level of wage associated with a decent or living wage;[660] it is merely intended to establish a wage floor.[661] The national minimum is superior in that it takes "precedence over any contrary provision in any contract, collective agreement, sectoral determination or law, except a law amending the Act".[662] The NMWA confirms the NMW role as a wage floor because it must be included as a term in a workers' contract except where such contract, collective agreement, or bargaining council agreements or law provides a more favourable wage to the worker.[663] In other words, workers may receive wages higher than the SANMW (general minimum wage) but not lower, which corresponds to the international standard mentioned in chapter 2.4.1.

Subject to certain exclusions, the NMWA applies to all workers[664] and employers[665] , and the NMW cannot be waived, which ensures optimal coverage.[666] The NMWA defines worker to mean "any person who works for another and who receives, or is entitled to receive, any payment for that work".[667]

---

[660]The working poverty line is R4317, minimum wage beats sectoral stipulations; Ensor L "Department Sticking to its Guns on Sectoral Determinations" *BusinessDay* (28-01-2019) <https://www.businesslive.co.za/bd/national/2018-04-03-department-sticking-to-its-guns-on-sectoral-determinations/> (accessed 10-9-2019).

[661]National Minimum Wage Research Initiative "National Minimum Wage in South Africa: The Basics: Fact sheet 1" *NMW-RI*. The SANMW level was determined on the basis of the following considerations: "the wage distribution in South Africa; poverty lines and a living wage; employment effects (particularly on small businesses); effects on youth employment; and affordability", National Minimum Wage Panel *A National Minimum Wage for South Africa* 61.

[662]Section 4(6) NMWA.

[663]Section 4(7) NMWA.

[664]Section 3 & 4(4) NMWA, "every worker is entitled to payment of a wage in an amount no less than the national minimum wage".

[665]Section 3 & 4(5) NMWA No. 9 of 2018, "every employer must pay wages to its workers that is no less than the national minimum wage".

[666]Section 4(6) NMWA.

[667]Section 1 NMWA.

Provision is made to exclude members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.[668] Also, the NMWA does not apply to volunteers, being "a person who performs work for another person and who does not receive or is not entitled to receive, any remuneration for his or her services".[669] A significant amount of care-work is provided by non-governmental organisations (NGOs) and non-profit organisations (NPOs).[670] The care-work sector is underfunded, resulting in extremely low wages where "volunteers and workers subsidise the cost of these services through low-wage or no-wage work".[671]

The introduction of the SANMW included reduced minimum wage rates for certain workers (e.g., domestic workers). Internationally some nations have similarly opted for differentiated rates for certain sectors such as agricultural and domestic workers.[672] The NMWA provides for a temporary reduced minimum wage rate for farm workers,[673] domestic workers[674] and for workers employed in the expanded public works programme (hereafter referred to as the EPWP).[675] Workers who

[668]Section 3(1) NMWA.

[669]Section 3(2) NMWA.

[670]National Minimum Wage Panel A National Minimum Wage for South Africa 77.

[671]National Minimum Wage Panel A National Minimum Wage for South Africa 77.

[672]23.

[673]Schedule 1(2)(a) NMWA, according to Schedule 1 (3) a farm worker "means a worker who is employed mainly or wholly in connection with farming or forestry activities, and includes a domestic worker employed in a home on a farm or forestry environment and a security guard employed in the private security industry in terms of the Private Security Industry Regulation Act, 2001 (Act No. 56 of 2001)".

[674]Schedule (2)(b) NMWA, according to Schedule 1 (3) a domestic worker "means a worker who performs domestic work in a private household and who receives, or is entitled to receive, a wage and includes; a gardener, a person employed by a household as a driver of a motor vehicle; a person who takes care of children, the aged, the sick, the frail or the disabled; and domestic workers employed or supplied by employment services".

[675]Schedule 1(2)(c) NMWA, according to Schedule 1 (3) EPWP: "means a programme to provide public or community services through a labour-intensive programme determined by the Minister in terms of section 50 of the BCEA and funded from public resources".

perform work in terms of learnership agreements are also remunerated differently to the NMW rate.[676] The various differentiated rates are considered in chapter 3.3.2.

The reduced NMW rates were utilised as a transitional measure to facilitate a gradual introduction of the NMW for vulnerable sectors.[677] Agricultural and domestic workers are considered especially vulnerable because many workers earn excessively lower wages than workers in other sectors or industries. During the formulation of the NMWA, 79.9% of domestic workers and 70.5% of workers in agriculture, earned below R 2,500.00 per month.[678] In comparison, 16,2% of workers in the electricity, gas and water supply industry and 13,3% of workers in the mining and quarrying industry earned below the corresponding amount.[679]

During the formulation of the NMWA, 90.7% of domestic workers and 84.5% of agricultural workers earned below R 3.500 per month.[680] In comparison, 54.6% of construction workers and 48.2% of wholesale and retail workers earned below the same amount per month.[681] Therefore, the domestic and agricultural sectors have an overwhelming majority of workers earning below the NMW threshold with an excessive disparity of these workers' wage level to the NMW threshold.

The EPWP is a South African Government initiative that responds to the high unemployment and poverty rates in South Africa. The initiative aims to; temporary alleviate unemployment by providing "short-term, low-paid, labour-intensive work opportunities".[682] Learnership agreements are typically aimed at the youth;

---

[676]Schedule 1(2)(d) NMWA, according to Schedule 2 (1) of the NMWA an allowance means; "the amount of money paid or payable to a learner in terms of regulation 3 of the Sectoral Determination 5: Learnership made under the Basic Condition of Employment Act, published in Government Notice 519 of 15 June 2001 as amended by Government Notice R.234 of 15 March 2011", Schedule 2 (1) of the NMWA describes the learner concept as a "learner who has concluded a learnership agreement in terms of section 17 of Skills Development Act, 1998 (Act No. 97 of 1998); and includes apprentice".

[677]National Minimum Wage Panel A National Minimum Wage for South Africa 58.

[678]National Minimum Wage Panel A National Minimum Wage for South Africa 39.

[679]39.

[680]39.

[681]39.

[682]51.

individuals between the ages of 18 and 29 years.[683] Learnership agreements aim to promote the employment of these individuals as the youth is disproportionally affected by unemployment and typically have low labour absorption and high unemployment in comparison to other individuals in the labour market.[684]

A degree of flexibility is provided for coverage of the SANMW. An application may be made for an exception from paying the NMW.[685] The Minister of Labour must, after consulting NEDLAC and where appropriate after consulting the South African National Minimum Wage Commission (hereafter referred to as the SANMWC) determine the form and manner[686] and the publication of data on exceptions.[687] In terms of the form and manner of exceptions, the Minister of Labour may make regulations that include:[688]

a) the exception application procedure,
b) the information that must be submitted with an exemption application,
c) the "obligations on employers to consult with employees or trade unions concerning an exemption application",[689]
d) the criteria that must be considered in the evaluation of exemption applications,
e) the time in which an exemption application should be made and
f) the time in which a decision must be reached on an exemption application.

Granted exceptions must specify the exception period (not longer than one year), the wage rate that the employer is required to pay the worker, and any other relevant

---

[683]"Weak job growth for young people compared with older workers has been a strong feature of the South African labour market since the 2008 global financial crisis." Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 8.

[684]National Minimum Wage Panel A National Minimum Wage for South Africa 52.

[685]Application for exemption may be made in the prescribed form and manner by an "employer or an employers' organisation registered in terms of section 96 of the Labour Relations Act, or any other law, acting on behalf of a member" Section 15 (1) NMWA.

[686]Section 16(1)(a) NMWA.

[687]Section 16(1)(b) NMWA.

[688]Section 16(1)(a) NMWA.

[689]Section 16(1)(a)(iii) NMWA.

condition may also be included.[690] The Minister of Labour may delegate or assign powers or duties arising out of the application for exception.[691]

In December 2018 the Minister of Labour published the National Minimum Wage Regulations. These regulations determine that exemption may only be granted if the delegated authority is satisfied that:

a) "the employer cannot afford to pay the minimum wage; and
b) every representative trade union representing one or more of the affected workers has been meaningfully consulted or, if there is no such trade union, the affected workers have been meaningfully consulted".[692]

In satisfying the non-affordability requirement in the exemption process, a commercial, financial decision process is utilised in schedule 1 of the National Minimum Wage Regulations, 2018.[693] In consulting with the union representative or affected workers, the employer must provide the bargaining council, union or if there is none, the affected workers with a copy of the exemption application to be lodged.[694] This requirement promotes transparency during the exemption process. The decision regarding the exemption application must be published on the National Minimum Wage Exemption System.[695]

An additional exemption application requirement is that the employer (applicant) must be compliant in terms of applicable statutory payments that promote general legislative compliance.[696] There are certain thresholds below which no exception may

[690]Section 15(2) NMWA. Also see section 6 National Minimum Wage Regulations, 2018.

[691]"Excluding the power to make regulations, in accordance with the provisions of section 85 of the Basic Conditions of Employment Act", Section 15 (3) NMWA.

[692]Section 2(3) National Minimum Wage Regulations, 2018.

[693]Section 2(4) & schedule 1 National Minimum Wage Regulations, 2018.

[694]Section 2(5) National Minimum Wage Regulations, 2018.

[695]In the case of refusal of exemption reasons therefore must also be published. Section 2 (8) & (9) National Minimum Wage Regulations, 2018.

[696]Section 2(10) National Minimum Wage Regulations, 2018.

be granted. During this research, the exempted employers were not allowed to pay their workers below a 90% threshold of the SANMW.[697]

Once exemption has been granted, a copy of the exemption notice must be displayed at the workplace, and a copy thereof should be given to representative trade unions, each worker requesting a copy, and the applicable bargaining council.[698] The display of the exemption notice ensures that stakeholders affected by the exemption are informed of the particulars of the exemption. The exemption notice does not necessarily mean its application is guaranteed for its duration as it may be withdrawn under certain circumstances.[699] An online NMW exemption system is established and managed by the Department of Labour (hereafter referred to as DOL).[700] A further responsibility of the DOL is to publish an annual report that includes information about exceptions.[701]

Awareness of the NMW is promoted through public involvement in the annual review process of the NMW.[702] The South African labour administrative system provides the operational framework for public consultation, the functioning of the SANMWC and the review process. Inefficiencies in the labour administrative framework may detrimentally affect the various workings in its operational framework. The NMW (amended NMW) is then published in the Government Gazette.[703] The NMW should also form part of the employment contract that should be supplied to the employee at commencement of employment.[704]

---

[697]Section 2(7) National Minimum Wage Regulations, 2018.

[698]Section 4 National Minimum Wage Regulations, 2018.

[699]Section 5 National Minimum Wage Regulations, 2018.

[700]Section 6 National Minimum Wage Regulations, 2018.

[701]Section 6(5) National Minimum Wage Regulations, 2018.

[702]Section 6(2) NMWA.

[703]Section 6(5) & (6) NMWA.

[704]Section 4(7) NMWA. Also see Section29 (f) BCEA.

3.3.2 Determination of the South African National minimum wage

The NMWA determines that a wage is an amount payable in money for ordinary working hours and it excludes:

a) "any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a sectoral determination;
b) any payment in kind including board or accommodation, unless specified otherwise in a sectoral determination;
c) gratuities including bonuses, tips or gifts; and
d) any other prescribed category of payment".[705]

These exclusions are necessary to protect the value and integrity of the received wage by prohibiting its erosion. As indicated in chapter 3.1, the SANMW came into effect in January 2019 and, in general, was determined at a monetary value of R20 per ordinary hour worked.[706] The NMWA[707] established reduced minimum wage rates as follows:

a) farm workers at R18,
b) domestic workers at R15,
c) workers employed in the extended public works programme at R11, and
d) workers who have concluded learnership agreements at the allowance rates established in terms of schedule 2 of the NMWA.

Besides the reduced minimum wages for these categories of workers, cognisance should be taken of the ad hoc employers granted exemption from the NMW. In effect, the NMWA provides a framework for numerous reduced minimum wage determinations for certain sectors, industries, or employers that may be regarded as vulnerable or susceptible to increases in labour cost that the SANMW may represent.

---

[705]Section 5(1) NMWA.

[706]Schedule 1(1) NMWA.

[707]Schedule 1(2) NMWA.

There is the threat that workers who work limited working hours will struggle to obtain the true value associated with the higher wage (SANMW). To counteract this threat the BCEA ensures minimum working hours. An employee or worker paid less than the threshold,[708] and works less than four hours per day, must be paid the hourly SANMW rate for a minimum of four hours work a day.[709]

Another threat to the integrity and value of the SANMW is where employers attempt to reduce working hours as a measure to offset the higher wage (SANMW). To ensure that workers truly receive the value associated with the SANMW, employers cannot unilaterally amend wages, working hours, or other employment conditions connected with the implementation of the NMW.[710]

Contextualisation is necessary to obtain a better understanding of the SANMW determination and the rationale behind it. The R3 500.00 per month level of the SANMW, consideration should be given to relevant wage figures during the development period of the SANMW. Based on data calculations of 2014, the monthly mean wage stood at R10 634.00, and the median wage stood at R4 485.00.[711] The large discrepancy between average and median wage is indicative of the excessive income inequality in South Africa. High-income inequality may result in a higher mean or average wage, that may not represent the majority of wage earners in the labour market. Consequently, South Africa and other countries with high-income inequality may utilise the median wage as a comparative benchmark for determining the NMW, as it may be more representative of the majority of wage earners.[712]

---

[708]In terms of the threshold determined by section 6(3) of the BCEA. At the time of this research the threshold was R205 433.30 per annum, GN R531 in GG 37795 of 1-06-2014 3.

[709]Section 9A BCEA.

[710]Section 4(8) NMWA. Any unilateral changes in this context, will constitute an unfair labour practice.

[711]Agricultural and domestic workers are excluded from these calculations because they are exceptionally low wage sectors and by omitting these sectors, an arguably more contextualised figure is produced that may be more in line with wages in the labour market, formal and informal workers are included in the figures which are hourly adjusted for 45 hours per week multiplied with 4.3 weeks per month. National Minimum Wage Panel *A National Minimum Wage for South Africa* 39.

[712]DPRU & CSDA (2016) *DPRU Working Paper* 42.

The following figures provide some context to the minimum wage level in South Africa: "On average, the lowest SD (sectoral determination) wage across sectors is R2 522 while the average highest SD wage across sectors is R3 624".[713] On average, the lowest BC (bargaining council) minimum wage across industries is 3 284,83 Rand while the average highest BC wage across industries is R10 670.97, per month.[714] A 2015 ILO publication, calculated a housing based living wage at R10 224 per month.[715]

As mentioned, the SANMW is not intended to represent a living wage; however, the level of a national living wage should not be disregarded as it is of great importance to workers and in the context of the holistic wage hierarchy of South Africa. Figure 5 considers the SANMW during its development period concerning median and mean wage in various nations that include, but is not limited to, emerging nations.

Figure 5 should be considered as follows; a value of one is given to both the mean and median wage, respectively. Minimum wage rates[716] are then illustrated with the value of the mean and median wages. Thus, a minimum wage with a low value, in relation to one can be interpreted as having a considerable discrepancy between the levels or the NMW and mean and, or median wages and this principle applies *vice versa*.

[713]DPRU & CSDA (2016) *DPRU Working Paper* 42.

[714]Figures are representative of private sector bargaining councils. DPRU & CSDA (2016) *DPRU Working Paper* 157.

[715]ILO "Towards a South African National Minimum Wage" *ILO* 24, the housing based living wage is based on a family being able to afford a low-cost house where 33.33% of total monthly household income is allocated towards bond repayments. The average low-cost housing in informal settlements is R323 000. These calculations come to a figure of R10 224 per month which is then representative of the housing based living wage.

[716]National minimum wage rates were utilised for the purpose of this comparison.

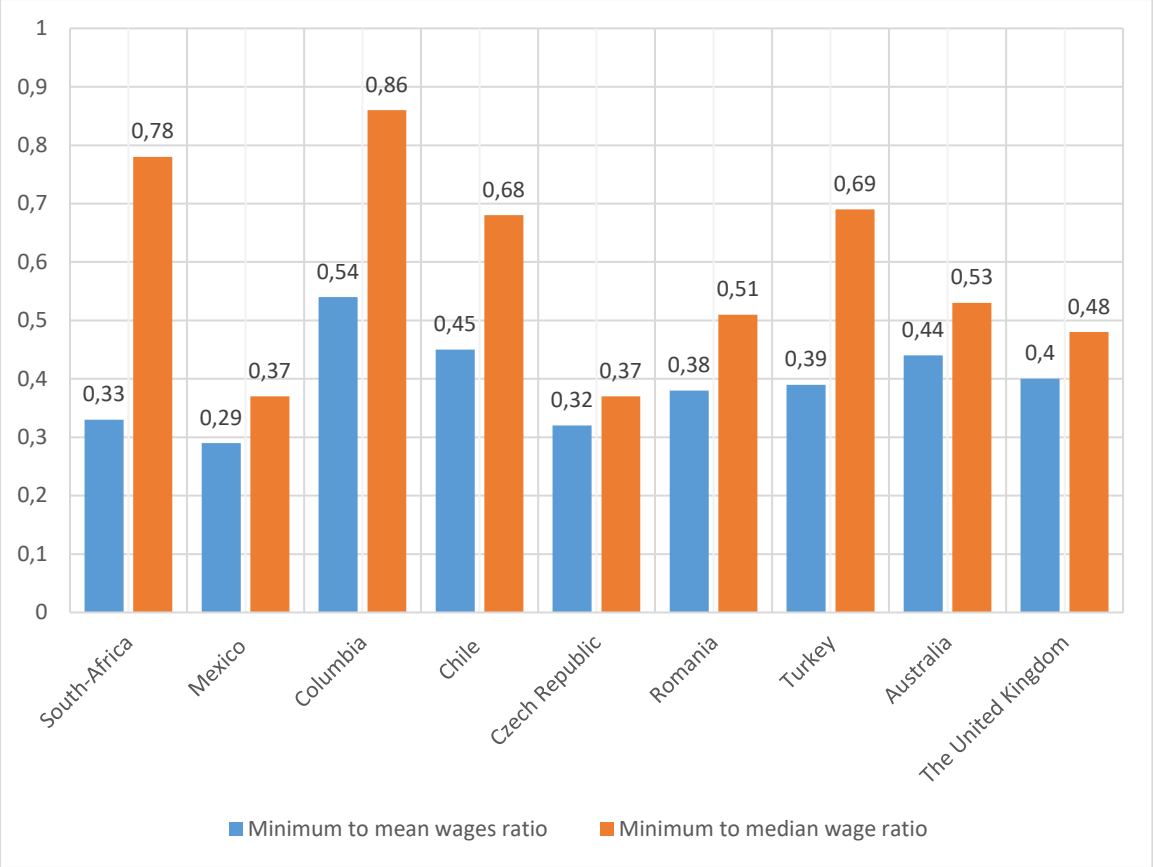


Figure 5: Minimum to mean and median wage ratios in selected nations (Compiled by the author using OECD data from 2014)[717]

From figure 5, it is evident that the SANMW is determined at a level well within global minimum wage standards. Mexico and the Czech Republic are the only nations in figure 5 that have a weaker minimum to mean wage ratio than South Africa. The rest of the nations in the illustration all have stronger minimum to mean wage correlation.

Developing nations tend to have higher minimum to median (also called the Kaitz index)[718] ratios than developed countries, which is probably because developing nations have a substantial low-income population in comparison to developed

[717]South African figures calculated using SANMW of R3 500.00 per month, South African mean monthly wage of R10 634.00 and a median South African wage of R4 485.00 as referred to in chapter 3.3.2; OECD.Stat "Minimum Relative to Average Wages of Full-Time Workers" (2020) <https://stats.oecd.org/Index.aspx?DataSetCode=MIN2AVE> (accessed 24-4-2020).

[718]ILO "Global Wage Report 2016/17: Wage Inequality in the Workplace" *ILO* 27.

nations.[719] A small group earning high incomes increase the mean wage of the country substantially compared to the median wage, which is a more accurate reflection of the majority of wage earners in South Africa.[720] For this reason, median wages generally represent a more accurate representation of workers in the middle of the income distribution in developing countries.[721] Developing nations usually have minimum to median wage ratios between 35% to 60% of the median wage.[722] The South African figure (78%) is higher than these figures for developing countries not necessarily because of a high NMW but rather because of a relatively low median wage level.

A noteworthy aspect illustrated in figure 5, is the extent of the discrepancy between the minimum wage to mean and median ratios in South Africa compared to other nations. The other nations in figure 5 have more modest discrepancies between the minimum, mean and median ratios. This discrepancy is indicative of the vast inequality in the labour market, where there is a considerable difference between the level of minimum wage and wages higher up in the wage hierarchy. Figure 5 indicates that apart from Chile, developed nations,[723] Australia and the UK have relatively modest differences between minimum to mean and median wage. This indicates a more equally distributed wage hierarchy in the labour market compared to developing nations.

When deliberating the SANMW level, it is also important to emphasise the demands placed on wage earners regarding the number of individuals' dependant on each wage earner. As shown in chapter 1, Finn[724] estimates that a wage earner living in poor household supports an average of 2.65 additional dependents in South Africa. If it is assumed that the wage earner will receive the SANMW, it holds potential in supporting not only the wage earner but also numerous dependents; an aspect that

---

[719]DPRU & CSDA (2016) *DPRU Working Paper* 42.

[720]42.

[721]42.

[722]ILO "Minimum Wage Policy Guide" *ILO* 7.

[723]The categorisation of nations according to ILO "World Employment Social Outlook: Trends 2018" *ILO* 54.

[724]Finn (2015) Wits Working Paper Series 7.

must be kept in mind when reflecting on the level of the SANMW. These factors may warrant the necessity for legal measures (such as the minimum wage) to assist in narrowing the gap between lower end and median and ultimately mean wages. In the rest of this chapter, consideration will be given to the adjustment of the determined SANMW.

3.3.2.1 The adjustment of the South African National Minimum Wage

Before considering the functioning of the NMW determination and adjustment framework in terms of the NMWA, it is necessary to consider the first adjustment made to the NMW.

The reduced minimum wage rates (as considered in chapter 3.3.2) represent temporary transitional measures to assist the adaption of the SANMW. By the temporary nature thereof, the NMWA determines that reduced minimum wages of farmworkers and domestic workers should be reviewed with the intent to adjust these rates to be correlated with, or as close to the NMW as possible.[725] The review must take place within 18 months of the commencement of the NMWA, by the SANMWC following the process as set out in section 6 of the NMWA. The SANMWC must consider the goals as determined in section 7 of the NMWA.[726]

The SANMWC must make recommendations to the Minister of Labour on adjusting the reduced minimum wage rates.[727] Within two years of the commencement of the NMWA and considering the SANMWC recommendations, the Minister of Labour must determine an adjustment of the NMW for farm workers and domestic workers under the section 6-process.[728] The reduced minimum wage rate of workers in the extended public works programme "must be increased proportionately to any adjustment of the national minimum wage as contemplated in section 6".[729]

---

[725]Section 2(a) NMWA.

[726]See Section (2)(a) NMWA.

[727]Section 4(2)(a) NMWA.

[728]Section 4 (2) (b) NMWA.

[729]Section 4 (3) NMWA.

Following the mandate to review the introductory level of the SANMW, the first adjustment of the SANMW was effected on 1 March 2020, together with other minimum wage adjustments, by notice in the Government Gazette.[730] The second adjustment of the SANMW is effected on 1 March 2021, by notice in Government Gazette.[731]

1. The following adjustments were made to the SANMW:

a) From R20.00 per ordinary hour worked, the rate was increased to R20.76 and is set to increase to R21,69.

2. Concerning the reduced NMW rates:

b) from R18.00 per ordinary hour worked for farmworkers, an increase to R18.68 was initially affected that is set to increase further to R21.69,
c) from R15.00 per ordinary hour worked for domestic workers, an increase to R15.57 was initially affected that is set to increase further to R19,09,
d) from R11.00 per ordinary hour worked for workers employed on an EPWP, an increase to R11.42 was initially affected that is set to increase further to R11,93, and
e) workers who have concluded learnership agreements contemplated in (per section 17 of the Skills Development Act of 1998) remain entitled to the allowances contained in schedule 2.[732]

3. Concerning sectoral determinations:

f) adjustment of Sectoral Determination 1: Contract cleaning sector: three different rates are determined based on the specific geographical area of employment[733] and

[730]GN R310 in GG 43026 of 17-2-2020.

[731]GN R668 in GG 44136 of 08-02-2021.

[732]Section 2(d) GN R310 in GG 43026 of 17-2-2020 and Section 2(d) GN R668 in GG 44136 of 08-02-2021.

[733]See Table 1: Minimum hourly rates for contract cleaning employees, GN R310 in GG 43026 of 17-2-2020 23.

g) adjustment of Sectoral Determination 9: Wholesale and retail sector. Numerous minimum wage rates are determined based on the specific geographical area of employment and the respective job description of employees in the wholesale and retail sector.[734]

These adjustments represent modest amounts, but it is important as early adjustments under the new NMWA.

In considering the functioning and adjustment framework of the SANMW, the NMWA provides for the annual adjustment of the NMW.[735] The annual adjustment should be conducted following section 6 of the NMWA that deals specifically with the adjustment and review process[736] and section 7 of the NMWA that deals specifically with the conduct of the annual review.[737] In both sections 6 and 7 of the NMWA, the SANMWC assumes a prominent role. The adjustment and review of the SANMW will be considered before discussing the role and composition of the SANMWC.

The SANMWC has the obligation in section 6 (1) of the NMWA to review the NMW yearly and make recommendations to the Minister of Labour regarding adjustments of the NMW, that "must then commence on a date fixed by the President by proclamation in the Gazette".[738] The review, formulated, in the form of a report, must include "alternative views, including those of the public"[739] about any recommendations regarding adjustments of the SANMW. The SANMWC review of the NMW and its subsequent recommendations for the coming year (as contained in the report) must then be sent to the Minister of Labour on a date determined by the President as a proclamation in the Gazette.[740]

---

[734]See Table 1: Area A and Table 2: Area B in GN R310 in GG 43026 of 17-2-2020 24 & 25.

[735]Section 4 (1) & 6 (1) NMWA.

[736]Section 6 NMWA.

[737]Section 7 NMWA.

[738]Section 6 (1) NMWA.

[739]Section 6 (2) NMWA.

[740]Section 6 (3) NMWA.

If there is disagreement between the Minister of Labour and the recommendations contained in the report of the SANMWC or if there is uncertainty regarding the report, the Minister of Labour may refer (in the prescribed manner) the report with recommendations back to the SANMWC for reconsideration or a request for clarity regarding the recommendations made.[741]

The Minister of Labour must, by a date determined by the President through proclamation in the Gazette: "determine the adjustment to the national minimum wage, and by notice (publication) in the Gazette, amend the national minimum wage".[742] Within seven days of the publication of the amended NMW, the Minister of Labour must table the amended NMW (as set out in schedules 1 and 2 of the NMWA) in Parliament and publish the final report of the SANMWC in the prescribed manner.[743]

In the review of the NMW and in the process of formulating recommendations on adjustments, section 7 of the NMWA[744] determines that the SANMWC must promote:

a) the medium-term targets,
b) the alleviation of poverty and
c) the reduction of wage differentials and inequality.

In respect of the review and recommendations of adjustments, the SANMWC must consider the following factors:

a) "inflation, the cost of living and the need to retain the value of the minimum wage;
b) wage levels and collective bargaining outcomes;
c) gross domestic product;
d) productivity;
e) ability of employers to carry on their businesses successfully;

[741]Section 6 (4) NMWA.

[742]Section 6 (5) NMWA.

[743]Section 6 (6) NMWA.

[744]Section 7 (a) NMWA.

f) the operation of small, medium or micro-enterprises and new enterprises;
g) the likely impact of the recommended adjustment on employment or the creation of employment; and
h) any other relevant factor".[745]

The SANMWC must consider the aims of the NMW as well as a broad range of factors in its review before formulating recommendations to the Minister of Labour. Because of the central role that the SANMWC assumes in determining and adjusting the NMW, it is necessary to consider its composition more thoroughly.

The role of the SANMWC is critical within the framework of the NMWA. The SANMWC is funded from the budget vote of the DOL and may therefore be regarded as a competent body under the ambit of national labour administration as considered in chapter 2.2.2.[746] The SANMWC is composed of members that must be citizens or permanent residents of South Africa.[747] The SANMWC consists of a chairperson as appointed by the Minister of Labour,[748] three members as nominated by organised business,[749] three members nominated by organised community,[750] three members as nominated by organised labour[751] and three independent experts as appointed by the Minister of Labour who are knowledgeable about the labour market and employment conditions.[752] SANMWC membership compilation is balanced to advance diverse interests on equal footing (as example: 3 members of organised labour and three members of organised business).

The three organised community members are the Financial Sector Coalition Campaign, Women's National Coalition, and the South African Youth Council. It may

[745]Section 7 (b) NMWA.

[746]Section 14 NMWA.

[747]Section 9 (2) NMWA.

[748]Section 9 (1) (a) NMWA.

[749]Section 9 (1) (b) NMWA.

[750]Section 9 (1) (c) NMWA.

[751]Section 9 (1) (d) NMWA.

[752]Section 9 (1) (e) NMWA.

be argued that there is a risk that the members of organised community (at least in its current make-up) predominantly represent the interests of workers in relation to the interest of employers or business. This risk may diminish the equal standing of diverse interests in the SANMWC membership compilation, where the interests of workers weigh more than the interest of other stakeholders that may influence decision making.

The Minister of Labour appoints the SANMWC members after consultation with NEDLAC.[753] Members are appointed on a part-time basis[754] for a maximum period of five years with the possibility of reappointment.[755]

Termination of membership may be affected by:

a) the death of a member,
b) resignation, giving three months' notice to the Minister of Labour,
c) "subject to due process of law, the removal of a member from office by the Minister for the following reasons:
   (i) serious misconduct,
   (ii) permanent incapacity,
   (iii) failure to attend three successive meetings without a reasonable explanation; or
   (iv) engaging in any activity that undermines the integrity of the Commission".[756]

The NMWA determines that members of the SANMWC must have a particular ethos. Consequently, members of the SANMWC:

a) "must act impartially when performing any function of the Commission;

[753]Section 10 (1) NMWA.

[754]Members are subject to "terms and conditions prescribed by the Minister in consultation with the Minister of Finance" Section 10 (3) NMWA.

[755]Section 10 (2) NMWA.

[756]Section 10 (4) NMWA. The Commission refers to the South African National Minimum Wage Commission.

b) may not engage in any activity that may undermine the integrity of the Commission; and
c) Must recuse themselves from advising the Minister on any matter in respect of which they have a direct or indirect financial interest or any other conflict of interest".[757]

These provisions are necessary to ensure the integrity and the ethos of the SANMWC through the actions of its members. However, these provisions may be problematic. It is noticeable that provision "b" utilises the auxiliary word "may" in its formation whereas the other provisions use "must" as the auxiliary verb. Some readers, especially someone unfamiliar with the law, that may include SANMWC members, may interpret this utilisation of auxiliary verbs to mean that provision "b" is advisable but ultimately optional. At the very least it may create a degree of uncertainty regarding the compulsory nature invoked by provision "b" which is unfavourable as it may not promote legal certainty and general legislative accessibility. Clarification or rectification may be necessary to create optimal certainty.

Section 10 (5) (a) and (c) of the NMWA that ensures impartiality and the prohibition of conflict of interest by SANMWC members may also be problematic. The rationale for legally prescribing diverse SANMWC membership may be problematic with the requirement of impartiality in performing SANMWC functions.

The NMWA requires a diverse compilation of SANMWC membership categories. Among other, the following categories of members are required; three members of organised business, three members of organised community and three members of organised labour. The rationale behind diverse SANMWC membership is most likely to promote the interests and views of each diverse stakeholder. If members' interests and views were to not play a role in the SANMWC's functioning, the lawmaker would likely not have required diverse membership. Instead, lawmakers would have opted for independent members not part of a membership category.

[757]Section 10 (5) NMWA.

Lawmakers chose the requirement for a diverse compilation of SANMWC members that may give each labour market and market stakeholder equal opportunity to represent their diverse interests in the decision-making process and the SANMWC's functioning. An inclusive approach may result in balanced decision-making that reflects the various stakeholders' interests resulting in decision-making beneficial to all stakeholders.

Underlying the rationale behind diverse SANMWC membership is the presupposition that each SANMWC membership category represents specific and inherent interests that are diverse, unique in the labour market and the general economy. Organised labour represents workers interests, organised community represent community and societal interests, and organised business represents business interest (employers).

From this perspective, it may be problematic to require diverse SANMWC membership premised on each stakeholder promoting certain interests, while simultaneously requiring each SANMWC member to act impartially. In this context, impartiality likely refers to the absence of fear, prejudice or influence. The instinctive and inherent interests associated with each prescribed member category may make impartiality impossible or at the very least difficult. Furthermore, the impartiality requirement undermines the rationale for prescribing a diverse compilation of SANMWC members, representing unique and diverse interests and views, on the one hand, while on the other hand, not acknowledging the very interests represented in the diversity of members by requiring impartiality.

Each member category may have a direct or indirect financial interest in the SANMWC functions. For example, organised labour may have a financial interest in promoting the highest possible wage for workers because that may lead to the appropriation of higher union membership fees. The collection of higher union membership fees may arguably not be the rationale behind the drive for higher wages by organised labour. However, it is a consequence that establishes a financial interest at least. Organised business may have a financial interest in the profitability of business that may result in the promotion of cost-saving measures to be more profitable. Organised community may have a financial interest in maximising worker wages while promoting the lowest possible prices for goods and services.

The functions of the SANMWC are to:

(a) “Review the national minimum wage and recommend adjustments;
(b) investigate and report annually to the Minister on the impact of the national minimum wage on the economy, collective bargaining and the reduction in income differentials and make such information available to the public;
(c) investigate income differentials and recommend benchmarks for proportionate income differentials;
(d) set medium term targets for the national minimum wage within three years of the commencement of this Act; and
(e) advise the Minister on measures to reduce income differentials or any other matter on which the Minister requests the Commission’s advice;
(f) advise the Minister on Sectoral determinations;
(g) advice the Minister on any matter concerning basic conditions of employment; and
(h) perform any such function as may be required of the Commission in terms of any employment law”.[758]

By judging the SANMWC's functions, it is apparent that these functions are far-reaching and may require adequate expertise and resources (financial, technical human, to name but a few) to be successfully fulfilled. The importance of the functions establishes a responsibility on the SANMWC. The fulfilment of this responsibility is fundamentally important for the successful utilisation of the SANMW.

The SANMWC must determine its own rules for the conduct of its meetings, but those rules must require the chairperson to act impartially, and the chairperson must not have a deliberate vote or casting vote. [759] The Minister of Labour must provide the SANMWC with a secretariat and the resources to: [760]

[758]Section 11 NMWA. The Commission refers to the South African National Minimum Wage Commission.

[759]Section 12 NMWA.

[760]Section 13 NMWA.

a) do the administration of the SANMWC,
b) conduct and procure research for the SANMWC and
c) monitor and evaluate the influence of the NMW and reduce income differentials.

Besides the central role of the SANMWC, the Minister of Labour also assumes a fundamental role within the framework of the NMWA. Section 16(2) of the NMWA determines that the Minister of Labour may make regulations that they consider necessary or expedient to be prescribed to achieve the primary objects of the NMWA.[761]

3.3.3 Legal enforcement of the South African National Minimum Wage

The legislative framework for monitoring and legal proceedings in non-compliance with minimum wage is mainly contained in chapter 10 of the BCEA and serves as the legislative basis for both the SANMW and sectoral determinations. The following chapters consider the legislative enforcement framework.

3.3.3.1 Monitoring Compliance with the South African National Minimum Wage

Labour inspectors are utilised as part of the South African minimum wage compliance system. The Minister of Labour appoints labour inspectors. Any person in public service may be appointed as a labour inspector, and any person in the public service or any person appointed as a designated agent of a bargaining council may be appointed to perform a labour inspector's functions.[762] A labour inspector must perform the functions (as contained in Chapter 10 of the BCEA), subject to the direction and control of the Minister of Labour. The subsequent paragraphs consider the functions of labour inspectors.

The functions of a labour inspector are to:

[761]Section 16(2) NMWA. Sections 16 (3) to (5) NMWA, provides guidance in terms of the process of making any regulations as mentioned in Section 16 (2) of the NMWA.

[762]Section 63(1)(b) BCEA.

"promote, monitor and enforce compliance with an employment law by –

a) advising employees and employers of their rights and obligations in terms of an employment law;
b) conducting inspections in terms of this Chapter;[763]
c) investigating complaints made to a labour inspector;
d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders;
e) referring disputes to the CCMA concerning failure to comply with this Act, the National Minimum Wage Act, 2018, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act;
f) appearing on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to in paragraph; and
g) performing any other prescribed function".[764]

From these functions, labour inspectors have an educational and advisory role.[765] They also have the responsibility of ensuring compliance with various legislative measures including sectoral determinations, the BCEA, the EEA[766], the Compensation of Occupational Injuries and Diseases Act,[767] the Occupational Health and Safety Act[768] as well as the NMWA.[769] Consequently, labour inspectors have diverse legislative compliance responsibility. This responsibility requires many components (e.g., quality personnel, support services, leadership and resources) in

[763]Chapter 10 BCEA.

[764]Section 64 (1) BCEA. CCMA refers to the Commission for Conciliation, Mediation and Arbitration.

[765]Section 64 (1) (a) BCEA. Also see; Murahwa B "Monitoring and Enforcement: Strategies to Ensure an Effective National Minimum Wage in South Africa" (2016) 5 *NMW-RI Working Paper Series* 5 <http://nationalminimumwage.co.za/wp-content/uploads/2016/11/NMW-RI-Monitoring-and-Enforcement-Brian-Murahwa.pdf> (accessed 20-1-2019).

[766]EEA.

[767]The Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.

[768]Occupational Health & Safety Act, No. 85 of 1993, see Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B & Steenkamp *A Labour Relations Law: A comprehensive guide* (2015) 64 & Heppell *Minimum Wages* 79 and Murahwa (2016) *NMW-RI Working Paper Series* 5.

[769]The NMWA.

the monitoring framework to work together effectively to fulfil this responsibility effectively.

Labour inspectors must fulfil their functions independently, without any unjust influence. They are barred from performing any of the functions provided for in an "undertaking in respect of which the labour inspector has, or may reasonably be perceived to have, any personal, financial or similar interest".[770] To fulfil their functions, labour inspectors are afforded certain rights considered in the subsequent paragraphs.

The rights of labour inspectors are contained in the BCEA[771] and correlate with the rights assigned to designated agents in the LRA.[772] Thus, labour inspectors' rights will be considered in the text, and the correlating legal provisions of designated agents will be referred to in footnotes.

The BCEA provides various rights and powers to labour inspectors. Section 65 of the BCEA[773] gives labour inspectors the right of entry to monitor and enforce compliance with employment law. A labour inspector may, without warrant or notice, at any reasonable time, enter:

a) "any workplace or any other place where an employer carries on business or keeps employment records, that is not a home; or
b) any place at which any person provides or purports to provide any employment services as defined in terms of the Employment Services Act, 2014 (Act No.4 of 2014)".[774]

---

[770]Section 64 (2) BCEA.

[771]The fundamental rights of labour inspectors are established in section 65, 66, 67 & 68 of the BCEA.

[772]The rights of designated agents are established in schedule 10 of the LRA.

[773]The correlated rights of a designated agent are provided in schedule 10(1), (2), (3) & (4) of the LRA.

[774]Section 65 (1) BCEA. Section 1 of the Employment Services Act, 2015 defines employment services as; ''employment services'' includes the provision of the following services: (a) Advising or counselling of workers on career choices, either by the provision of information or other approaches; (b) assessment of work seekers for— (i) entry or re-entry into the labour market; or (ii) education and training; (c) referring work seekers— (i) to employers to apply for vacancies; or (ii) to training providers for education and training;

Labour inspectors have the right to inspect a workplace without warrant or notice. However, the DOL standard operational plan guidelines stipulate that the labour inspector should notify the employer in writing of the intended inspection. Notice should be given three days before the inspection to ensure that the employer is available and the required documents for the inspection are prepared.[775] Unions often criticise this practice, but it streamlines the inspection process and improves efficiency.[776]

A labour inspector may enter a home or any other place not referred to in the previous paragraphs under the following circumstances:

a) with consent of the owner or occupant or
b) if written authorisation is obtained.[777]

Written authorisation can be obtained by the labour inspector lodging a written application at the Labour Court, stating under oath or affirmation; "the reasons for the need to enter a place in order to monitor or enforce compliance with any employment

---

(d) assisting employers— (i) by providing recruitment and placement services; (ii) by advising employers on the availability of work seekers with skills that match their needs; (e) performing the functions of temporary employment services; and (f) any other prescribed employment service". The correlating legal provision for a designated agent is contained in Schedule 10 (1) of the LRA for which the definition of "workplace" is: (a) "in relation to the public service-

i. for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or

ii. for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace;

(c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place, or places where employees work in connection with each independent operation, constitutes the work-place for that operation;" section 213 LRA.

[775]Cebo K Exploring Factors that Prevent Non-Compliance with the Basic Conditions of Employment Act; Sectoral Determination 9: The Case of Sunflower Retail Store, Western Cape Master's thesis Stellenbosch University (2019) 55.

[776]55.

[777]Section 65 (2) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (2) of the LRA.

law".[778] Private residences present a particular conundrum concerning enforcement in South African but globally and leaves affected workers potentially vulnerable to exploitation. See chapter 3.6.3 and 5.4.1 regarding possible solutions.

Once the labour inspector is at the workplace and if practical to do so, "the employer and a trade union representative must be notified that the labour inspector is present at a workplace and of the reason for the inspection".[779] Section 66 of the BCEA establishes the right of labour inspectors to question and inspect.[780] To monitor and enforce compliance with employment law,[781] a labour inspector may:

(a) "require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on any matter to which an employment law relates, and require that the disclosure be made under oath or affirmation;
(b) inspect, and question a person about, any record or document to which an employment law relates;
(c) copy any record or document referred to in paragraph (b), or remove these to make copies or extracts;
(d) require a person to produce or deliver to a place specified by the labour inspector any record or document referred to in paragraph (b) for inspection;
(e) inspect, question a person about, and if necessary, remove, any article, substance or machinery present at a place referred to in section 65;
(f) inspect or question a person about any work performed; and

[778]Section 65 (3) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (3) of the LRA with the distinction of monitoring or enforcing compliance with a collective agreement concluded in the bargaining council.

[779]Section 65 (4) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (4) of the LRA.

[780]The correlated rights of a designated agent are provided in Schedule 10(5) The LRA.

[781]A designated agent monitors and enforces compliance with a collective agreement.

(g) perform any other prescribed function necessary for monitoring or enforcing compliance with an employment law".[782]

To assist the labour inspector, an interpreter or any other person, reasonably required to assist in conducting the inspection, may accompany the labour inspector.[783] The BCEA places two obligations on employers that may assist a labour inspector in realising the right to question and inspect effectively.

Firstly, every employer must keep a record of numerous particulars of each employee. A record must be kept of the following;[784] every employee's name and occupation, time worked by each employee, remuneration paid to each employee, the date of birth of minor employees, and any other prescribed information. Record entries must be accurate, and no false entries may be made.[785] The employer must safeguard these records for three years from the date of the last entry in the record.[786] A labour inspector may request employee records from the employer to evaluate minimum wage compliance.

Records are important for evaluating the state of compliance of the employer. It is the responsibility of the employer to prove compliance. In any proceedings concerning a contravention of the BCEA, the NMWA or any sectoral determination, the employer must prove:[787]

a) the validity and accuracy of records maintained by them or for them, or
b) compliance with any provision of the BCEA, if they failed to keep any record as required by the BCEA or the NMWA, is relevant to those proceedings.

---

[782]Section 66 (1) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (5) of the LRA. The rights of a designated agent is based on collective agreement and not on employment law, as is the case for labour inspectors.

[783]Section 66 (2) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (6) The LRA.

[784]Section 31 (1) BCEA.

[785]Section 31 (3) BCEA.

[786]Section 31 (2) BCEA.

[787]Section 76 BCEA.

Secondly, an employer must provide the employee with a remuneration invoice on each day the employee is paid. The invoice must contain: [788]

a) employee's name, address and occupation,
b) period for which payment is made,
c) employee's remuneration in money,
d) the amount and purpose of any remuneration deduction,
e) the actual amount paid to the employee[789] and if relevant:
    i) the employee's rate of remuneration and overtime,
    ii) the number of ordinary and overtime for the payment period,
    iii) the hours worked on Sundays and public holidays,
    iv) if an average working time agreement has been concluded then the total number of ordinary and overtime hours worked by the employee in the period of averaging.

Employees are legally entitled to remuneration invoices that labour inspectors may utilise to monitor minimum wage compliance. A further helpful measure is that labour inspectors have the right to require cooperation. A person questioned by a labour inspector must answer all lawful questions to that person's best ability.[790] An answer to a question by a labour inspector may not be utilised in any criminal proceedings, except proceedings about a charge of perjury or making a false statement.[791] A further cooperation requirement is that; "every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a labour inspector to perform the labour inspector's functions effectively".[792]

In utilising the rights and powers afforded to a labour inspector, certain obligations must be satisfied by the labour inspector:

---

[788]Section 33 (1) BCEA.

[789]Section 3 (1) (f) BCEA.

[790]Section 67 (1) BCEA. The correlated rights of a designated agent are provided in Schedule 10(8) of the LRA.

[791]Section 67 (1) footnote of the BCEA. The correlated rights of a designated agent are provided in Schedule 10 (9) of the LRA.

[792]Section 67 (2) BCEA. The correlated rights of a designated agent are provided in Schedule 10 (10) of the LRA.

a) a copy of the authorisation issued by the Labour Court must be produced on request;[793]
b) a receipt must be provided for any object removed;[794]
c) anything removed must be returned within a reasonable period.[795]

Similar to the international standard about confidentiality of information obtained by labour inspectors (see chapter 2.4.3.1) section 90 of the BCEA contains a general confidentiality provision that labour inspectors must obey. It prohibits disclosing information about another person's business or financial affairs while exercising, performing any duty under the BCEA.[796] Nevertheless, this information may be disclosed "in compliance with the provisions of any law –

a) to enable a person to perform a function or exercise a power in terms of an employment law;
b) for the purposes of the proper administration of this Act;
c) for the purpose of the administration of justice".[797]

This provision "does not prevent the disclosure of any information concerning an employer's compliance or non-compliance with the provisions of any employment law".[798] Therefore, an employer's compliance status may be disclosed, which acts as an additional non-compliance deterrent.

The BCEA contains specific provisions against obstruction, undue influence and fraud. Section 92 determines that is an offence punishable by imprisonment to:

a) "obstruct or attempt to influence improperly a person who is performing a function in terms of this Act;

[793]Section 66 (3) (a) BCEA. Schedule 10 (7) (a) & (3) LRA.

[794]Section 66 (3) (b) BCEA. In the case of a designated agent; any record or document removed in terms of subitem (5) (e) Schedule 10 The LRA.

[795]Section 66 (3) (c) BCEA. Schedule 10 (7) (c) The LRA.

[796]Section 90 (1) BCEA.

[797]Section 90 BCEA.

[798]Section 90 (2) BCEA.

b) obtain or attempt to obtain any prescribed document by means of fraud, false pretences, or by presenting or submitting a false or forged document;
c) pretend to be a labour inspector or any other person performing a function in terms of this Act;
d) refuse or fail to answer fully any lawful question put by a labour inspector or any other person performing a function in terms of this Act;
e) refuse or fail to comply with any lawful request of, or lawful order by, a labour inspector or any other person performing a function in terms of this Act;
f) hinder or obstruct a labour inspector or any other person performing a function in terms of this Act".[799]

Any magistrate's court may impose the penalty of imprisonment to a maximum of one year for any successful conviction based on an offence determined in section 92 of the BCEA.[800] These provisions empower labour inspectors to carry out their duties effectively. It also protects the integrity and standing of the profession.

3.3.3.1.1 A reflection of labour inspection in South Africa

According to the 2019/20 Annual Report of the DOL, South Africa had a total of 1264 inspectors.[801] The number of labour inspectors does not necessarily indicate efficient enforcement or compliance. However, it does constitute an important aspect of a minimum wage compliance framework because of the centralised role labour inspectors are often mandated to fulfil by promoting and realising compliance.[802] The

[799]Section 92 BCEA.

[800]Section 93 BCEA.

[801]As on 31 March 2019, RSA Department of Labour *Annual Report 2018/19* (2019) 117 <https://www.gov.za/sites/default/files/gcis_document/201911/labour-annual-report201819.pdf> (accessed 8-6-2020); RSA Department of Labour *2019/20 Annual Performance Plan: Department of Labour* (2019) <https://static.pmg.org.za/DOL_Annual_Performance_Plan_2019-2020.pdf> (accessed 23-5-2020), indicated a total of 1 159 inspectors, that conducted more than 214 946 workplace inspections for the financial year.

[802]See Development Policy Research Unit "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" *National Minimum Wage Research Initiative* 11 & 12.

number of labour inspectors utilised by nations needs to be considered within the appropriate context. To this end, table 2 indicates the size of the labour inspectorate (labour inspectors) relating to employed persons to provide an inspector-employee ratio (hereafter referred to as "ratio") in various countries.

Table 2: Inspector-employee ratio (Compiled by the author 2008 to 2020)

	Number of Inspectors	Employed persons	Inspector-employee ratio
South- Africa (2019)	1264[803]	16,420,268.292[804]	12990.71
Mauritius (2018)	129[805]	536 800.00[806]	4161.24

[803]As on 31 March 2019, RSA Department of Labour *Annual Report 2018/19* 117; RSA Department of Labour *2019/20 Annual Performance Plan* 3 indicated a total of 1 159 inspectors, that conducted more than 214 946 workplace inspections for the financial year.

[804]As at December 2019. CEIC "South Africa Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/South Africa/employed-persons> (accessed 17-4-2020). Also see Strauss et al "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour Market" *ILO* 4.

[805]ILO "ILOSTAT Explorer" (2020) *ILO* <https://www.ilo.org/shinyapps/bulkexplorer46/?lang=en&segment=indicator&id=LAI_INSP_SEX_NB_A> (accessed 18-4-2020).

[806]As at October 2018. CEIC "Mauritius Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/mauritius/employed-persons> (accessed 18-4-2020).

Brazil (2020)	2997[807]	94,552,000.000[808]	31548.88
Chile (2018)	490[809]	8, 773, 836.000[810]	17905.78
Mexico (2018)	723[811]	54, 027, 997.000 [812]	74727.52
Malaysia (2018)	444[813]	14, 937, 100.000 [814]	33642.11
The UK (2017)	938[815]	32, 241, 099.309[816]	34372.17
Australia (2008)[817]	1575[818]	10, 788, 448.300[819]	6849.80

[807]ILO "Brazil" (2020) *ILO* <https://www.ilo.org/labadmin/info/WCMS_114935/lang--en/index.htm> (accessed 17-4-2010); Coslovsky S, Pires R & Bignami R "Resilience and Renewal: The Enforcement of Labor Laws in Brazil" (2017) 59 *L Am Pol Soc* 77 93

[808]As at December 2019. CEIC "Brazil Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/brazil/employed-persons> (accessed 17-4-2020).

[809]ILO "ILOSTAT Explorer" *ILO*.

[810]As at October 2018. CEIC "Chile Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/chile/employed-persons> (accessed 18-4-2020).

[811]ILO "ILOSTAT Explorer" *ILO*.

[812]As at October 2018. CEIC "Mexico Employed Persons" (2020) CEIC www.ceicdata.com/en/indicator/mexico/employed-persons (accessed 18-4-2020).

[813]ILO "ILOSTAT Explorer" *ILO*.

[814]ILO "ILOSTAT Explorer" *ILO*; CEIC "Mauritius Employed Persons" *CEIC*.

[815]ILO "ILOSTAT Explorer" *ILO*.

[816]As at December 2017 CEIC "United Kingdom Employed Persons" (2020) CEIC https://www.ceicdata.com/en/indicator/united-kingdom/employed-persons.

[817]The scarcity on relevant data necessitates the use of data from 2008.

[818]ILO "Figures and Statistics on Labour Inspection Systems" (2010) *ILO* <https://www.ilo.org/labadmin/info/WCMS_141079/lang--en/index.htm> (accessed 04-03-2017).

[819]As at December 2008 CEIC "Australia Employed Persons" (2020) CEIC https://www.ceicdata.com/en/indicator/australia/employed-persons (accessed 17-4-2020).

Table 2 indicates the vast difference in the number of employed persons between various developing nations. These differences may be exacerbated even further by including developed nations, which indicates the importance of considering each nation in context. The total employed persons in South Africa are relatively comparable to that of Malaysia and to a lesser extent Chile. In comparison, South Africa has less employed persons per inspector, even though Chile has substantially less employed persons than South Africa. Theoretically, fewer employees per inspector may provide a beneficial compliance framework. The compliance-responsibility, workload, and pressure may be reduced, enabling inspectors to fulfil their compliance duties better.[820] On the contrary, more employees per inspector may increase responsibilities, workload and pressure resulting in less effective functioning labour inspectors that may ultimately bear negative consequence on compliance.

Mexico and Brazil can be considered as big geographically nations with a substantial number of employed persons. The ratio of labour inspectors to employed persons is large in both Mexico and Brazil, which may present challenges for labour inspectors. The relatively small geographical nation of Mauritius has less employed persons to each inspector because of a smaller group of employed persons and a reasonable group of inspectors. Figure 6 establishes international thresholds of the ratio between inspectors and employed persons.

[820]EPSU "A Mapping Report on Labour Inspection Services in 15 European Countries" (2013) *EPSU* 18 <https://www.epsu.org/sites/default/files/article/files/EPSU%20report%20on%20Labour%20Inspection%20services%20update%202013.pdf> (accessed 23-2-2021).

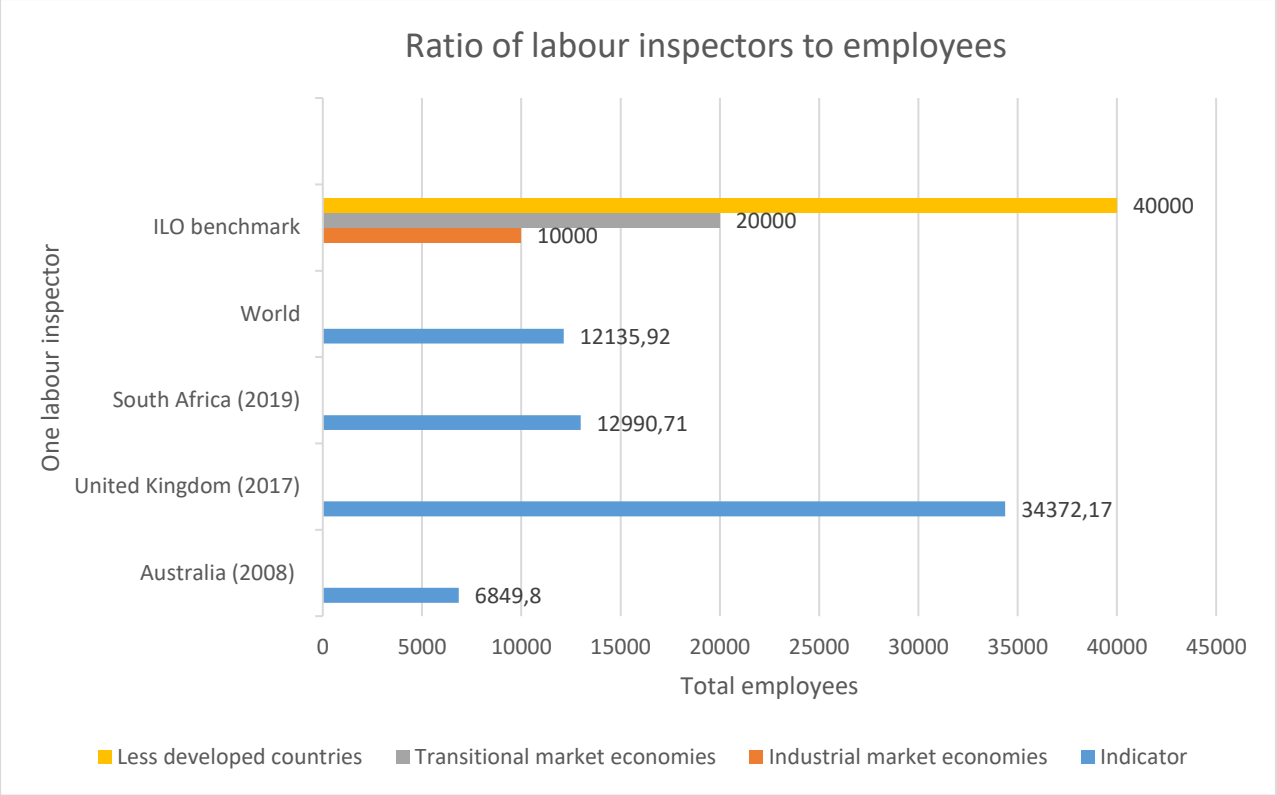


Figure 6: Ratio of labour inspectors to employees (Compiled by the author)[821]

Figure 6 includes international thresholds for the ratio between labour inspectors and employees in countries of various degrees of economic development. There is an indication that the ILO thresholds may be inadequately low, especially in low-income and medium-income countries.[822] With this criticism in mind, the ILO thresholds still help establish a benchmark to evaluate the number of labour inspectors in various nations.

[821]UK: Metcalf D "United Kingdom Labour Market Enforcement Strategy 2018/19" (2018) *Government UK* 67 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf> (accessed 18-4-2020); ILO benchmark: ILO "Strategies and Practice for Labour Inspection" (2006) *ILO* 4 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_297_esp_3_en.pdf> *ILO* (accessed 26-1-2019); World: 8.24 inspectors per 100 000 workers = 100 000/8,24=12135,92, Ronconi L "Enforcement of Labor Regulations in Developing Countries" (2019) 457 *IZA World of Labor* 15.

[822]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 28.

Figure 6 indicates that the South African ratio of labour inspectors to employees, is better than the corresponding ratios in some developed nations (the UK) and comparable to the ILO threshold of industrialised market economies.

Also, the South African ratio is reasonably correlated with the world ratio. This international comparison may indicate that South Africa has an adequate number of inspectors. The ratio of inspectors to employed persons is not a stagnate occurrence. It is constantly changing because the labour market is constantly changing. It is important to be up to date with the state of the labour market, so the number of labour inspectors can be adjusted accordingly.

Literature indicates that the number of labour inspectors in South Africa is geographically skewed.[823] This means that the ratio of labour inspectors per 100 000 employees in industrialised provinces are less than in less industrialised provinces. For example, Gauteng had 5.5 labour inspectors per 100 000 employees, while the Northern Cape had 15,2 labour inspectors per 100 000 employees in 2016.[824] Gauteng and the Western Cape would typically require a greater number of labour inspectors because of the industrialised nature of these provinces, characterised by more employers and employees. A more balanced ratio between various provinces may relieve work pressure and workload of inspectors active in the more industrialised provinces and improve the efficiency of the inspection system that may promote compliance.

Between 2018 and 2019, South African labour inspectors conducted 218 919 inspections.[825] Of the inspections conducted, 177 209 employers were compliant,[826] which means that around 80% of the employers inspected were compliant. This

[823]DPRU & CSDA (2016) *DPRU Working Paper* 84.

[824]84.

[825]RSA Department of Labour *Annual Report 2018/19* 47.

[826]RSA Department of Labour *Annual Report 2018/19* 64.

compliance figure should not be interpreted as reflective of compliance across the entire spectrum of the labour market, because many factors should be considered.[827]

Considering the total inspections between 2018 to 2019 and assuming equal; workload, efficiency and distribution of inspections throughout the year, it amounts to 173 inspections conducted per inspector, per year; fourteen inspections per month and around four inspections per week.[828] Accepting that most inspections occur during office hours, the frequency of these figures changes significantly. In evaluating the efficiency of the number of annual labour inspections in South Africa, foreign standards need to be considered. Because of the scarcity of data for 2019/20, figure 7 indicates the foreign standard for the number of annual labour inspector visits for developing nations for 2018.

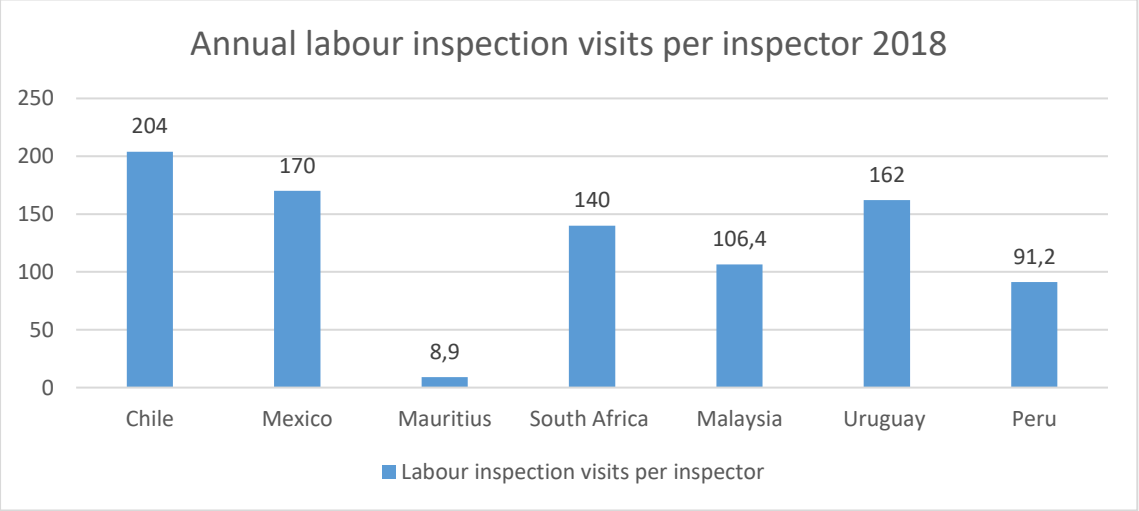


Figure 7: Annual labour inspection visits per inspector 2018 (Compiled by the author)[829]

[827]Factors such as the efficiency of selection of employers for inspection. Furthermore, certain sectors or industries may have more non-compliance in relation to other sectors or industries and compliance statistics of sectors with better compliance may not be representative of the compliance in the broader labour market.

[828]Calculated on 218 919 inspections between 2018 and 2019 divided by 1264 labour inspectors for March 2019 reaches 173 inspections per inspector per year divided by 12 to reach 14,41 inspections per month, divided by 4 reaches 3.60 inspections per week, rounded up to 4 inspections per week.

[829]ILO "ILOSTAT Explorer" *ILO*; data for Brazil not available.

Table 2 indicates that Mexico has the highest ratio, which may necessitate more frequent inspections. Mexico's annual inspections are relatively high, but it is not the highest. Chile, with a relatively moderate ratio, had the most annual inspections. Mauritius has the fewest annual labour inspector visits while South Africa's 2018 annual inspection figure is mid-range for the developing nations considered. One may argue that more annual inspections are theoretically possible, considering the position of other nations with more inspection visits.

In 2015, the number of workers under sectoral determination coverage was 5 075 109.[830] It is estimated that the SANMW covers an additional two million workers that previously did not enjoy minimum wage coverage.[831] The additional coverage represents a 40% increase in the coverage provided by sectoral determinations. The addition of two million recipients of a minimum wage increases labour inspectors' responsibility as they are mandated to enforce and promote compliance with minimum wage. In correlation with the introduction date of the NMW, one may expect a substantial increase in the number of inspections, because of the increased compliance responsibility established by the SANMW. Figure 8 considers the annual labour inspection figures from 2014 to 31 March 2019. (The NMW was introduced on the 1 of January 2019 and inspection data is only available until the end of March 2019.) Therefore, it is impossible to consider whether there was a substantial increase in the number of inspections for 2019.

[830]DPRU & CSDA (2016) *DPRU Working Paper* 31 & 37.

[831]Rounded up to the nearest million, DPRU & CSDA (2016) *DPRU Working Paper* 24.

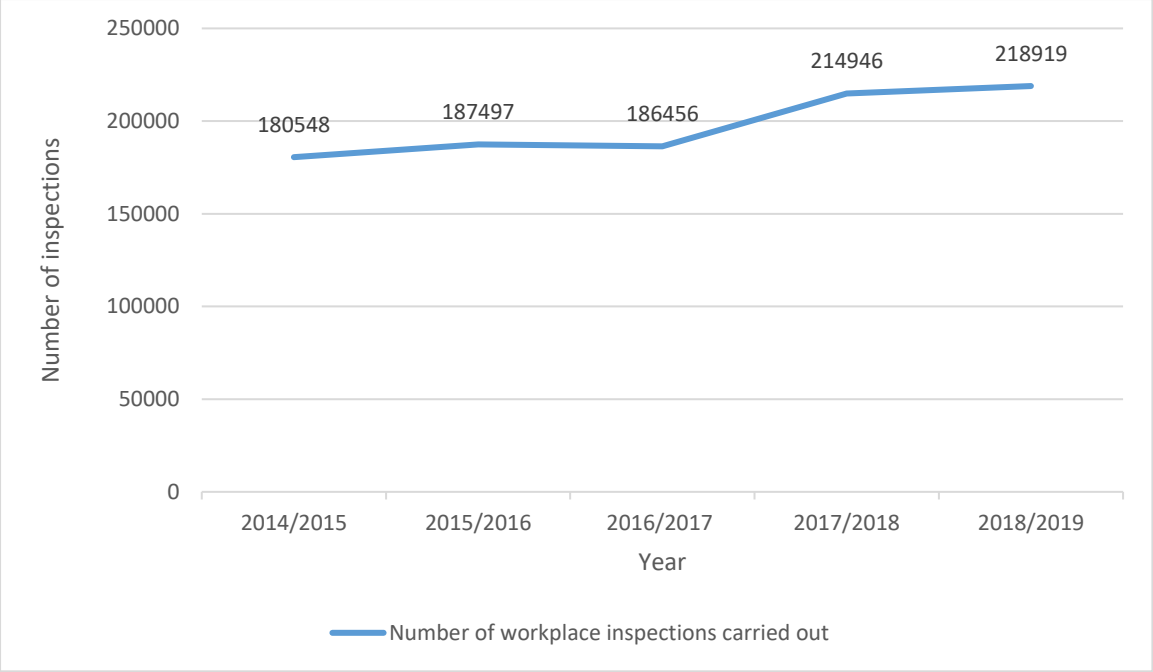


Figure 8: Number of inspections 2014 to 2019 (Compiled by author)[832]

Figure 8 indicates a steady increase in the number of inspections from 2014 to the financial year 2018 to 2019, which amounts to a total increase of 21% for the period.

Labour inspection visits are not the only function of labour inspection. Other functions should not be overlooked. In the South African context, these functions may include but are not limited to administrative duties; education and training of inspectors, education; informing and advising employers; preparation of labour dispute cases; and appearance at quasi-judicial authorities such as the CCMA, Labour Court. The number of labour inspection visits should be considered regarding these other inspectorate functions. These functions may demand a considerable amount of time and may constitute a substantial portion of the inspector's work. Literature indicates that South African labour inspectors work more than 40 hours per week and travel an average of 256.00 kilometres per week.[833]

[832]RSA Department of Labour *Annual Report 2018/19* 47.

[833]DPRU & CSDA (2016) *DPRU Working Paper* 83.

The legislative measures that labour inspectors must enforce are diverse and may often require interpretation by a knowledgeable person to understand the working and the application thereof. Literature indicates that a major challenge in South African enforcement of minimum wages is labour inspectors' ability to meet the required standard. In 2009, only 40% of labour inspectors in South Africa held university degrees.[834] This is not to say that a university degree indicates an able worker, but it may say something regarding the job description and requirements and the associated recruitment approach followed in attracting new talent or empowering current inspectors. South African labour inspectors' earnings range from R6 401.00 to R12 800.00 in South Africa.[835] These earnings may be considered moderate, especially since the South African mean wage is in the vicinity of R8 773.00.[836]

There is an indication that the recruitment practices of the DOL may not be functioning optimally because of underemployment of workers in labour inspector posts. The 2019 to 2020 Annual Report of the DOL indicates that the number of approved posts for labour inspectors stood at 1350, which leaves a negative staff deficit of 86 posts, constituting a vacancy rate of 6.4%.[837] By the DOL's account, it faces challenges in "both retaining inspectors and finding suitable, specialised candidates for appointment".[838] Between 1 of April 2018 to 31 March 2019, 49 labour inspectors vacated their employment at the DOL, resulting in a turnover rate of 3.5%.[839]

Reflecting on budgetary considerations, the 2018 to 2019 expenditure for the inspection and enforcement services programme indicates that a final appropriation was granted at R592 223 000 and that expenditure stood at R549 211 000, which

---

[834]Heppell *Minimum Wages* 79, ILO "South Africa" (2020) *ILO* <http://www.ilo.org/labadmin/info/WCMS_150917> (accessed 12-05-2020) and see Murahwa (2016) *NMW-RI Working Paper Series* 5.

[835]DPRU & CSDA (2016) *DPRU Working Paper* 83.

[836]National Minimum Wage Panel A National Minimum Wage for South Africa 70.

[837]RSA Department of Labour *Annual Report 2018/19* 117.

[838]13.

[839]122.

means that a total of R43 012 000 can be reported as under expenditure.[840] The reasons provided for the under expenditure are:

a) "internal promotions and vacant posts that were not filled during the financial year",[841] and
b) "delay in the delivery of ICT (Information and Communication Technology) equipment for inspectors".[842]

These reasons relate to management failures to plan, implement, and ensure equipment delivery in good time. The South African DOL as the central administrative body is not operating optimally, which may hamper the functionality of the various specialised areas or bodies under its ambit (such as labour inspection). Chapter 2.4.2 indicates the role of an effective administrative system as the operational basis for national labour policies.

Monitoring compliance with minimum wage is not a responsibility exclusively reserved for labour inspectors or designated agents. Instead, it is a shared responsibility between numerous stakeholders. It is, therefore, important to acknowledge the role of stakeholders in monitoring compliance with minimum wage.

Stakeholders that play a role in monitoring compliance with minimum wage may typically include employees and employers and their respective representatives. For stakeholders to function effectively and assume a meaningful role in monitoring compliance with minimum wage, there must be a legislative framework that protects stakeholders.

The LRA establishes every employee's right to freedom of association and protects every employee's right to join and participate in forming a trade union.[843] The right to freedom of association is a fundamental right for both employees and for their representatives (trade unions). Firstly, it enables individual employees to mobilise

---

[840]RSA Department of Labour *Annual Report 2018/19* 11.

[841]12.

[842]12.

[843]Section 4 (1) LRA. See corresponding provisions in chapter 4.1.4.1 for the UK and 4.2.4.1 for Australia.

collectively. Secondly, it allows employees to mobilise collectively allows the formation and establishment of unions. The ability to mobilise collectively may provide employees and their representatives (unions) more power and authority to monitor minimum wage compliance.

Every trade union member has the right (subject to the trade union constitution) to participate in lawful activities, to participate and stand in union elective activities.[844] No person may discriminate against an employee for exercising any right conferred in the LRA.[845] The LRA, therefore, protects the rights of employees or persons seeking employment by determining that no person may act or threaten to do any of the following:[846]

a) require an employee or person seeking employment, not to be or become a member of a trade union or workplace forum or to give up such membership,
b) to prevent them from exercising any right or participating in any proceedings established by the LRA, and
c) with prejudice because of past, present or anticipated;
    i) membership and participation in a trade union or workplace forum,
    ii) participation in lawful activities of a trade union, federation of trade unions or workplace forum,
    iii) failure or refusal to do something that the employer may not lawfully require from an employee,
    iv) disclosure of information that the employee is lawfully entitled or required to provide,
    v) the exercise of any right in terms of the LRA, or
    vi) the participation of any proceedings in terms of the LRA.

[844]Section 4 (2) LRA. Section 4 (3) LRA; confers the right to participate in federation of trade union activities to members of a trade union that is a member of the federation of trade unions.

[845]Section 5 (1) LRA.

[846]Section 5 (2) LRA.

An employee or person seeking employment may not be advantaged for not exercising any right or participating in any proceedings afforded through the LRA.[847] Unless permitted by the LRA, a contractual provision that directly or indirectly contradicts or limits the employee's right to freedom of association is invalid.[848]

As the other party to the employment relationship, the employer also enjoys the right to freedom of association.[849] The right content corresponds to that afforded to employees, with contextual differences.[850] Every employer has the right to join and participate in employer organisation activities,[851] and the right to freedom of association is protected.[852] Employer organisations may promote minimum wage compliance with its members, for example informing employers of the applicable legislation. Employer organisations have an interest in promoting minimum wage compliance by monitoring the employment practices of its members to ensure a fair playing ground. Failure to fulfil this interest may result in an employer having an unfair cost advantage over competitors by not complying with minimum wage.

The employee has a shared responsibility to monitor compliance with minimum wage and is consequently considered a stakeholder. The BCEA establishes employee rights that include a worker according to the NMWA definition.[853] Every employee has the right to:[854]

a) lodge a complaint at a trade union representative, a trade union official or a labour inspector regarding the refusal or alleged failure of an employer to comply with the BCEA or the NMWA,

---

[847]Section 5 (3) LRA. Nothing precludes the parties to a dispute from concluding a settlement agreement.

[848]Section 5 (4) LRA.

[849]Section 6 LRA.

[850]Main contextual differences are that employers participate in employer's representatives (organisations), while employees participate in employee representatives (unions).

[851]Section 6 (1), (2) & (3) LRA.

[852]Section 7 LRA.

[853]Section 62A BCEA. Worker mean; "any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind" Section 1 NMWA.

[854]Section 78 (1) BCEA.

b) "discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person",[855]
c) "refuse to comply with an instruction that is contrary"[856] to the BCEA, the NMWA or any sectoral determination,
d) "refuse to agree to any term or condition of employment that is contrary" to the BCEA, the NMWA or any sectoral determination",[857]
e) inspect any kept record in terms of the BCEA or the NMWA that relates to that employee,
f) participate in proceedings in terms of the BCEA, and
g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act (the BCEA) and that relates to the employment of that employee.

Every trade union representative has the right to inspect any record kept in terms of the BCEA or the NMWA that relates to the employment of that employee if so, requested by that employee.[858] These rights provide a legal platform that enables employees to individually promote compliance with minimum wage and the general legislative framework to which they are entitled too. It assists in keeping employers responsible for their actions or lack thereof. Former employees, employees or potential employees are ensured of the rights mentioned, in that no person may act or threaten them with discrimination for exercising any of the rights afforded to employees.[859]

Raising awareness of employee rights is promoted by the legal obligation on the employer. The employer must display at the workplace, where it is accessible to

[855]Section 78 (1) (b) BCEA.

[856]Section 78 (1) (c) BCEA.

[857]Section 78 (1) (d) BCEA.

[858]Section 78 (2) BCEA.

[859]Section 79 BCEA.

employees, a summary of the most important sections of the BCEA in the official languages spoken at the workplace.[860]

If any right of an employee has allegedly been infringed, the employee making the allegation bears the burden to prove the conduct said to constitute the infringement.[861] The party allegedly engaged in the prohibited conduct must then prove that the conduct did not infringe any provision.[862]

Any dispute about the interpretation or application of employee rights, its protection or the burden of proof may be referred to the CCMA in writing[863] by any party to the dispute, which includes a labour inspector.[864] If such referral occurs, then the referring party must satisfy the CCMA that a copy of the referral has been served on the other parties. The CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved, any party to the dispute may refer the dispute to the CCMA for arbitration.

3.3.3.2 Legal sanctions and remedies in terms of non-compliance with the South African National Minimum Wage

If a labour inspector has reasonable grounds to believe that an employer has not complied with any provision of the; BCEA, NMWA, UIA or UICA, then the labour inspector may:

a) attempt to secure a written undertaking by the employer to comply with the provision,[865] or
b) issue a compliance order.[866]

---

[860]Section 30 BCEA. The summary format can be found in form; BCEA 1A.

[861]Section 81 (a) BCEA.

[862]Section 81 (b) BCEA.

[863]Section 80 (1) BCEA.

[864]Section 80 (6) BCEA.

[865]Section 68 (1) BCEA. See similar enforcement measure in Australia chapter 4.2.4.

[866]Section 69 (1) BCEA.

In terms of the first possibility, the labour inspector may attempt to secure a written undertaking from the employer in two ways, firstly, by meeting with the employer or a representative of the employer or secondly, by "serving a document in the prescribed form, on the employer".[867] In attempting to secure the undertaking the labour inspector;

a) may try to reach an agreement between the employer and employee as to any amount owed to the employee in terms of the BCEA or the NMWA,[868]
b) "may arrange for payment to an employee of any amount paid as a result of an undertaking";[869]
c) may receive payment at the written request of an employee on behalf of the employee, and must provide a receipt for any payment received on behalf of the employee.[870]

If the employer fails to comply with a written undertaking, the Director-General of Labour may request the CCMA to make the written undertaking an arbitration award.[871]

In terms of the second possibility, section 69 of the BCEA gives labour inspectors the right to issue a compliance order.[872] A compliance order must contain the following information:[873]

a) employer name as well as the location of every workplace to which the compliance order applies;
b) the provision of the BCEA not complied with and details of the conduct constituting non-compliance;

---

[867]Section 68 (1A) BCEA.

[868]Section 68 (2) (a) BCEA.

[869]Section 68 (2) (b) BCEA.

[870]Section 68 (2) (c) and (d) BCEA.

[871]Section 68 (3) BCEA.

[872]See the case of Department of Labour v Abdul Mohammed t/a Abdul Shop ECPE5799-19 (CCMA).

[873]Section 69 (2) BCEA.

c) the amount payable to the employee by the employer or in the case of failing to pay the NMW the amount of the fine that is payable by the employer;[874]
d) "any steps that the employer is required to take including, if necessary, the cessation of the contravention in question and the period within which those steps must be taken"[875]; and
e) the maximum fine that may be imposed on the employer for failure to comply with a provision of the BCEA.

A copy of the compliance order must be served on the employer.[876] The employer must prominently display (at a place accessible to affected employees) a copy of the compliance order at each workplace named in the order.[877] It does not invalidate the compliance order if not served, a copy of the compliance order must be served on each employee affected or if impractical on the representative of employees.[878] The employer must comply with the compliance order in the time specified in the order, except if the employer has referred a dispute to the CCMA about the compliance order.[879]

If the employer has not complied with the compliance order, the Director-General of Labour may apply to the CCMA to make the compliance order an arbitration order.[880] The CCMA may grant an arbitration award requiring the employer to comply with the directions of the compliance order if the CCMA is satisfied that:

---

[874]Any amount payable to the employee, "or in the case of a failure to pay the national minimum wage, the amount that the employer is required to pay to an employee in terms of section 76A" Section 69 (2) (c) BCEA.

[875]Section 69 (2) (e) BCEA.

[876]Section 69 (3) (a) BCEA.

[877]Section 69 (4) BCEA.

[878]Section 69 (3) (b) BCEA.

[879]Section 69 (5) BCEA.

[880]Section 73 (1) BCEA. In the case of *Mazwi Preysgod Buthelezi v Ebenezer Asset management Holdings* 2019 GAEK1014-19, the CCMA made an arbitration award against the employer who failed to remunerate workers at the prescribed national minimum wage rate. The award determined that the workers be remunerated the shortfall and that wages be aligned with the national minimum wage rate.

a) service was affected on the employer[881] and
b) the employer has not referred a dispute in terms of section 69 (5) of the BCEA.[882]

Provision is made for the quarterly publication on the DOL's official website, of a list of employers issued with compliance orders.[883] This publication may harm the public image of the transgressing employer, which may negatively impact the employer.

The BCEA[884] places certain limitations on the issuing of compliance orders by labour inspectors. A compliance order may not be issued concerning any amount payable to an employee as a result of a failure to comply with a provision of the BCEA or the NMWA if:[885]

a) the employee who earns more than the monetary threshold as prescribed by the Minister of Labour in terms of section 6(3),
b) any proceedings have been instituted in a court or the CCMA for the recovery of the amount,
c) "that amount has been made payable by the employer to the employee for longer than 36 months before the date on which a complaint was made to a labour inspector by or on behalf of the employee or, if no complaint was made, the date on which a labour inspector first endeavoured to secure a written undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69".[886]

An employee may seek sanctions or remedies for minimum wage violations individually. Section 73A (1) of the BCEA Amendment Act determines that any employee or worker as defined by the NMWA, who do not earn more than the

---

[881]Section 73 (2) (a) BCEA.

[882]Section 73 (2) (b) BCEA.

[883]Section 76A (4) of the BCEA.

[884]Section 10 Basic Conditions of Employment Act Amendment Bill which substitutes Section 70 of the Basic Conditions of Employment Act.

[885]Section 70 BCEA.

[886]Section 70 BCEA.

monetary threshold[887] (as determined by the Minister of Labour) may refer a dispute to the CCMA regarding the failure to pay any amount owed to that worker in terms of the BCEA, the NMWA, a contract of employment, a sectoral determination or a collective agreement.[888] An employee or worker not falling in the ambit of section 73A (1) of the BCEA, may institute a claim for the failure to pay any amount owing to the employee or worker in either the; Labour Court, High Court or subject to jurisdiction; the Magistrates Court or small claims court.[889]

Disputes referred to the CCMA under the ambit of section 73A (1), proceeds with a commissioner's appointment (in terms of section 135 of the LRA) who then attempts to resolve the dispute through conciliation.[890] If the dispute remains unresolved in section 135 (5) of the LRA, the CCMA must commence with arbitration proceedings.[891]

The BCEA encourages the consolidation of certain disputes; disputes about violations of the BCEA or the NMWA may be consolidated with proceedings instituted for discrimination against the employee.[892] If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount owed to that employee in terms of the BCEA or the NMWA. [893] A dispute about any amount owing to an employee regarding the non-compliance of the BCEA or the NMWA may be initiated together "with a dispute instituted by that employee over the entitlement to severance pay in terms of section

[887]Section 73A (2) of the BCEA which refers to Section 6 (3) of the BCEA. At the time of conducting this research the threshold stood at R205 433.30 per annum. Government Gazette no.531 1 July 2014 No. 37795 3.

[888]Section 73A (1) BCEA.

[889]Section 73A (3) BCEA.

[890]Section 73A (4) BCEA.

[891]Section 73A (5) BCEA. A dispute remains unresolved when conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties. Section 135 (5) LRA.

[892]Section 74 BCEA.

[893]Section 74 (2) BCEA.

41(6)".[894] These measures streamline the dispute resolution process while being more convenient to the employee.

In order to retain real monetary value, section 75 of the BCEA determines that interest at a rate determined under section 1 of the Prescribed Rate of Interest Act, 1975 must be paid on any amount due and payable in terms of the BCEA or the NMWA to any person to whom payment should have been made.[895] At the time of conducting this research, the prescribed rate of interest stood at 7.75% per annum.[896]

To discourage non-compliance with the SANMW, the BCEA provides for the payment of fines. Section 76A of the BCEA determines that a fine may be imposed on an employer who has not complied with the NMW which amount is the greater of:

a) twice the value of the underpayment; or
b) twice the employee's monthly wage.

In instances of second or further non-compliance, a fine may be imposed on the employer in an amount that is greater of:

a) three times the underpayment value; or
b) three times the employee's monthly wage. [897]

The Minister of Labour may "issue guidelines on the determination of whether a non-compliance is a second or further non-compliance".[898] In *Department of Labour obo Shayibu, Dickson v Cash and Carry*[899] the CCMA made a compliance order (issued by the labour inspectorate) an arbitration award. The employer failed to remunerate the aggrieved worker the NMW rate. The arbitration award consisted of a monetary

[894]Section 74 (3) BCEA.

[895]Section 75 of the BCEA. *DETAWU obo Ntshangase, Graphics v PFM* 2019 MPEM5408-19 (MPEM), is an example of a case where interest was awarded to the employee on the underpaid minimum wage amount.

[896]Unless the arbitration award provides otherwise. Section 143 (2) LRA. GN R987 in GG 43703 of 11-9-2020.

[897]Section 76A (2) BCEA.

[898]Section 76A (3) BCEA.

[899]2019 ECPE5432-19 (CCMA). Also see Department of Labour v Abdul Mohammed t/a Abdul Shop, ECPE5799-19 (CCMA) and Department of Labour v Haisam Kashtte t/a Sea Flights Fisheries ECPE4435-19 (CCMA).

award equal to the shortfall that the worker was entitled to under the NMWA as well as a fine of R2400. Fines are payable to the aggrieved employee, which offers additional financial compensation besides the reimbursement of minimum wage underpayment.[900] This is a good practice that encourages workers to take compliance responsibility and enforce their rights.

At the time of conducting this research, no caselaw were available about the violation of the SANMW, in the Labour Court or Labour Appeal Court. In contrast, the CCMA had an increase in labour dispute cases on minimum wage, where the introduction of the SANMW appears to have played a role.[901] The CCMA appears to have played an instrumental role in handling labour disputes concerning the SANMW, so relieving pressure on overburdened courts. From the period 1 January 2020 to 31 August 2020 the CCMA received 19 757 referrals about the NMWA 2018 and the amendment BCEA.[902] These referrals make up 18% of the total referrals received by the CCMA.[903]

There may be several reasons for NMW disputes not to reach the Labour and Labour Appeal Court. Firstly, the dispute may be resolved by the CCMA where the parties to the dispute accept the resolution. Secondly, the dispute may be resolved by the CCMA where a party to the dispute is not satisfied with the resolution but cannot afford to apply to the labour court for a review. Thirdly, it may simply not be worth the additional legal application costs, which results in the abandonment of review aspirations.

---

[900]See Department of Labour v Abdul Mohammed t/a Abdul Shop ECPE5799-19 (CCMA).

[901]Jordaan N "Minimum Wage Act has Led to Huge Rise in Labour Disputes, Says CCMA" (2020) *Timeslive* <https://www.timeslive.co.za/news/SouthAfrica/2020-03-03-minimum-wage-act-has-led-to-huge-rise-in-labour-disputes-says-ccma/> (accessed 31-3-2020)

[902]CCMA "National Minimum Wage" (2020) *CCMA* <https://www.ccma.org.za/Advice/Knowledge-Hub/Downloads/National-Minimun-Wage> (accessed 17-4-2020).

[903]CCMA "National Minimum Wage" *CCMA*.

3.4 Sectoral determinations in South Africa

3.4.1 Coverage of sectoral determinations

Sectoral determinations hold that the Minister of Labour may determine certain basic employment conditions for certain employees in certain sectors or areas, including the minimum rates of remuneration[904] and the adjustment of these rates.[905]

During this research, sectoral determinations were still implemented except where such sectoral determinations are less than the SANMW (see chapter 3.3.1).[906] The DOL indicated its intent of phasing out sectoral determinations and reaching a conclusion of sectoral determinations by 2021.[907] However, there is a degree of uncertainty about the future role of sectoral determinations over the long term as various employee stakeholders apparently strongly oppose the phasing out of sectoral determinations.[908] These stakeholders contend that sectoral determinations protect workers earning more than the SANMW.[909] It is up to parliament's portfolio committee on labour to decide the fate of sectoral determinations.[910] See chapter 3.4. for further deliberation on sectoral determinations.

The DOL's rationale behind the phasing out of sectoral determinations, which cannot be faulted, is to simplify the South African minimum wage framework in an attempt to ensure better compliance.[911] There are 120 different minimum wage rates within the

---

[904]Section 51(1) & 55 (4) (a) BCEA; Huysamen (2018) *De Jure* 289.

[905]Section 55 (4) BCEA.

[906]Section 20 (1) Basic Conditions of Employment Amendment Act, 2017.

[907]Ensor *BusinessDay* (28-01-2019) 2, Section 20 (3) determines that sectoral determinations that are higher than the national minimum wage must be adjusted, increased proportionally to any adjustments of the national minimum for a period of three years from the commencement of the NMWA.

[908]Legalbrief "Labour Department Aims to Phase Out Sectoral Determinations" (2020) *Legalbrief* <http://legalbrief.co.za/diary/legalbrief-workplace/story/sectoral-determination-will-be-phased-out-dol/pdf/> (accessed 19-12-2020).

[909]Legalbrief "Labour Department Aims to Phase Out Sectoral Determinations" *Legalbrief*.

[910]Legalbrief "Labour Department Aims to Phase Out Sectoral Determinations" *Legalbrief*.

[911]Ensor *BusinessDay* 2. Also see Legalbrief "Labour Department Aims to Phase Out Sectoral Determinations" *Legalbrief*.

sectoral determination framework [912] that make the framework complex and holds compliance challenges.[913] The SANMW represents a simplified universal minimum wage framework that replaces the highly complex sectoral determinations that may benefit compliance purposes.

Sectoral determinations are set for the following sectors: [914]

a) contract cleaning;
b) civil engineering;
c) learnerships;
d) private security sector;
e) domestic worker;
f) wholesale and retail sector;
g) children in the performance of advertising, artistic and cultural activities;
h) taxi sector;
i) forestry sector;
j) farm worker sector, and
k) hospitality sector.

The BCEA may be considered as the legislative basis of sectoral determinations and applies to all employees and employers except to members of:[915]

- the National Intelligence Agency,
- the South African Secret service,
- the South African National Academy of Intelligence and
- the unpaid volunteer workers, helping a charitable purpose.

---

[912]National Minimum Wage Panel A National Minimum Wage for South Africa 53.

[913]Huysamen (2018) *De Jure* 293; Piek & Von Fintel (2020) *Dev S Africa* 643-644.

[914]Du Toit et al *A Labour Relations Law* 635; Huysamen (2018) *De Jure* 290.

[915]See Section 3 BCEA. Certain persons undergoing vocational training may also be exempt from BCEA application, section 3 3 (2) BCEA. With the exception to certain sections, the BCEA does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act applies, "except to the extend provided for in a sectoral determination and the National Minimum Wage Act, 2018, read with section 62A" Section 3 (3) BCEA.

Sectoral determination provisions can apply to all or some, of the employees and employers in the specific area (region) or sector[916] and the application of sectoral determinations can also vary in terms of the specific occupation in question.[917] The location of the occupation may also be a factor leading to the differentiation of sectoral determinations.

Unless the statutory determination regulates otherwise, the employer to whom the sectoral determination is binding, must;

a) keep a copy of the statutory determination at the workplace,
b) the copy must be available for inspection by an employee,
c) give a copy of the sectoral determination;
   i) to "an employee who has paid the prescribed fee and
   ii) free of charge, on request, to an employee who is a trade union representative or a member of a workplace forum".[918]

These provisions are important to promote information transparency to empower employees of their rights and create awareness.

In terms of coverage, sectoral determinations may not be published:

a) for employees and employers that are already bound by collective agreements concluded at a bargaining council,[919]
b) for employees that are covered under a collective agreement concluded by a statutory council,[920]
c) for the regulation of any sectoral determination matter that has been in effect for less than 12 months.[921]

---

[916]Section 55 (5) BCEA.

[917]Heppell *Minimum Wages* 81.

[918]Sections 58 (c) BCEA.

[919]Sections 55 (7) (a) BCEA.

[920]Section 55 (7) (b) BCEA.

[921]Section 55 (7) (c) BCEA.

If there is corresponding regulation of a matter by the BCEA and a sectoral determination, then the sectoral determination prevails.[922] A sectoral determination remains binding until it is amended or superseded by a new or amended sectoral determination, cancelled or otherwise superseded by the Minister of Labour.[923] The Minister of Labour is afforded the right to;

a) "cancel or suspend any provision of a sectoral determination, either in the sector and area as a whole or in part of the sector or in a specific area; or
b) Correct or clarify the meaning of any provision of a sectoral determination as previously published".[924]

Before the Minister of Labour can utilise these rights, notice thereof must be given in the Government Gazette announcing the intent to cancel or suspend any provision of a sectoral determination and allowing the public with an opportunity to comment on such intent. Following this process, the Minister of Labour may give notice in the Government Gazette of utilising the rights mentioned.

3.4.2 The determination and adjustment of sectoral determinations

The BCEA Amendment Bill 2017 repeals chapter 8 and 9 of the BCEA that dealt specifically with the promulgation of sectoral determinations. Chapter 9 provides the framework for the Employment Conditions Commission (hereafter referred to as the ECC). The repeal of chapters 8 and 9 of the BCEA ultimately hold that minimum wages through sectoral determinations cannot be reviewed and adjusted through the ECC, which means that it will ultimately become nonfunctional through this original review and adjustment framework. However, according to the NMWA 2018, the review and adjustment responsibility of sectoral determinations, traditionally held by the ECC, are taken over by the SANMWC (the operation of the SANMWC is discussed in chapter 3.3.1 and 3.3.2).[925]

---

[922]Section 57 BCEA.

[923]Section 56 (1) BCEA.

[924]Section 56 (3) BCEA.

[925]The SANMWC are to advise the Minister on sectoral determinations. Section 11 (f) NMWA.

The BCEA determines that any sectoral determination that is higher than the SANMW (at its promulgation date) must be increased proportionally to any adjustment of the SANMW.[926] Chapter 3.3.2.1 refers to the first adjustments of the SANMW and sectoral determinations. This effectively means that despite the repeal of chapters 8 and 9 of the BCEA, sectoral determinations that are higher than the SANMW, will still be adjusted and will remain applicable to the labour market.

The Minister of Labour makes sectoral determinations, but before sectoral determinations are made the Minister of Labour directs the SANMWC to investigate specific employment conditions in a sector or area.[927] A notice must be published in the Government Gazette in which the public is invited to submit written representations on the matter being investigated.[928]

In conducting the investigation, the SANMWC may question any individual who may provide relevant information[929] and answers may not be withheld in instances where individuals are legally obliged to provide an answer.[930] The SANMWC may also request information, documents, objects and or books, within a reasonable period from any employer or employee in the field being investigated.[931]

After investigation and after considering any representations by members of the public the SANMWC must compile a report (containing recommendations on the matters that should be included in a sectoral determination for the relevant sector and area)[932] which has to be sent to the Director-General for their information and the Minister of Labour for consideration.[933]

---

[926]Section 51 (3) BCEA.

[927]Section 52 (1) BCEA.

[928]Section 52 (3) BCEA.

[929]Section 53 (1) (a) BCEA.

[930]Section 53 (2) BCEA.

[931]Section 53 (1) (b) BCEA; also see Heppell *Minimum Wages* 82.

[932]Section 54 (4) BCEA.

[933] Section 54 (2) (a) BCEA.

The SANMWC must consider certain criteria about the sector and area concerned when advising the Minister on the publication of sectoral determinations. These criteria are:[934]

a) the report prepared by the SANMWC;
b) the ability of the employers to carry on their businesses successfully;
c) the operation of small, medium, micro-enterprises, or new enterprises;
d) the cost of living;
e) the alleviation of poverty;
f) the conditions of employment;
g) wage differentials and inequality;
h) the likely impact of any proposed condition of employment on current employment or the creation of employment;
i) the possible impact of any proposed conditions of employment on the health, safety or welfare of employees; and
j) any relevant information made available to the SANMWC.

The Minister of Labour may make sectoral determinations after the report and recommendations of the SANMWC have been considered.[935] If the Minister of Labour does not accept a recommendation of the SANMWC, it may be referred back to the SANMWC for its reconsideration and indicating the matters with which the Minister of Labour disagrees.[936] The Minister of Labour may make sectoral determinations after considering the revised report.[937]

[934]Section 54 (3) BCEA.

[935]Section 55 (1) *BCEA*.

[936]Section 55 (2) BCEA. See also Du Toit et al *A Labour Relations Law* 636.

[937]Section 55 (3) *BCEA*.

3.4.3 Legal Enforcement of sectoral determinations

3.4.3.1 Monitoring compliance with sectoral determinations

Sectoral determinations use the corresponding legislative framework for monitoring compliance with the SANMW, as explained in chapter 3.3.3.1.

3.4.3.2 Legal sanctions and remedies for non-compliance with sectoral determinations

There is ample evidence that disputes on sectoral determination violations are absorbed in the dispute resolution mechanisms of bargaining councils and the CCMA.[938] Table 3 and 4 set out the maximum permissible fines that may be imposed in terms of chapter 10 of the BCEA for a failure to comply with a provision of the BCEA. The maximum fine that may be imposed involving a failure to pay an amount due to an employee is the greater of the amount determined in terms of table 3 or 4.[939]

---

[938]In *NUHRCCHAW obo Skhosana M v Ahmod Wholesalers* 2005 GAPT 4114-05, the CCMA made an arbitration award against an employer who failed to effect payment in terms of a sectoral determination to the worker. The award recovered the underpayment that the worker was entitled to in terms of the sectoral determination for the wholesale and retail sector. Also see *Domingos v IE Lourens Welgelegen (Pty) Ltd*, MP724-12 (CCMA).

[939]Schedule 2 Section 2 (b) BCEA.

Table 3: Maximum permissible fine not involving an underpayment (Published under GN R1402 in Government Gazette 42124 19 Dec 2018)

No previous failure to comply	R300 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R600 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provision within three years	R900 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R1200 per employee in respect of whom the failure to comply occurs
Four previous failures to comply in respect of the same provision within three years	R1500 per employee in respect of whom the failure to comply occurs

Table 4: Maximum permissible fine involving an underpayment (Published under GN R1402 in Government Gazette 42124 19 Dec 2018)

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two previous failures to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

3.5 Collective agreements

Whereas the legal framework for enforcement, monitoring and legal proceedings of the NMW and sectoral determinations are mostly contained in the BCEA, the same legal framework for collective agreements is predominantly contained in the LRA. In keeping with section 23 of the South African Constitution, the LRA promotes

collective bargaining[940] that provides a platform for concluding collective agreements. As indicated in 3.1, bargaining council agreements and collective agreements are the result of collective bargaining and have, in general, similar operation except for being differentiated based on the parties involved in the collective bargaining. Based on the general similarities between bargaining council and collective agreements, the subsequent discussion is relevant to both these measures.

Collective bargaining is used by management and organised labour to reach agreements in terms of which their relationship is formalised and earnings, conditions of service and other matters of mutual interest are regulated for given periods.[941] Collective agreements are generally concluded at bargaining councils used as a platform to conclude collective agreements. A collective agreement is defined as a written agreement concerning terms and conditions of employment or any other matter of mutual interest that is concluded by one or more registered trade unions on the one hand and on the other hand:

a) “one or more employers;
b) one or more registered employers' organisations; or
c) one or more employers and one or more registered employers’ organisations”.[942]

Bargaining councils are established by organised labour in the form of representatives of employers (registered employer organisations) and representatives of employees (registered unions) and does not include individual employers.[943] Bargaining councils are established for a sector and area by adopting

[940]Section 1 LRA.

[941]Grogan *Workplace Law* 393.

[942]Section 213 LRA.

[943]Section 27 (1) LRA. Van Niekerk et al *Law@work* 429.

a constitution and by obtaining registration of the bargaining council.[944] Bargaining councils fulfil functions similar to those formerly fulfilled by industrial councils.[945]

Although not utilised to conclude collective agreements about wages,[946] mention should be made of Statutory councils established to promote centralised bargaining,[947] particularly in those sectors or areas with low union density and no bargaining councils. Grogan describes statutory councils as; "essentially attenuated bargaining councils".[948] According to a DPRU working paper, statutory councils "have not accomplished much in terms of collective bargaining".[949] A statutory council is established by a unilateral application, meaning either a representative trade union or employers' organisation can apply for its establishment. The powers and functions of statutory councils are more limited than that of bargaining councils.[950] However, a statutory council may include any other functions of a bargaining council in its constitution as referred to in section 28 of the LRA.[951].

---

[944]Section 27 (1) (a)-(b) The LRA. Registration of the bargaining council should be done in terms of section 29 of the LRA.

[945]Grogan *Workplace Law* 372-378. Van Niekerk et al *Law@work* 483-384.

[946]The extension of collective agreement is only afforded to collective agreements concluded in terms of; dispute resolution functions, promotion and establishment of training and education schemes as well as the establishment and administration of various benefit schemes. Collective agreement pertaining to wages do not form part thereof and may subsequently not be extended to non-parties of the collective agreement. Section 43 (3) LRA.

[947]During the period of conducting this research there were three registered statutory councils; the Statutory Council of the Printing, Newspaper and Packaging Industry of South Africa, the Statutory Council for the Squid and Related Fisheries of South Africa and the Statutory Council for the Fast Food, Restaurant, Catering and Allied Trades.

[948]Grogan *Workplace Law* 378. Van Niekerk et al *Law@work* 425-426 & 484.

[949]DPRU & CSDA (2016) *DPRU Working Paper* 19.

[950]For the functions of a bargaining council see section 28 of the LRA, compared to the functions of a statutory council contained in s43 LRA.

[951]Section 43 (2) LRA. It may be possible for statutory councils to conclude collective agreements and extend certain agreements to non-parties within the registered scope of the statutory council, see Section 43 (3) LRA; Van Niekerk et al *Law@work* 426. The extension of bargaining council agreements are a contentious issue. See *Free Market Foundation v Minister of Labour; Minister of Justice and Constitutional Development; Bargaining Councils listed in Annexure "A"; National Union of Metalworkers of South Africa (NUMSA); Southern African Clothing and Textile Workers Union (SACTWU)* 13762/2013 2016 (HC).

3.5.1 Coverage of collective agreements

Section 23 of the LRA stipulates that a collective agreement binds:[952]

a) the parties to the collective agreement,
b) each party to the collective agreement and the members of every other party to the collective, in so far as applicable to them,
c) "the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates:
   i) terms and conditions of employment; or
   ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers";[953]
d) the employees who are not members of the registered trade union or trade unions party to the agreement, if three requirements are met:
   i) "the employees are identified in the agreement;
   ii) the agreement expressly binds the employees; and
   iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace".[954]

The collective agreement remains binding for the whole period of the collective agreement.[955] Unless otherwise determined in the collective agreement, any party to an indefinitely determined collective agreement may give reasonable written notice of termination in writing.[956] A collective agreement is binding on every person in terms of section 23 (1) (c) of the LRA who was a member at the time that it became binding or thereafter, whether or not that person continues to be a member of the registered

---

[952]Section 23 LRA. Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to exemptions from any collective agreement or any law, Section 84 (1) (f) LRA.

[953]Section 23 (1) (d) LRA.

[954]Section 23 (1) (c) & (d) the LRA. "Unions that do not enjoy majority status do not have the power to bind non-members" Grogan *Workplace Law* 396.

[955]Section 23 (2) LRA.

[956]Section 23 (4) LRA.

trade union or registered employer's organisation for the duration of the collective agreement.[957] This provision is necessary to prevent evasion of a collective agreement by employers.

Where applicable, a collective agreement varies any employment contract where the employee and employer are both bound by the collective agreement.[958] Employers and employees may not conclude employment contracts that waive provisions of collective agreements.[959] Whether concluded before or after the coming into operation of any applicable collective agreement, a contract of employment may not permit an employee to be paid less or treated less favourable than prescribed by the applicable collective agreement.[960] A provision in any employment contract that establishes less favourable conditions than provided for in the applicable collective agreement is invalid.[961] This provision ensures optimal collective agreement coverage to the benefit of employees.

A bargaining council derives its legislative backing to conclude collective agreements from section 28 of the LRA.[962] The coverage or binding extent of collective agreements concluded within bargaining councils are contained in section 31 of the LRA. Subject to section 32 of the LRA and the bargaining council's constitution, a collective agreement concluded at a bargaining council binds largely to the same extent as the general description of collective agreements, section 23 LRA, as described in the previous paragraphs.[963]

---

[957]Section 23 (2) LRA.

[958]Section 23 (3) LRA. Grogan *Workplace Law* 397.

[959]Grogan *Workplace Law* 397.

[960]Section 199 (1) LRA.

[961]Section 199 (2) LRA. Grogan *Workplace Law* 397.

[962]Section 28 (1) (a) LRA. The power and function to conclude collective agreements may be afforded to statutory councils with relation to certain matters stipulated in Section 43 (2) LRA. These matters do not include wages.

[963]Compare the binding extent of collective agreements as determined in Section 23 of the LRA with Section 31 of the LRA that stipulate the binding extent of collective agreements concluded at bargaining councils. See Grogan *Workplace Law* 429; Section 32 of the LRA is "not dissimilar to section 23, but takes account of the structure of a bargaining council, and the identity of the bargaining parties".

A collective agreement concluded in a bargaining council may be extended to non-parties of the collective agreement.[964] The extension essentially binds non-parties to the collective agreement, practically making them parties to the collective agreement.[965] The extension process is as follows:[966] The authority to extend collective agreements of bargaining councils to nonmembers rests with the Minister of Labour.[967] The bargaining council may ask the Minister of Labour in writing to extend the collective agreement concluded at the bargaining council to any non-parties to the collective agreement. The Minister of Labour must extend a collective agreement if the following two overarching requirements are met:

Firstly, there needs to be adequate representativeness of parties for the extension. Consequently, the following needs to be established: [968]

a) The registered trade union/s whose members constitute the majority of the members of the trade unions that are party to the bargaining council must vote in favour of the extension and
b) Registered employer organisation/s whose members constitute the majority of the members of the employer organisations that are party to the bargaining council must vote in favour of the extension.

Secondly, the representation of parties to the bargaining council need to reflect the scope of the extended collective agreement which[969] requires compliance with section 32 (3) (a) to (g) of the LRA:

---

[964]Section 32 LRA.

[965]Grogan *Workplace Law* 399. "Collective agreements concluded by bargaining councils may similarly be imposed upon the industry by ministerial decree for specified periods and are subject to amendment and extension from time to time", *Tao Ying Metal Industry (Pty) Ltd v Pooe NO* (222/06) 2007 (SCA) 54; 2007 3 All SA 329 (SCA); 2007 7 BLLR 583 (SCA) para 11.

[966]For consideration of the extension process of collective agreements concluded in bargaining councils see; National Employers' Association of South Africa ('NEASA'); Plastic Convertors Association of South Africa ('PCASA') v Minister of Labour; Metal and Engineering Industries Bargaining Council ('MEIBC'); Parties to the MEIBC 2018 J1475/2015 (LC).

[967]Section 32 (1) LRA.

[968]Section 32 (1) LRA. Also see Van Niekerk et al *Law@work* 431.

[969]Section 32 (3) LRA.

a) Satisfying the first requirement of adequate representativeness of parties for the extension as referred to in the previous paragraphs.[970]
b) Upon extension of the collective agreement a majority of all employees covered by the extension must be members of the trade unions that are parties the bargaining council.[971]
c) Upon extension of the collective agreement a majority of all employees covered by the collective agreement must be employed by members of employer organisations that are parties to the bargaining council.[972]
d) Parties not covered by the collective agreement of the bargaining council, to whom such agreement is to be extended must fall within the bargaining councils registered scope.[973]
e) The bargaining council must have an effective procedure to deal with exemption applications by non-parties within 30 days.[974]
f) Provision must be made in the collective agreement for an independent body to hear and decide, as soon as possible but not later than 30 days after appeal is lodged, any appeal against the bargaining council's refusal of a non-party's exemption application or the withdrawal of exemption by the bargaining council.[975]
g) The collective agreement must contain criteria that must be applied by the independent body in consideration of an appeal.[976] The criteria must be fair and promote the objectives of the LRA, and the terms of the collective agreement must not discriminate against non-parties.[977]

---

[970]Section 32 (3) (a) LRA.

[971]Section 32 (3) (b) LRA.

[972]Section 32 (3) (c) LRA.

[973]Section 32 (3) (d) LRA.

[974]Section 32 (3) (dA) LRA.

[975]Section 32 (3) (e) LRA.

[976]Section 32 (3) (f) LRA.

[977]Section 32 (3) (g) LRA. No representative, office bearer or official of a trade union or employer's organisation that is a party to the bargaining council may be a member of or participate in the appeal deliberations, Section 32 (3) (3A) LRA.

If these requirements are met the Minister of Labour must extend the collective agreement within 60 days, by giving notice by publication in the government gazette of the date and period that the collective agreement will be effective and binds on the non-parties specified in the notice.[978]

Despite provision “b” and “c”, in the previous paragraphs, the Minister of Labour may extend a collective agreement in the second requirement if:

a) the parties to the bargaining council are sufficiently representative within the scope of the bargaining council;[979]
b) the Minister of Labour is satisfied that the failure to extend the collective agreement may undermine collective bargaining at sectoral level or in the public service as a whole;[980]
c) the Minister of Labour has published a notice in the Government Gazette stating that a application (in terms if this subsection) has been received and specifying where a copy of the application may be inspected or obtained and inviting public comment within a minimum period of 21 days from date of publication of the notice and;[981]
d) the Minister of Labour has considered all comments received within the referred period in subsection “c”.[982]

Extension of agreements is a controversial matter, in particular when it relates to the extension of minimum wages.[983] As indicated, however, several checks and balances are applicable, and there must be an exemption clause. Provision is made for the exclusion from bargaining council agreements.[984] The authority to grant exemptions from a bargaining council agreement will emanate from the constitution of the

[978]Section 32 (2) LRA.

[979]Section 32 (5) (a) LRA.

[980]Section 32 (5) (b) LRA.

[981]Section 32 (5) (c) LRA.

[982]Section 32 (5) (d) LRA.

[983]Van Niekerk et al *Law@work* 430.

[984]Section 30(1) (k) LRA.

bargaining council concerned. A bargaining council agreement imposed upon the industry must provide for an appeal to an independent body from a refusal by the bargaining council to grant an exemption to a person who is not a party to the bargaining council.[985]

Informing, promoting, and educating employers and workers on legal provisions applicable to them (coverage) are significant aspects of compliance. A bargaining council[986] has the power and function to prevent labour disputes,[987] promote and establish training and educational schemes about its registered scope.[988] These powers and functions may be utilised to inform, educate and empower workers and employers regarding employment rights and conditions, including minimum wage provisions. Therefore, bargaining councils must promote compliance by fully utilising the powers and functions afforded to them.

3.5.2 Determination of minimum wage through collective agreements

The NMWA establishes the minimum permissible standard concerning wages. The NMW takes precedence over any contrary provision in any employment contract, collective agreement, sectoral determination or law,[989] except where a wage is provided that is more favourable to the worker.[990] Workers are entitled to the most favourable wage provision, be it established through the BCEA, collective agreement employment contract or the NMW. Because the NMW is acknowledged as the minimum wage threshold, any wage determination in collective agreements would have to be concluded above this threshold.

---

[985] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO* 222/06 2007 (SCA) 54; 2007 3 All SA 329 (SCA); 2007 7 BLLR 583 (SCA) para 11.

[986] As well as statutory councils in certain instances. Section 43 (2) LRA.

[987] Section 28 (c) LRA.

[988] Section 28 (f) LRA.

[989] Section 4 (6) NMWA.

[990] Section 4 (7) NMWA.

The ILO defines collective bargaining as:

> "all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:
>
> (a) determining working conditions and terms of employment; and/or
> (b) regulating relations between employers and workers; and/or
> (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."[991]

The right to collective bargaining is contained in the South African Constitution.[992] The legal framework for collective bargaining is established by legislation. The promotion of collective bargaining is one of the primary objectives of the LRA.[993] Collective bargaining is utilised as the basis where negotiations take place between employers, their representatives and employees, their representatives.

Collective bargaining may often occur within diverse or often opposing interest of workers and employers. Regarding wages, workers and their representatives may typically have an interest in getting the most favourable, highest wage. Cost considerations may typically drive employers in seeking to pay more modest wages. To strengthen and promote orderly collective bargaining the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing may be utilised[994] by employees, trade unions, employers, employers' organisations, the registrar of labour relations, conciliators, arbitrators and judges.[995] A fundamental commitment to orderly and constructive collective bargaining is for trade unions, their members,

---

[991]Section 2 The Collective Bargaining Convention, 1981 no. 154.

[992]Section 23 (5) The Constitution of the Republic of South Africa, 1996.

[993]Section 1 LRA.

[994]GN R1396 in GG 42121 of 19-12-2018.

[995]Section 1 (2) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

trade union federations, employers and employers' organisations[996] to adhere to the principles of good faith bargaining.

The principles of good faith bargaining are:

a) Every trade union, employer and their representatives and negotiators appointed to represent them commit to the principles of good faith bargaining and mutual respect.[997]
b) All relevant information should be disclosed to the trade on request and subject to confidentiality.[998]
c) All demands and responses by parties should be in writing.[999]
d) A new demand may only be raised during the course of the proceedings if it is introduced for the purposes of finding a settlement and with the agreement of the other party.[1000]
e) "An employer should not unilaterally alter terms and conditions of employment
g) during the course of negotiations prior to deadlock being reached in terms of any collectively agreed dispute procedure, failing which, when a period of 30 (thirty) days has lapsed after the referral of the dispute to the CCMA or Bargaining Council, or a certificate of non-resolution has been issued".[1001]
f) Negotiations should be conducted in a courteous and rational manner and abusive and disruptive behaviour must be avoided.[1002]
g) Parties should attend agreed negotiation meetings, if attendance is not possible, good reasons should be provided along with reasonable notice.[1003]
h) The parties in the bargaining process should constructively engage each other and not unreasonably conduct itself prior to or during negotiations in a manner

[996]Section 1 (2) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[997]Section 7 (1) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[998]Section 7 (2) also see section 13 Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[999]Section 7 (3) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1000]Section 7 (4) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1001]Section 7 (5) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1002]Section 7 (6) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1003]Section 7 (7) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

that unreasonably delays negotiations by "failing to agree dates and times for negotiation meetings, failing to attend agreed meetings, changing negotiators, failing to secure a mandate or refusing to modify demands".[1004]

i) During the negotiations, parties should be prepared to modify demands and responses.[1005]

j) As far as possibly parties should undertake to utilise the same negotiators through the course of the negotiations and that they have the mandate to modify their demands and responses. [1006]

k) The parties should accommodate each other concerning the utilisation of facilities for the mandating process.[1007]

l) The negotiators should provide the demands or responses of the other party as accurately as possibly, without interfering with the trade union or employer's organisation's right to communicate with its members.[1008]

m) "Without interfering with the right of the trade union to communicate with the members of an employers' organisation and an employer with its employees, the trade union or employer should not undermine the bargaining status of union or organisation as the case may be."[1009]

n) "An employer should not bypass a recognised trade union and deal directly with employees before deadlock or a reasonable period after deadlock in respect of the matters that are subject of the negotiations in order to allow the trade union to communicate with employees."[1010]

o) Consideration should be given to escalate the negotiations to higher authoritarian positions within the trade union or employer to avoid deadlock

---

[1004]Section 7 (8) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1005]Section 7 (9) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1006]Section 7 (10) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1007]Section 7 (11) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1008]Section 7 (12) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1009]Section 7 (13) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1010]Section 7 (14) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

and to settle differences or exploring the possibility of voluntary referring the dispute to binding or advisory arbitration.[1011]

p) After a dispute is declared the parties should remain open to continue negotiations.[1012]

The parties to collective bargaining should develop and support negotiators by promoting training initiates that should be conducted on a regular basis.[1013] Before negotiation commences, there needs to be sufficient preparation by the respective leadership structures of the union or employer or employer's organisations demands or responses, to the necessary extent.

In preparing for negotiation, it may be necessary to:[1014]

a) Conduct research into the state of the economy and sector, the ability of; individual employers, specifically new, small, medium and micro-enterprises, the cost of living, the alleviation of; inequality, poverty, wage differentials and the likely impact of any proposal or response on the employment, health, safety or welfare of employees.[1015] Consideration should be given to whether any demand or response reduces inequality of treatment.[1016]

b) There need to be established if there is a need for disclosure of information in order to prepare a demand or response.[1017] If the trade union considers the disclosure of information necessary in order to formulate its demands, it has to request such disclose from the employer in writing as soon as possible.[1018]

[1011]Section 7 (15) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1012]Section 7 (16) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1013]Section 8 Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1014]For a comprehensive list of factors for the preparing of negotiations see section 9 Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1015]Section 9 (1) (a) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1016]Section 9 (1) (e) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1017]Section 9 (1) (b) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1018]Section 9 (2) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

The obtained information should be utilised to manage expectations of members and to introduce a sense of realism.[1019]

c) Advice should be obtained from experts on employment effects of a proposal or response. Advice should also be obtained regarding general settlement rates and rates specific to the sector.[1020] Consideration should be given whether a demand or response or the extend thereof be obtained differently through a reconfiguration of the demand or response.[1021]

After the preparation for the negotiation has been done, the negotiation process progresses further with the submission of demands and its responses. A party should submit its demands in writing or according to any agreed negotiation procedure or practice in good time.[1022]

A submission of a demand or a response to that should include demand/s or response in clear and concise form as well as an outline of its demands, any request or response to a request for the disclosure of information, a proposed timetable for negotiations, and the names and details of its appointed negotiators.[1023]

After the demand is received the receiving party (employer or employer's organisation) should acknowledge receipt in writing and inform the other party, when it will respond to the demand or make demands itself and whether it agrees or not with the dates for the pre-negotiation meeting[1024] and if necessary, propose alternative dates.[1025] Also, a facilitator may be utilised to assist in the negotiation process.[1026]

[1019]Section 9 (3) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1020]Section 9 (1) (c) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1021]Section 9 (1) (f) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1022]Section 10 (1) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1023]Section 10 (2) and (4) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1024]See section 11 Code of Good Practice: Collective Bargaining, Industrial Action and Picketing regarding pre-negotiation meeting.

[1025]Section 10 (3) Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

[1026]Section 12 Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

3.5.3 Legal enforcement of collective agreements

Bargaining Councils have the power and function to enforce collective agreements concerning its registered scope.[1027]

3.5.3.1 Monitoring of compliance with collective agreements

Section 33 of the LRA determine that (if the bargaining councils request so) the Minister of Labour may appoint any person as a designated agent of that bargaining council to promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council.[1028]

Section 63 of the BCEA determines that the Minister of Labour may; designate any person appointed as a designated agent of a bargaining council to perform any of the functions of a labour inspector.[1029] In such case, the designated person must perform their functions in accordance with chapter 10 of the BCEA, subject to the Minister's direction and control.[1030]

In section 33A of the LRA, Bargaining Councils are afforded the right to monitor and enforce compliance with its collective agreements or collective agreements concluded by parties to the council.[1031] A collective agreement for this purpose, includes conditions of employment in terms of section 49 (1) of the BCEA and "the rules of any fund or scheme established by the bargaining council".[1032]

[1027]Section 28 (b) LRA.

[1028]Section 33 (1) LRA.

[1029]Section 63 (1) (b) BCEA.

[1030]Section 63 (2) BCEA. Refer to chapter 3.3.3.1, for a complete consideration of a labour inspector's functions.

[1031]"Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council" Section 33A (1) LRA.

[1032]Section 33A (2) (b) LRA.

A designated agent may hold the following functions:

a) "Secure compliance with the council's[1033] collective agreement by:
   i) publicising contents of the agreements;
   ii) conducting inspections;
   iii) investigate complaints; or
   iv) any other means the council may adopt; and
b) perform any other functions that are conferred or imposed on the agent by the council".[1034]

Tao Ying Metal Industry (Pty) Ltd v Pooe NO[1035] states that bargaining councils replaced industrial councils and are utilised as a principal institution for resolving labour disputes. Bargaining councils have various functions as contained in section 28 of the LRA. Among these are concluding and enforcing collective agreements[1036] to prevent and resolve labour disputes and to perform the dispute resolution functions referred to in section 51 of the LRA that includes conciliation and arbitration.[1037]

The rights and powers of a designated agent are provided in schedule 10 of the LRA[1038] and are comparable to the rights and powers provided for labour inspectors in terms of the BCEA. Refer to chapter 3.3.3.1 for a complete expansion of these rights and powers. The main rights afforded to a designated agent are:

[1033]For purposes of the LRA, council refers to a bargaining council and a statutory council.

[1034]Section 33 (1A) LRA.

[1035]*Tao Ying Metal Industry (Pty) Ltd v Pooe NO* 222/06 2007 (SCA) 54; 2007 3 All SA 329 (SCA); 2007 7 BLLR 583 (SCA) para 8 & 11.

[1036]Section 28 (a) & (b) LRA.

[1037]Section 51 (3) (a) & (b) LRA.

[1038]"For the purposes of this Schedule, a collective agreement is deemed to include any basic condition of employment which constitutes a term of a contract of employment in terms of section 49 (1) of the Basic Conditions of Employment Act", Schedule 10 (12) LRA.

a) the right to enter any workplace,[1039]
b) to monitor or enforce compliance with a collective agreement by relying on certain powers to question and inspect,[1040] and
c) to require any person to cooperate with the designated agent.[1041]

The rights of a designated agent are protected in that a "bargaining council may apply to the Labour Court for an appropriate order against any person who-

a) refuses or fails to answer all questions lawfully put to that person truthfully and to the best of that person's ability;
b) refuses or fails to comply with any requirement of the designated agent in terms of this item; or
c) hinders the designated agent in the performance of the agent's functions in terms of this item".[1042]

3.5.3.2 Legal sanctions and remedies for non-compliance with collective agreements

The collective agreement may authorise a designated agent to issue a compliance order that requires any person (bound by the collective agreement) to comply with the collective agreement within a specific period.[1043]

Any unresolved dispute of compliance with a collective agreement may be referred to arbitration by the bargaining council.[1044] An arbitrator appointed by the council shall adjudicate the arbitration.[1045] If there is objection to the appointment of an arbitrator,

[1039]Schedule 10 (1), (2), (3) & (4) LRA. Workplace in this context defined by section 213 of the LRA.

[1040]Schedule 10 (5), (6) & (7) LRA.

[1041]Schedule 10 (8), (9) & (10) LRA.

[1042]Schedule 10 (11) LRA.

[1043]Section 33A (3) LRA.

[1044]Section 33A (4) (a) LRA.

[1045]Section 33A (4) (a) LRA.

by a party to the arbitration who is not a party to the council, then the CCMA must appoint an arbitrator on request of the council.[1046]

The arbitrator conducting the arbitration has the powers of a commissioner as contemplated in section 142 of the LRA.[1047] Section 142 of the LRA provides the arbitrator with the right to subpoena any person that:

a) may be able to provide useful information,[1048]
b) believed to be in possession, control of an object relevant to the dispute,[1049]
c) is an expert, to give evidence relevant to the dispute,[1050]
d) was present at the conciliation or arbitration or could have been subpoenaed for questioning.[1051]

The arbitrator may also administer an oath or affirmation.[1052] The arbitrator may at any reasonable time after obtaining the necessary written authorisation:

a) enter and inspect any premises,[1053]
b) examine, demand the production of, and seize any relevant object,[1054]
c) obtain a statement from any person willing to do so regarding any relevant matter.[1055]

[1046]Section 33A (4) (b) LRA, "the Council remains liable for the payment of the arbitrator's fee; and

(ii) the arbitration is not conducted under the auspices of the Commission (CCMA)". Section 33A (4) (c) LRA.

[1047]The powers of a commissioner in terms of section 142 of the LRA, read together with the changes required by the context. See section 33A (5) LRA.

[1048]Section 142 (1) (a) LRA.

[1049]Section 142 (1) (b) LRA.

[1050]Section 142 (1) (c) LRA.

[1051]Section 142 (1) (d) LRA.

[1052]Section 142 (1) (e) LRA.

[1053]Section 142 (1) (f) (i) LRA.

[1054]Section 142 (1) (f) (ii) LRA.

[1055]Section 142 (1) (f) (iii) LRA.

The obstruction of the commissioner's rights may be done in contempt of the CCMA.[1056] A commissioner may refer a finding of contempt of the CCMA to the Labour Court[1057] where the decision of the commissioner may be confirmed, varied or set aside.[1058] Arbitration proceedings must be conducted (with consideration of contextual changes) in accordance with the framework established in section 138 of the LRA.[1059] The extent of disputes that may be determined by the arbitrator in this context extends to; "any dispute concerning the interpretation or application of a collective agreement".[1060]

An arbitrator in arbitration proceedings operating in terms of section 33A of the LRA may make an appropriate award that includes:

a) "ordering any person to pay any amount owing in terms of a collective agreement",[1061]
b) issuing a fine for non-compliance with the collective agreement (considered in the ensuing paragraphs),[1062]
c) "charging a party an arbitration fee",[1063]
d) making an arbitration costs' order against a party,[1064]

[1056]Section 142 (9) (a) LRA.

[1057]Section 142 (9) (b) LRA.

[1058]Section 142 (11) LRA.

[1059]Section 33A (6) LRA.

[1060]Section 33A (7) LRA.

[1061]Section 33A (8) (a) LRA. In *MIBCO Obo Alicia Chantelle Du Plessis v S A D Paneelkloppers CC t/a Precision Paneelkloppers* MINT66788 (BC), a bargaining council (DRC: A Division of the Motor Industry Bargaining Council) made an arbitration award in favour of a worker on the basis that the employer violated an collective agreement by underpaying the worker; In *Autozone Holdings (Pty) Lts t/a Autozone v Moolman* JR649/15 2017 ZALCJHB 201 (LC), the employer failed to remunerate the worker the minimum wage rate as determined by collective agreement. A reward wat made in favour of the aggrieved worker for the shortfall between the received wage and the prescribed wage rate.

[1062]Section 33A (8) (b) LRA. A fine may be imposed in accordance with section 33A (13) LRA.

[1063]Section 33A (8) (c) LRA.

[1064]Section 33A (8) (d) LRA.

e) confirming, varying or setting aside a compliance order issued by a designated agent in accordance with section 33A (4) LRA,[1065]
f) any award contemplated in section 138(9) LRA as considered in the ensuing paragraphs.[1066]

The Minister of Labour may; publish in the Government Gazette a notice that sets out the maximum fines that may be imposed by an arbitrator acting in terms of section 33A LRA, concerning the enforcement of collective agreements by bargaining councils.[1067] Maximum fines may be prescribed for the breach of collective agreement with reference to:

a) a breach that does not pertain to the failure to pay any amount of money,[1068]
b) a breach involving a failure to pay any amount of money, and[1069]
c) repeat breaches of the collective agreement.[1070]

The maximum fines that may be imposed by an arbitrator are illustrated in tables 5 and 6.[1071]

[1065]Section 33A (8) (e) LRA.

[1066]Section 33A (8) (f) LRA.

[1067]Section 33A (13) (a) LRA.

[1068]Section 33A (13) (b) (i) (aa) LRA.

[1069]Section 33A (13) (b) (i) (bb) LRA.

[1070]Section 33A (13) (b) (ii) LRA.

[1071]These figures reflect the position at the time of conducting the thesis.

Table 5: Maximum permissible fine not involving an underpayment (Published under GN R1446 in GG 25515 10 Oct 2003)

No previous failure to comply	R100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provisions within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four or more previous failures to comply in respect of the same provision within three years	R500 per employee in respect of whom the failure to comply occurs

Table 6: Maximum permissible fine involving an underpayment (Published under GN R1446 in Government Gazette 25515 10 Oct 2003)

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two previous failures to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

In terms of the LRA,[1072] an arbitrator[1073] can make any appropriate arbitration award "including, but not limited to, an award:

a) that gives effect to any collective agreement;
b) that gives effect to the provisions and primary objects of this Act;
c) that includes, or is in the form of, a declaratory order".[1074]

Interest accrues at a rate of 7.75% per annum[1075] on any amount; a person is obliged to pay in terms of a collective agreement from the date on which the amount was due and payable, unless the arbitration award provides otherwise.[1076]

Any arbitration award conducted in terms of section 33A of the LRA is final and binding and may be enforced by utilising section 143 of the LRA[1077] that explains the effect of arbitration awards.[1078] The effect of arbitration awards is that:

a) It may "be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award",[1079]and

[1072]Section 33A (8) (f) LRA.

[1073]Section 138 (9) LRA, refers to commissioner but in the context of section 33A (f) of the LRA reference is made to arbitrator.

[1074]Section 138 (9) LRA. See *Kureva v Lakeside Transport And Logistics*, RFBC44064 (BC).

[1075]Unless the arbitration award provides otherwise. Section 143 (2) LRA. Prescribed rate of interest at the time of conducting this research as published in; GN R987 in GG 43703 of 11-9-2020.

[1076]Section 33A (9) LRA.

[1077]In terms of the application of section 143; "Subsections (1), (4) and (5), as amended by the Labour Relations Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date". Section 143 (6) LRA.

[1078]Section 33A (10) LRA.

[1079]Section 143 (1) LRA. Subsection 3 of the aforementioned section determines that: an arbitration award may only be enforced in accordance with this provision, if the director of the CCMA has certified that the arbitration award is an award contemplated in section 143 (1) LRA. "Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court" Section 143 (5) LRA.

b) "If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award"[1080] at a rate of 7.75% per annum,[1081] unless the award provides otherwise.

The subsequent chapter reflects on the South African minimum wage compliance framework by identifying weaknesses and providing recommendations.

3.6 Weaknesses of the South African minimum wage compliance framework and recommendations

3.6.1 Coverage

The coverage of the SANMW is the minimum coverage most workers enjoy while currently minimum wage coverage through sectoral determinations and collective agreements provides "minimum wage" coverage above the SANMW. These minimum wage mechanisms establish differentiated minimum wage coverage that applies nationally or through various sectors and industries or between certain employers and employees that may complicate the coverage and hold compliance challenges. The simplification of coverage through less minimum wage mechanisms may be beneficial for compliance purposes. Simplification may be affected through the erosion of sectoral determinations (in accordance with government ambitions as mentioned in chapter 3.4). To address fears (of organised labour) concerning the neglect of minimum wage in industries or sectors earning above the SANMW, collective agreements may be used to establish minimum wage in certain sectors or industries above the SANMW level. There may currently be a degree of uncertainty regarding the future role of sectoral determinations, it is in everyone interest for the competent body to provide clarity.

The non-compliance risk associated with the differentiated minimum wage may be mitigated by promoting and specifically emphasising the importance and the responsibility of the employer and employee representatives and the individual in

[1080] Section 143 (2) LRA.

[1081] Prescribed rate of interest at the time of conducting this research as published in; GN R987 in GG 43703 of 11-9-2020.

sectoral determinations and collective agreements. The differentiated minimum wage represents unique minimum wage coverage that deviates from the standard SANMW that may be optimally monitored through the parties affected by the coverage. Therefore, personal responsibility for minimum wage compliance should be encouraged among the parties covered by minimum wage.

SANMW coverage is arguably broad enough to include as many workers as possible while allowing a degree of flexibility by providing for certain exemptions and exclusions. The exemptions are for certain sectors considered vulnerable, where a reduced SANMW is allowed for a temporary period to assist sectors in adapting to the SANMW; exemptions may therefore alleviate non-compliance. The temporary nature of exclusions correlates with international standards as mentioned in chapter 2.4.1.1 and ensures that the coverage of the affected workers is revaluated. Some of the exclusions (agricultural and domestic workers) to NMW coverage will ultimately be eroded and simplify the minimum wage coverage.

Flexibility in the form of exemptions may be further developed to include other vulnerable workers such as workers with disabilities in order to promote employability and to alleviate non-compliance. Flexibility measures should be carefully constructed in order to avoid abuses thereof.

The copious numbers of youth workers in the South African labour market should receive special consideration in terms of SANMW coverage because youth workers may be a potential non-compliance risk. Currently, differentiated minimum wage coverage through learnership agreements allows reduced minimum wage rates for these workers, thus making them more attractive to employers and reducing the possible non-compliance risk. There may be a degree of uncertainty whether learnerships agreements are considered part of a long-term differentiated minimum wage coverage solution or, rather, a transitional measure utilised to facilitate the introduction of the SANMW in the labour market. The South African economy's significant youth segment arguably requires differentiated coverage to aid compliance. The youth segment in the South African labour market should be carefully monitored and further developed in the future.

The involvement of the public in the review process of minimum wage may promote awareness of minimum wage. As indicated in chapter 3.3.3, inefficiencies in the operation of the South African labour administrative system may detrimentally affect the workings of the bodies under its ambit which may have specific bearing to coverage of minimum wage and general compliance. As indicated in chapter 3.3.1, the NMW must constitute a term of an employee's contract and should promote awareness of the NMW. The BCEA determines that employers are required to keep a copy of sectoral determination (as referred to in chapter 3.4.1) that promotes awareness. However, there is no corresponding provision requiring same of the NMWA. This can easily be rectified by appropriate legal provision.

The South African legislative framework provides stakeholders (employer and employees and their representatives) with various rights that are beneficial for creating awareness of minimum wage coverage. The role of stakeholders in creating awareness should not be underestimated. The government through its labour administration framework may arguably take a more decisive and leading role in encouraging and requiring stakeholders to assume greater responsibility in terms of awareness as part of a comprehensive effort to promote awareness.

3.6.2 Determination

As indicated under chapter 3.3.2, the South African NMW is not determined at an excessive ratio to median wages. The moderate SANMW level is confirmed within the international context of minimum wage determination. The SANMW is relatively new and represents an increase in the minimum wage floor for numerous workers. That being said, because of the reasonable level thereof, the SANMW determination will probably not be a dominant driving factor towards minimum wage non-compliance. The SANMW should ideally be adjusted over the long term to correlate with global minimum wage determination standards. The correlation with global standards should be actively pursued after the South African labour market has adapted to the introduction of the SANMW and the necessary administrative infrastructure has been developed to effectively pursue higher NMW determination successfully.

As previously stated in this chapter, the flexibility in the SANMW allows exceptions to the SANMW coverage where certain sectors are exempted from remunerating workers at the full minimum wage level. These exceptions arguably still protect the workers in the applicable sectors by not doing away with minimum wage altogether but requiring remuneration at 90% of the SANMW. There is no significant discrepancy between the excepted minimum wage rate and the SANMW that still offers a "respectable" minimum level of remuneration while only being of temporary nature.

3.6.2.1 Adjustment

Adjustment of the SANMW is done annually after recommendation of the SANMWC. The SANMWC is responsible for establishing medium-term targets for the NMW within three years of the commencement of the NMWA.[1082] These targets will arguably assume a central role in the adjustment approach of the NMW. Minimum wage should not primarily be regarded as a short or even medium-term measure. It should rather be regarded as a long-term measure that includes medium- and short-term targets. For the minimum wage to truly make a noticeable difference in decreasing the excessive inequality in South Africa (among other objectives) it arguably requires establishing long-term goals. The relatively recent introduction of the SANMW arguably requires time to settle into the labour market that may correspond better with long term goals.

The SANMWC needs to establish these targets as soon as possible in order to promote transparency and stability by managing expectations in the labour market. The adjustment of minimum wage has a direct impact on the expenditure of employers, which influences the financial prosperity of the employer. Being able to rely on a legal framework, to provide a general indication in terms of the extent of future adjustments may be useful to employers. Employees may also utilise such measure to improve financial planning and decision-making.

Realistically, a legal framework may be established that indicates the; method, parameters or framework utilised to establish the value of adjustments. Such a

[1082] Section 11 NMWA.

framework does not necessarily provide exact adjustment values but rather estimated adjustment ranges to promote long-term stability and transparency in adjusting minimum wage.

The legislative compilation of SANMWC members may arguably be problematic for representing the majority interest of labour (employees) ahead of the interests of business. In line with international standards, chapter 2.4.2., stakeholders should be represented on equal footing in minimum wage determination. The current SANMWC membership may be inclined to represent the interests of workers above other interests that may result in these interests being predominantly promoted in the decision making of the SANMWC. This may be to the detriment of the interests of other stakeholders such as business. The ideal compilation of the SANMWC should arguably be made out of members from various parts of the labour market, representing diverse interests, but independent from one another and carrying equal authority.

3.6.3 Legal enforcement

The CCMA assumes a central position as the judicial authority that oversees various enforcement aspects of the SANMW including but not limited to making arbitration awards and handling disputes about the NMWA 2018. In overseeing these aspects, the CCMA play an important role in relieving pressure from the South Africa court system. However, the CCMA runs the risk of getting overburdened by its central role in the enforcement of the SANMW that may compromise compliance and the ultimate success of the SANMW. It is recommended that the functions of bargaining councils are expanded to mitigate this risk. The role of bargaining councils may be expanded to deal with disputes and other enforcement aspects of the SANMW.

The timely rectifying of non-compliance is important to ensure legislative integrity in rectifying non-compliance but also to offer timely relief to the employees subject to the non-compliance. To promote the timely rectification of non-compliance, legislative provisions may be developed to offer financial incentives to non-compliant employers to address the non-compliance in a timely manner. This may take on the form of reduced fines.

Chapter 2.4.2 indicates the central role of labour administration in the functioning of national labour policy which emphasises the need for an effective labour administration framework. The labour administration system in South Africa is not functioning optimally which originates from inefficiencies in the central administrative body being the DOL. Considering the state of the labour inspection profession in South Africa, as referred to in 3.3.3.1.1, the following aspects may be of concern:

The recruitment approach followed by the DOL is not functioning optimally, and it may be to the detriment of the minimum wage compliance framework. Literature indicates that the quality of labour inspectors is problematic within South African labour inspectors' broad mandate. On this point, the limited portion of labour inspectors in possession of university degrees or other advanced training should be highlighted considering the diverse functions and the numerous legislative measures under the responsibility of labour inspectors. The labour inspection profession should be a specialised profession, with suitably qualified individuals with the necessary skills and temperament for the profession. These factors should be reflected in stringent recruitment criteria. Once employed, labour inspectors should also be mandated to engage in regular training and development initiatives for personal and professional reasons.

The DOL struggles to recruit and retain inspectors. This results in various vacant labour inspection positions exacerbated by the inability to retain inspectors. It may be argued that vacant labour inspection positions indicate that the labour inspectorate is not functioning optimally because there should be a strategic recruitment and selection strategy to ensure continuous and uninterrupted placement in inspectorate positions. Traditionally, recruitment and retention are the responsibility of the human resource department. Rodríguez states the following regarding the significant role of the human resources department responsible for labour inspectors:

> "[A] sound HR (human resources) policy for Labour Inspectorates should therefore endeavour to ensure the professional conduct and

> accountability of labour inspectors, while in no way weakening their employment status or curtailing their powers."[1083]

The human resources department's current functioning within the DOL may be weakening the employment status and curtailing the powers of labour inspectors, ultimately weakening the labour inspectorate in South Africa that will necessarily affect compliance with minimum wage.

Besides the recruitment of suitable candidates, the retention of labour inspectors also appears to be a challenge in the South African context. An aspect that may play a role in recruitment and retention is labour inspectors' earnings. The earnings range of labour inspectors may be considered modest regarding the profession's demands and responsibilities. If the quality of labour inspectors is to be improved, by moving towards a specialised profession, then the earning ranges of labour inspectors will have to be reviewed and improved to make it more attractive for potential job seekers to apply and retain staff.[1084] The remuneration of labour inspectors should be commensurate with their responsibilities.[1085] Davidov states that "a higher wage helps firms to recruit workers, keep them motivated and maintain low turnover 'efficiency wage'".[1086] For the last few years, the DOL financial status indicated underspending of the allocated budget that indicates potential room to have the earnings of inspectors reviewed and adjusted. Employment growth through promotional opportunities is another measure that must be utilised to retain labour inspectors. The ILO indicates that the lack of promotional opportunities is a major cause for high labour inspector turnover in low and (possibly also) middle-income countries.[1087]

Regarding the number of labour inspectors, chapter 3.3.3.1.1 indicates that the number of labour inspectors in South Africa is adequate in global standards. To

---

[1083]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 15.

[1084]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 48.

[1085]49.

[1086]Davidov (2009) *Mod Law Rev* 589.

[1087]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 50.

maintain this standard, it may be useful to establish a legislative framework providing guidelines of the ratio's that must be attained between inspectors and workers. Following the ILO threshold, this ratio should optimally not exceed one labour inspector per 20 000.00 workers.

The number of annual labour inspections may be considered average within global standards. Inspections have traditionally been considered as the preferred measure, in enforcing compliance with employment law in general. Labour inspections involve the physical presence of a labour inspector at the targeted workplace to evaluate compliance with a wide range of legislative measures. However, physical labour inspections may present problems for workers employed at private residences because labour inspectors cannot enter these premises in the same manner as other workplaces.[1088] This presents a challenge to inspectors in fulfilling their functions and it leaves the applicable workers (including but not limited to domestic workers, chefs, garden workers and caretakers) vulnerable to exploitation and minimum wage non-compliance.

Technology presents new possibilities and may be utilised to monitor compliance with the traditional approach of workplace inspections. The employer has the legislative duty to provide the worker with an employment contract in writing, and monthly remuneration invoices. These two measures can be utilised to evaluate compliance with minimum wage. Such evaluation does not necessarily have to be conducted at the employer's workplace but can be conducted remotely. The labour inspector or other appropriate staff of the labour inspectorate may select certain employers for minimum wage audits, that require the employer to submit the employment contracts and monthly earning invoices of certain monetary threshold employees to the labour inspectorate department. Institutional frameworks may be established by utilising technological platforms to allow physical submission of the requested documents at the inspectorate, or submissions may be done electronically. These documents can then be evaluated to establish the state of compliance.

[1088] 21.

To promote evaluation, reliability and validate documents and content or to seek clarity on any particularity, employees may be contacted (telephonically or by alternative means) in order to achieve such purposes. Minimum wage audits can possibly be conducted with other adequately proficient administrative staff at the labour inspectorate department that may have the benefit of saving financial resources, reducing travelling costs of inspectors, relieving pressure and workload of inspectors, saving time and allowing the enforcement and monitoring of more employers, that would perhaps not have been possible with traditional on-site workplace inspections. Minimum wage audits also overcome problems that may arise from labour inspectors' failure to access workplaces, which is often the case when inspecting workplaces in the domestic sector.

Financial penalties regarding minimum wage non-compliance are categorised according to the minimum wage instrument. The categorisation of financial penalties effectively established three different punitive frameworks in the South African legal landscape that may not represent a simplified punitive system that may negatively influence certainty and general awareness. In addition, the punitive measures, especially of sectoral determinations and collective agreements, may be insignificant to deter non-compliance. The current punitive measures may not outweigh the perceived benefit associated with non-compliance which is a crucial weakness in the punitive system. It is therefore recommended that the punitive categorisation be simplified into a standard uniform punitive framework for all three minimum wage measures. It is also recommended that the punitive measures, especially of collective agreements and bargaining councils, be adjusted to represent more severe consequences.

Chapter 4: Comparative perspective of minimum wage compliance systems

To better understand the minimum wage compliance models of foreign jurisdictions, this chapter will consider minimum wage compliance in the UK and Australia for the reasons set out in chapter one. The minimum wage compliance models of these nations will be considered with reference to the compliance elements identified in this study.

4.1 Compliance with minimum wage in the UK

The UK is a sovereign state consisting out of four countries; England, Scotland, Wales and Northern-Ireland. Minimum wage legislation in the UK can be traced back to the "Fair Wages Resolution" of 1891. [1089] In the early 1900's, the so called "Wages Councils" set minimum wage rates for a number of industries that were mostly low wage industries, including: retail, hotels, catering and clothing manufacturing.[1090] Wages were differentiated by age, occupation and region.[1091] The development of the UK minimum wage model was curbed under the leadership of Margaret Thatcher during which time there was a gradual deregulation of the labour market, which saw a diminishing role of minimum wage and trade unions, in favour of liberalization of the economy.[1092] It was only during the late 1900's that the role of minimum wage was re-established by the introduction of the NMW 1999.[1093]

In 1999, the UK's NMW was introduced by the National Minimum Wage Act of 1998 (hereafter referred to as the NMWA 1998). Since then, the UK's minimum wage

---

[1089]Finn D "The National Minimum Wage in the United Kingdom" (2005) 1 *Graue Reihe des Instituts Arbeit und Technik* 1 11.

[1090]Machin & Manning (1996) *Econ J* 668.

[1091]668.

[1092]Marinakis, A. (2009) The role of ILO in the development of minimum wages. ILO Century Project. 26-28. Giupponi G & Machin S "Changing the Structure of Minimum Wages: Firm Adjustment and Wage Spillovers" (2018) 11474 *IZA Institute of Labor Discussion Paper Series* 1 1.

[1093]Minimum pay standards established by the Wages Councils is recognised as inadequate for solving the low pay challenge in the UK. Oude Nijhuis D "Low Pay Wage Relativities, and Labour's First Attempt to Introduce a Statutory National Minimum Wage in the United Kingdom" (2016) 28 *J Pol His* 81 81-82. Marinakis, A. (2009) The role of ILO in the development of minimum wages. ILO Century Project 26-28. Also see Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 7.

model has developed to such an extent that it includes a National Living Wage (NLW), which arguably establishes the UK as a global leader of minimum wage utilisation. Since the NMW's inception, it made a positive impact on addressing low pay and income inequality[1094] that coincides with an effective minimum wage compliance model. [1095] The minimum wage compliance model is well developed to address a wide range of elements about compliance such as effective and timeous compensation in instances of non-compliance with minimum wage provisions; effective awareness of minimum wage to deter possible non-compliance, and the optimisation of limited resources. All these elements contribute to a holistic compliance model with an overall low non-compliance rate.

Before considering the minimum wage framework of the UK, it is necessary to consider international measures ratified by the UK.

4.1.1 International legal measures ratified by the UK

As indicated under chapter 2.3 and table 1, the UK has ratified the following relevant conventions:

- The Labour Inspection Convention, 1947, no. 81
- The Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87
- The Right to Organise and Collective Bargaining Convention, 1949 no. 98
- The Equal Remuneration Convention, 1951, no. 100
- The Labour Administration Convention, 1978, no.150

In the context of the numerous Conventions applicable to compliance as discussed in chapter 2.3, the UK has a relatively modest number of ratified Conventions. Despite this, the UK minimum wage model is well developed in terms of coverage, determination and enforcement.

[1094]Wills & Linneker (2014) *Trans Inst Br Geogr* 185. Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 1-5.

[1095]Benassi "The Implementation of Minimum Wage: Challenges and Creative Solutions" *Global Labour University* 4. Wills & Linneker (2014) *Trans Inst Br Geogr* 185.

4.1.2 Coverage of Minimum Wage in the UK

The NMWA 1998 forms the legislative basis for minimum wage in the UK. The NMWA 1998, establishes two prominent types of employment status "employee" and "worker".[1096] An "employee" means: "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".[1097]

The definition of a "worker" is broader, it includes an individual that worked under a contract of employment as well as any other contract where the individual undertakes to personally to any work or services.[1098] Workers in the UK are similar to independent contractors in South Africa in the sense that they are free to accept or reject any offer of work made to them, without penalty. Employees do not always have such freedom to reject a work offer without penalty.

A prominent difference between employees and workers is their statutory rights.[1099] Employees are entitled to all statutory employment rights while workers have a limited entitlement to the statutory employment rights. The statutory employment right in the form of the NMW applies to employees and workers.

Workers must be at least school leaving age[1100] to be entitled to the NMW, which is a single hourly rate as prescribed from time to time, by the Secretary of State[1101] for

---

[1096]Section 54 NMWA 1998. Another employment status type is that of "self-employed". See Department for Business Innovation & Skills "Employment status review" (2015) *Government UK* 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585383/employment-status-review-2015.pdf> (accessed 21-12-2020).

[1097]Section 54 (1) NMWA 1998.

[1098]Section 54 (3) (b) NMWA 1998: Any contract "whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". Also see Department for Business Innovation & Skills "Employment status review" *Government UK* 7-8.

[1099]Department for Business Innovation & Skills "Employment status review" *Government UK* 8-9.

[1100]Generally accepted to be 16 years of age across the various regions of the UK, Government UK "The National Minimum Wage and Living Wage" (2020) *Government UK* <https://www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage> (accessed 8-5-2020). Also see Government UK "School leaving age" (2020) *Government UK* <https://www.gov.uk/know-when-you-can-leave-school> (accessed 2-5-2020).

[1101]Section 1 (3) NMWA 1998.

work in any pay reference period.[1102] To qualify for the NMW an individual must be a worker, who is working, or ordinarily works, in the UK under his contract and has ceased to be of compulsory school age.[1103]

The NMWA 1998 defines an employer as "the person by whom the employee or worker is (or, where the employment has ceased, was) employed".[1104] In the instance where an employer (immediate employer) is himself employed by another employer (superior employer) and a worker is employed on the premises of the superior employer, then the superior employer and the immediate employer are deemed to be the joint employer of the worker.[1105]

The UK minimum wage model utilises a series of minimum wages (differentiated minimum wages) where different minimum wage coverage is provided depending on two criteria, namely:[1106]

a) age and
b) whether you are an apprentice or not.

These criteria are utilised to establish a series of different minimum wage rates that provides differentiated minimum wage coverage for five general categories in the labour market. These general categories are:[1107]

a) workers aged 25 years and older,
b) workers aged between 21 to 24 years,

[1102]Section 1 (1) NMWA 1998. A pay reference period for the purpose of the NMWA 1998 is such a period as the Secretary of State may from time to time prescribe. Section 1 (4) NMWA 1998.

[1103]Section 1 (2) NMWA 1998. Employment tribunals will consider NMW coverage disputes carefully to ensure the protection of individuals under its intended scope, see: *Guiseppe Caruso T/a Albro House Hotel Ltd vs The Commissioners for HM Revenue and Customs* 2018 2206722 (UKET).

[1104]Section 54 (4) NMWA 1998.

[1105]Section 48 NMWA 1998.

[1106]Sargeant (2010) *Pol Stud* 352. Also see Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" (2020) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877174/LPC_2020_uprating_report.pdf> (accessed 8-5-2020).

[1107]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 2. Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 7.

c) workers aged 18 to 20 years,
d) workers aged 16 to 17 years, and
e) certain workers engaged in apprenticeships.

Minimum wage in the UK is therefore structured having regard of five categories of workers who receive minimum wages ranked in an aged-based hierarchy. There may be numerous reasons for categorising the minimum wage according to age.

A lower minimum wage rate for younger workers may make education more attractive, therefore balancing the desirability of education and the desirability of work, while still protecting younger workers against exploitation.[1108]

Younger workers are typically less skilled and productive than older workers, which may make younger workers less desirable employees to employers at general minimum wage rates.[1109]

> "Since young people are disproportionately represented among the low-paid, given their lack of experience and perceived lack of job-related skills, they are also likely to be disproportionately affected by the establishment of a minimum wage".[1110]

A lower minimum wage rate for younger workers may drive the employability of younger workers which may balance this conundrum. One may argue that the differentiation of minimum wage based on age constitutes discrimination. This may be true; however, it may be justified in protecting the position of younger workers in the labour market.[1111]

The workers aged 25 years and older receive the highest minimum wage that is known as the National Living Wage (hereafter referred to as the NLW. Any reference to NMW includes the NLW). The stagnant historical profile of wages in the UK played

---

[1108]Sargeant (2010) *Pol Stud* 353.

[1109]353.

[1110]O'Higgins N & Moscariello V "Labour Market Institutions and Youth Labour Markets: Minimum Wages and Youth Employment Revisited" (2017) 223 *ILO Employment Working Paper* 1 5.

[1111]Sargeant (2010) *Pol Stud* 353.

a central role in the introduction of the NLW, that it serves to address.[1112] It is important to emphasise that the NLW forms part of the UK's NMW framework and it doesn't stand independent from this framework. However, the approach followed in the determination and adjustment of the NLW is distinct from the approach used in the minimum wage categories, as discussed in sub-chapter 4.1.3.

Since its introduction, the NMW had a positive impact on income inequality and low pay. However, NMW was not established high enough to "stem the rising tide of in-work poverty".[1113] Consequently, the idea of an NLW originated from a recognition of poverty under workers,[1114] also known as the "working poor".

Every year since the introduction of the NLW the number of workers paid the NLW has remained constant.[1115] It is estimated that the upper-bound of NLW coverage is 9.5% for 2020.[1116] As indicated in sub-chapter 4.1.3, the Low Pay Commission (hereafter referred to as the LPC) is tasked to lower the qualifying age for the NLW from 25 years and older, to 21 years by 2024. This will be attained by using a gradual approach that lowers the qualifying age for the NLW to 23 years by 2021 and lowering the age further to 21 by 2024. This initiative will restructure the NMW coverage framework of the UK and establish more favourable coverage to younger workers in the form of the NLW.

A consequence of lowering the qualifying age for the NLW, is that it will result in the erosion of one category (the 21-24-year-old) of minimum wage that may result in a simpler minimum wage model with benefits for improved compliance. This is an important development, as the complex nature of the NMW, in utilising different rates,

---

[1112]Giupponi & Machin (2018) IZA Institute of Labor Discussion Paper Series 6.

[1113]Wills & Linneker (2014) *Trans Inst Br Geogr* 185.

[1114]Wills & Linneker (2014) *Trans Inst Br Geogr* 185. Huysamen (2018) *De Jure* 272.

[1115]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 6.

[1116]6.

have been identified as a challenge of the UK's minimum wage model.[1117] Refer to sub-chapter 4.1.3 for further deliberation on the determination of minimum wages.

Cognisance should be taken of the living wage as established by the Living Wage Foundation (hereafter referred to as the LWF). The LWF is an independent organisation in the UK, that establishes an independent calculated living wage based on the "actual living costs".[1118] Employers may apply for accreditation to the organisation, which then requires employers to voluntary pay their workers the living wage rate as established by the LWF. Besides age, engaging in an apprenticeship is another criterion used to differentiate minimum wage coverage.

An apprentice is an individual who has entered or works (or worked) under a contract of apprenticeship, whether express or implied and whether oral or in writing.[1119] Subject to certain exception, apprentices are entitled to the NMW. The reduced minimum wage rate for apprentices may be justified on the premise that workers under an apprenticeship may possess little skill and experience in which case the employer provides the apprentice with training and experience. The minimum wage coverage of apprentices may be necessary to protect the dignity of these individuals because these individuals may be in a greater position of vulnerability than regular workers.[1120]

The NMWA 1998 recognises special classes of persons in the labour market, that have particular application (coverage) of the NMW:[1121]

a) An "agency worker" is an individual that is supplied by a person (agent) to do work for another (principal) under contract or other arrangements made

---

[1117]Sargeant (2010) *Pol Stud* 352.

[1118]Living Wage Foundation "What is the Real Living Wage?" (2020) *Living Wage Foundation* <https://www.livingwage.org.uk/what-real-living-wage> (accessed 10-9-2020).

[1119]Section 54 (1) & (2) NMWA 1998. "[W]hile there are exceptions for people included in various publicly-funded training schemes,87 for the most part trainees enjoy the right to receive a minimum wage for their work" Davidov (2009) *Mod Law Rev* 598. See *HM Revenue & Customs v Rinaldi-Tranter* 20070486.06.1309 (UKEAT).

[1120]Davidov (2009) *Mod Law Rev* 599.

[1121]Also see special classes of persons excluded in NMW coverage; 230.

between the agent and the principal but is not considered a worker, with reference to that work, because of the absence of a worker contract between the individual and the agent or principal and "is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual".[1122] The NMWA 1998 applies to agency workers and has effect as if there were a worker's contract between the agency worker and;[1123]

i) the party (agent or principal), responsible for paying the agency worker or
ii) if neither the agent or the principal is responsible to pay the agency worker, then whichever of them that pay the agency worker.

b) Home workers for the purpose of section 35 of the NMWA 1998 means an individual that is contracted with a person for the purpose of that person's business, "for the execution of work to be done in a place not under the control or management of that person".[1124] For the purposes of the NMWA 1998, home workers are included in the definition of worker.[1125]

c) Subject to certain exceptions mentioned in this chapter, Crown employment shall be included in the coverage of the NMWA 1998.[1126] Crown employment being; "employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by statutory provision".[1127]

[1122]Section 34 (1) (c) NMWA 1998.

[1123]Section 34 (2) NMWA 1998.

[1124]Section 35 (2) NMWA 1998.

[1125]Section 35 (1) NMWA 1998. Also see section 54 (3) (b) NMWA 1998.

[1126]Section 36 (1) NMWA 1998.

[1127]Section 36 (2) NMWA 1998.

d) Apart from the provisions provided in section 21 of the NMWA 1998,[1128] the NMWA 1998 has effect on any member of the House of Lords staff[1129] and the House of Commons staff.[1130]
e) With reference to mariners, individuals employed to work on board a ship registered to the UK must be treated as an individual who ordinarily works in the UK, under his/her contract except where the employment is wholly outside the UK or where the individual is not ordinarily a resident of the UK.[1131]

Concerning the extension of minimum wage coverage, Section 41 of the NMWA 1998 gives the Secretary of State the power to apply, by regulations, the NMWA 1998 to individuals not falling within the original scope of application, thereby extending the coverage of the NMW. Such extension may apply as if:

a) "any individual of a prescribed description who would not otherwise be a worker for the purposes of this Act were a worker for those purposes;
b) there were in the case of any such individual a worker's contract of a prescribed description under which the individual works; and
c) a person of a prescribed description were the employer under that contract".[1132]

[1128]Apart from section 21 (financial penalty for non-compliance) of the NMWA 1998.

[1129]Section 38 NMWA considers House of Lords staff meaning; any person who is employed under a worker's contract with the Corporate Officer of the House of Lords.

[1130]Section 39 NMWA 1998 considers House of Commons staff meaning; any person who was appointed by the House of Commons Commission; or who is a member of the Speaker's personal staff.

[1131]Section 40 NMWA 1998. Notice should be drawn to the fact that NMW coverage was extended: "From 1 October 2020, the NMW (Offshore Employment) (Amendment) Order 2020, comes into force. This extends the right to the National Minimum Wage to all Seafarers and employed fishers working in the UK's territorial sea, regardless of where they ordinarily work or where a ship is registered. It will also apply to those working in the UK part of the Continental Shelf, including where the field crosses the UK boundary, and where the work is connected to UK activity on the Continental Shelf", BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 12.

[1132]Section 41 NMWA 1998.

Her Majesty has the power to apply the NMWA 1998 (by Order in Council) to a person in offshore employment,[1133] to such extent and purpose as may be specified in the Order.[1134] This power of Her Majesty is far reaching and may apply (among other provisions) to individuals, regardless of whether they are British subjects and corporate bodies (regardless of whether they are incorporated under UK law) even where the application affects their business activities outside the UK.[1135]

The subsequent paragraphs consider the exceptions and modifications of minimum wage coverage for certain classes of persons.

Section 3 of the NMWA 1998 provides for the exclusion of, and modifications for, certain classes of persons by the Secretary of State by means of regulations.[1136] The LPC must prepare a report to the Secretary of State after considering:

a) if any provision should be made, and if so what provision, with reference to exclusions or modifications of the NMW[1137] and
b) if any, what descriptions of persons should be added to the application of exclusions and modifications as contained in Section 3 of the NMWA 1998.[1138]

See chapter 4.1.3 for further consideration of the role that the LPC assumes in the minimum wage system of the UK. Section 3 of the NMWA 1998 applies to persons under the age of 26, as well as persons who have reached the age of 26 who are:

[1133]Offshore employment means "employment for the purposes of activities—(a)in the territorial waters of the United Kingdom, or (b)connected with the exploration of the sea-bed or subsoil, or the exploitation of their natural resources, in the United Kingdom sector of the continental shelf, or (c)connected with the exploration or exploitation, in a foreign sector of the continental shelf, of a cross-boundary petroleum field" Section 42 (1) NMWA 1998.

[1134]Section 42 (2) NMWA 1998.

[1135]Section 42 (3) (a) NMWA 1998. In addition, there are numerous other provisions listed under subsection (3).

[1136]Section 3 (2) NMWA 1998.

[1137]Section 5 (2) (d) NMWA 1998.

[1138]Section 5 (2) (e) NMWA 1998.

a) in the initial six months of employment with an employer with whom they have not previously been employed,[1139]
b) participating in either of the following;
   i) a scheme that provides shelter in return for work,[1140]
   ii) a scheme designed to provide training, work experience or temporary work,[1141]
   iii) a scheme that assists in obtaining work,[1142]
c) taking up a course of higher or further education that requires attendance for a period of work experience.[1143]

The Secretary of State may regulate with regards to the above-mentioned applicable persons, which includes the exemption from the NMW or prescribing a different minimum wage rate than the general NMW rate.[1144] However, exclusions or differentiated minimum wage rates are not allowed that treat persons differently based on dissimilar:

a) geographical areas,
b) employment sectors,
c) organisational sizes or
d) occupations.[1145]

These provisions make no mention of differentiation based on age. Accordingly, provision is made where “apprentices under the age of 19 do not qualify for the

[1139]Section 3 (1A) (a) NMWA 1998.

[1140]Section 3 (1A) (b) NMWA 1998.

[1141]Section 3 (1A) (c) NMWA 1998. The NMWA 1998 applies to apprentices, considered to be employees for the purpose of the NMWA 1998. Davidov (2009) *Mod Law Rev* 597.

[1142]Section 3 (1A) (d) NMWA 1998.

[1143]Section 3 (1A) (e) & (f) NMWA 1998. Section 4 of the NMWA 1998 gives the Secretary of State the power to add persons who attained the age of 26 to the application of Section 3 of the NMWA 1998, that deals with exclusions or modification of the national minimum wage. However, any amendment can be made by the Secretary of State that treat persons differently with reference to various elements as mentioned in Section 4 (2) NMWA 1998.

[1144]Section 3 (2) NMWA 1998.

[1145]Section 3 (3) NMWA 1998.

national minimum wage, and apprentices over 19 do not qualify for the national minimum wage for the first 12 months of their apprenticeship."[1146]

As mentioned in previously, the NMWA 1998 establishes special classes of persons, with particular application of the NMWA 1998. The following special classes of persons are excluded from NMW coverage:

1. Members of the armed forces, that include; naval, military and air forces.[1147]

2. Volunteers that assist the activities of the armed forces, otherwise than in the course of Crown employment and are members of the:[1148]

a) Combined Cadet Force,
b) Sea Cadet Force,
c) Army Cadet Force and
d) Air Training Corps.[1149]

Further exclusions from the NMW are:

a) share fishermen being, a person employed as master or member of the fishing vessel crew and remunerated for that employment only by a share of profits or gross earnings of the vessel,[1150]
b) voluntary workers, being workers that are employed by a charity, voluntary organisation, associated fund-raising body or a statutory body if they receive (under the terms of the employment) no monetary payments except in respect of expenses and no benefits except for subsistence,[1151]

[1146]Mantouvalou V "Study on Labour Inspection Sanctions and Remedies: The case of the United Kingdom" (2011) 19 *LAB/ADMIN Working Document* 1 2. Davidov (2009) *Mod Law Rev* 597.

[1147]Section 37 (1) NMWA 1998. The exclusion of the armed forces is; "justified on the ground that the Armed Forces Pay Review Body was the appropriate mechanism to ensure that they had adequate minimum wage protection", Simpson (2009) *Ind Law J* 58.

[1148]Section 37A NMWA 1998. Simpson (2009) *Ind Law J* 58.

[1149]The UK Ministry of Defence promotes four cadet forces that take on the form of voluntary youth organisations with the aim to develop young people.

[1150]Section 43 NMWA 1998.

[1151]Section 44 (1) NMWA 1998. Further particulars are provided in subsections (2) to (4) regarding the application of subsection (1). Davidov (2009) *Mod Law Rev* 596. Simpson (2009) *Ind Law J* 59.

c) resident workers, being residential members[1152] of a community that are employed by the community. Subject to certain exceptions,[1153] the exclusion of NMW application applies to communities that are charities or established by charities, where a purpose of the community is to practice or advance a belief of a religious or similar nature and all or some of its members live together for that purpose,[1154]
d) prisoners, being a person detained in (or temporary released from) prison, in respect of work he does in pursuance of prison rules,[1155] and
e) persons discharging fines by engaging in unpaid work in accordance with a work order,[1156]
f) certain persons detained in removal centres for immigration-based reasons.[1157]

As illustrated above, there are several exclusions of the NMW in the UK. These exceptions are based on specific characteristics related with each exclusion and is arguably necessary to avoid the NMW becoming a rigid measure that burdens the legal and market frameworks.

4.1.2.1 Education and awareness

Regulations may be made requiring the employer to provide the worker (at or before the time at which remuneration is paid to the worker) with a written statement. Regulations may require such statement to contain:[1158]

[1152]Residential members of a community are where all or some of the community members, live together for that purpose. Section 44A (2) (c) & (4) NMWA 1998.

[1153]Section 44A (3) NMWA 1998 provides for the exclusion of certain communities.

[1154]Section 44A (2) NMWA 1998.

[1155]Section 45 NMWA 1998.

[1156]Section 45A NMWA 1998.

[1157]Section 45B NMWA 1998.

[1158]Section 12 (2) NMWA 1998. Any statement required to be given under this section to a worker by his employer may, if the worker is an employee, be included in the written itemised pay statement required to be given to him by his employer under section 8 of the Employment Rights Act 1996 or Article 40 of the

a) prescribed information relating to the NMWA 1998 or any regulation under it or;
b) prescribed information that can assist the worker in determining whether his/her remuneration is compliant with the NMW.

Information and regulations under the NMWA 1998 must be published, in the most appropriate manner to draw the attention of affected persons.[1159] The following information is required to be published:

a) the hourly minimum wage rate for the particular time being prescribed,[1160]
b) the method/s used for determining the hourly minimum wage rate for the pay reference period,[1161]
c) the methods of enforcing rights under the NMWA 1998,[1162] and
d) the persons to whom exclusion of, and modifications of, the NMW apply and the provision made in relation to them by regulations.[1163]

The Department for Business, Energy & Industrial Strategy (hereafter referred to as the BEIS) publishes a quarterly educational bulletin that aims to raise awareness of the relevant law.[1164] These bulletins include statistical information on breaches and case studies.

The determination and adjustment framework of minimum wage may also facilitate awareness because of stakeholder involvement in the annual review process. The publication of findings of the review also creates awareness. The predictability may

---

Employment Rights (Northern Ireland) Order 1996, as the case may be. Section 12 (3) NMWA 1998. Examples of Employment Tribunal decisions pertaining to the failure to provide written statement of terms and conditions of employment: *Mr W Brown and Mrs A M Stubbs v Farringdon City Sports and Social Club* 2018 2501227 (UKET) and *Miss P Powell v Tedroo Ltd* 2019 1406075 (UKET).

[1159]Section 50 (1) NMWA 1998.

[1160]Section 50 (2) (a) & section 1 NMWA 1998.

[1161]Section 50 (2) (b) & section 2 NMWA 1998.

[1162]Section 50 (2) (c) NMWA 1998.

[1163]Section 50 (2) (d) & section 3 NMWA 1998.

[1164]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 21.

also facilitate awareness as the review process is conducted in a predictable manner with subsequent minimum wage determination and adjustments affected the same time annually.

The complex nature of the different minimum wage rates, especially for younger workers, has been identified as a challenging aspect in effectively publishing the NMW.[1165] Research indicates a very high level of awareness of minimum wage in the UK, which is promising. Unfortunately, far fewer people know how much the minimum wage is or how and to who it applies.[1166] The following subsection considers the determination of minimum wage in the UK.

4.1.3. Determination of minimum wage in the UK

As indicated under chapter 4.1.2, the series of minimum wages utilised by the UK provides unique coverage based on age and whether you are an apprentice. The distinctive coverage is characterised by differentiated minimum wage rates. At the time of conducting this study, the minimum rates of the UK's minimum wage system were set as follows:[1167]

a) 25 years and older (National Living Wage) £8.72
b) 21- to 24-year-old rate £8.20
c) 18- to 20-year-old rate £6.45
d) 16 to17-year-old rate £4.55
e) apprentice rate £4.15

[1165]Sargeant (2010) *Pol Stud* 352.

[1166]Arup & Sutherland (2009) *Monash Uni Law Rev* 101.

[1167]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 2.

It is also useful to take note of the living wage as established by the LWF (as mentioned in chapter 4.1.2):[1168]

a) a. across the UK £9.30
b) b. in London £10.75.

It is evident that the determination of the living wage according to the LWF is higher than the government determined living wage across the UK and the difference is more pronounced in London than across the rest of the UK. The LWF bases its determination on the actual cost of living that is higher in urban London than in other areas of the UK.

According to figure 5 (chapter 3.3.2) the UK minimum wage level is in the higher spectrum relative to global minimum wage levels. The disparity between minimum to mean and median wage levels are relatively small compared to global standards that may indicate more modest inequality.

Concerning living wage determination in the UK, a national living wage was introduced in April 2016 and ensures higher wages for workers aged 25 and over. The NLW is currently determined at 60% of median wages in the UK[1169] which is one of the highest NMW's among developed countries.[1170] Giupponi and Machin state that:

> "the NLW introduction generated a wage change much larger than recent uprates, namely an increase of 10.8 percent at the time of announcement

[1168]Living Wage Foundation "What is the Real Living Wage?" *Living Wage Foundation*.

[1169]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 3.

[1170]Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 9.

in July 2015 and of 7.5 percent when made effective on April 1st, 2016".[1171]

This approach to determination may be considered as ambitious[1172] and some may assume detrimental consequences to the labour market according to the neo classical perspective because it may result in a decrease of employment, an increase of unemployment, a reduction of working hours and a reduction of the number of employees. Contrary to these concerns, however, the UK labour market has fared considerably well since the introduction of the NLW. Figure 9 indicates the general labour market performance of the UK since the introduction of the NLW.

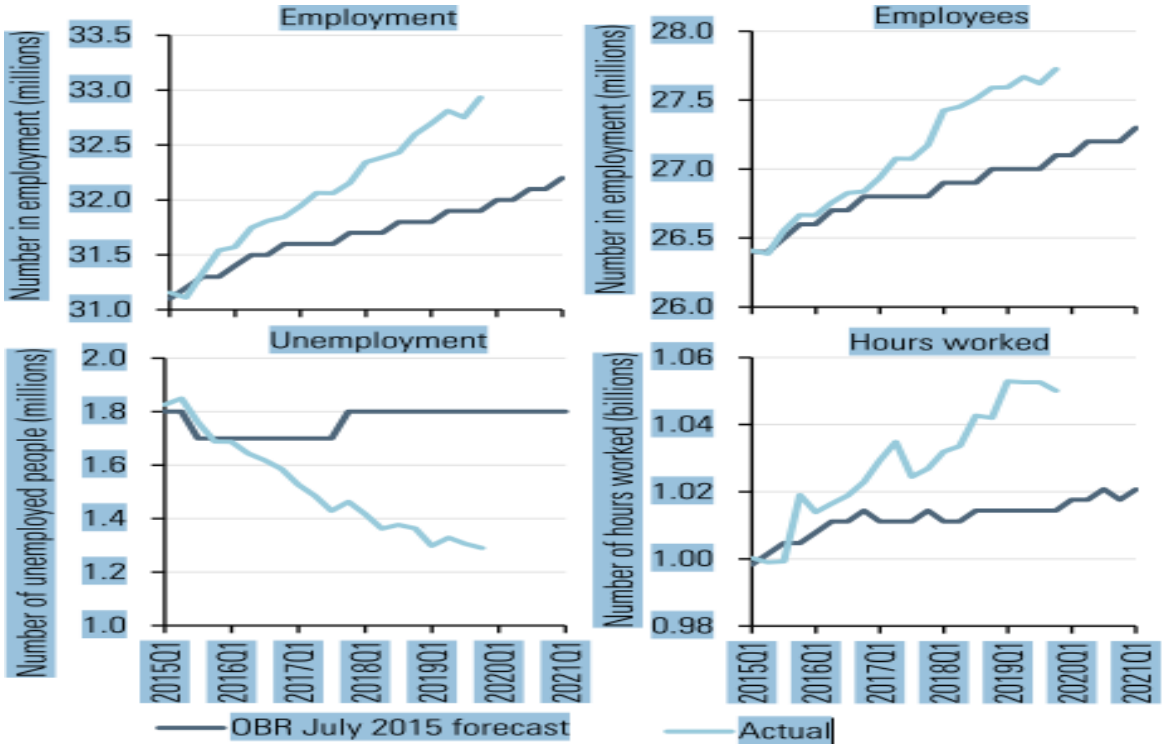


Figure 9: General UK labour market performance forecast and actuality 2020.[1173]

[1171]Giupponi & Machin (2018) IZA Institute of Labor Discussion Paper Series 7.

[1172]6-7.

[1173]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 8.

Figure 9 indicates the Office for Budget Responsibility (hereafter referred to as the OBR) estimates of the impact on employment as a result of raising the NLW in relation to the actual impact. It is evident that the OBR estimates were exceeded where the labour market reacted better than expected. The labour market performed well where the number of hours worked generally increased, unemployment decreased and the number of employed persons increased.[1174]

Concerning the functioning of minimum wage determination in the UK, section 2 of the NMWA 1998 establishes the legislative basis for the determination of the UK minimum wage. The Secretary of State has the authority to utilise regulations[1175] to determine the single hourly rate of the NMW (as prescribed from time to time),[1176] the pay reference period[1177] and the determination of the hourly rate of remuneration.[1178] The Secretary of State shall refer certain matters to the LPC for consideration before making regulations.[1179] The NMWA 1998 assigns the LPC as an independent[1180] consultation body that assumes a central role within the minimum wage model of the UK.[1181] The role of the LPC is similar to the SANMWC in South Africa (3.3.2.1) and the FWC in Australia (4.2.3.1).

The broad aim of the NMWA 1998 has been defined by the LPC "to make a difference to the low paid while minimising burdens to business".[1182] The broad aim indicates that the LPC must consider and promote the needs and interests of low paid individuals on the one hand, while, on the other hand, taking the needs and interests of business into account by minimising the burden on business. This indicates a

---

[1174]2.

[1175]Section 2 (1) NMWA 1998.

[1176]Section (1) (3) NMWA 1998.

[1177]Section (1) (4) NMWA 1998.

[1178]Section 2 NMWA 1998.

[1179]Section 5 (1) NMWA 1998.

[1180]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 2.

[1181]Section 5 NMWA 1998. Davidov (2009) *Mod Law Rev* 583.

[1182]Davidov (2009) Mod Law Rev 583. Giupponi & Machin (2018) IZA Institute of Labor Discussion Paper Series 5.

social responsibility to low paid individuals in the labour market but also a commercial responsibility that protects the interests of business. The LPC has been exceptionally effective in increasing UK minimum wage levels without detrimentally effecting the labour market[1183] as indicated in previously and in figure 9.

The LPC should consider the following matters:[1184]

a) what the hourly NMW rate should be,
b) what the pay reference period/s should be,
c) what method/s should be used for determining the hourly rate at which a person is to be regarded as remunerated,
d) if any provision should be made, and if so what provision, with reference to exclusions or modifications of the NMW and
e) if any, and if so what descriptions of persons should be added to the application of exclusions and modifications as contained in Section 3 of the NMWA 1998.[1185]

It is evident from point (a), that the LPC has to advise the Secretary of State on determining the NMW rate and the pay reference period it applies to (see, (b) above). The NMW determination is correlated with a specific pay reference period, which means that NMW determination is not a once off occurrence but rather something that changes in accordance with the applicable pay reference period. Consequently, the adjustment of the NMW is inherently part of the functions of the LPC.

After the LPC considered the various matters, a report should be compiled that contains recommendations on each of the matters, that should be provided to the Secretary of State and the Prime Minister within the time allowed.[1186] The State

---

[1183]"The LPC has been a tremendous success story", Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 4, 9 & 10.

[1184]Section 5 (2) NMWA 1998.

[1185]See subchapter 4.1.1.3, for a consideration on exclusion of the NMW.

[1186]Section 5 (3) NMWA 1998. If the LPC fails to deliver the report within the allowed time period, any power of the Secretary of State to make regulations under the NMWA shall be exercisable as if section 5 (1) of the NMWA had not been enacted, section 5 (5) NMWA 1998. The Secretary of State provides a notice specifying

Secretary must lay a copy of any LPC report before each House of Parliament and arrange for the publication of the report.[1187]

If the Secretary of State decides to deviate from the recommendations of the LPC, then the Secretary of State must lay a report containing reasons for such deviation before each house of parliament.[1188] Historically there has been two deviations from the recommended minimum wage rates for apprentices, but the UK government has accepted all other recommendations from the LPC.[1189]

Besides for the abovementioned matters, the Secretary of State may also refer matters relating to the NMWA 1998 to the LPC at any time.[1190] After any additional matter has been considered by the LPC, a report must once again be delivered utilising much of the same process used in consideration of the prescribed matters.[1191]

The LPC must follow certain procedures in considering the matters before it. The LPC must consult with worker- and employer- organisations and any other person that they think fit before arriving at recommendations of the report.[1192] The LPC is required to provide evidence-based advice to the government: "The LPC assesses research and considers evidence from a wide set of sources, including academic research, site visits around the country, and oral evidence taken from a broad range of stakeholders".[1193]

---

the time that the report must be concluded. Such time may be extended by the Secretary of State by issuing a notice. Section 7 (2) & (3) NMWA 1998.

[1187]Section 7 (7) NMWA 1998.

[1188]Section 5 (4) NMWA 1998.

[1189]"The apprentice rate has, however, twice been changed by the Government beyond the LPC recommendations: firstly in 2011, when the rate was increased by £0.05 even though the LPC recommended a freeze; secondly in 2015, when the business secretary uprated the apprentice minimum by an additional £0.50, substantially pushing it up from £2.73 in 2014 to £3.30 in 2015", Giupponi & Machin (2018) *IZA Institute of Labor Discussion Paper Series* 6.

[1190]Section 6 (1) NMWA1998.

[1191]Section 5 (2) (3) NMWA 1998.

[1192]Section 7 (4) NMWA 1998.

[1193]Giupponi & Machin (2018) IZA Institute of Labor Discussion Paper Series 5.

The LPC should take account of the effect of the NMWA 1998 on the economy of the UK as a whole and on competitiveness as well as any additional factors specified by the Secretary of State.[1194]

Besides recommendations the LPC report must contain the following:[1195]

a) the identity of the LPC members compiling the report,
b) an explanation of the procedures adopted in respect of consultation, the taking of evidence and the receiving of representations,[1196]
c) the reasons for the recommendations, and
d) where applicable, any additional factor as prescribed by the Secretary of State that has been considered.

Considering the functions of the LPC, it is evident that the LPC assumes an instrumental role in advising the Secretary of State on the minimum wage framework of the UK. For the LPC to effectively fulfil its functions, it must be established on a sound operational framework. Schedule 1 of the NMWA 1998 establishes the operational framework of the LPC.
Section 8(9) of the NMWA 1998 gives the Secretary of State the authority to appoint the LPC. The members of the LPC must comprise nine Commissioners- three from employer backgrounds, three from trade union backgrounds and three independents, including the chair.[1197] It is desirable to appoint members that secures a balance between:

a) “members with knowledge or experience of, or interest in, trade unions or matters relating to workers generally;

[1194]Section 7 (5) NMWA 1998.

[1195]Section 7 (6) NMWA 1998.

[1196]Section 7 (6) (b) NMWA 1998.

[1197]Low Pay Commission “The National Minimum Wage in 2020: Uprating Report April 2020” *Government UK* 2.

b) members with knowledge or experience of, or interest in, employers' associations or matters relating to employers generally; and
c) members with other relevant knowledge or experience".[1198]

Generally, these provisions require the voice of three stakeholder categories in competent body membership which is similar to the South African approach, namely workers, employers and other relevant individuals in the membership of the LPC. The provisions are broadly determined so that the Secretary of State has a measure of discretion in selecting LPC members. The membership make-up ensures a balanced and diverse membership, consisting of various stakeholders, making it possible to make recommendations that reflect the needs of the whole labour market. LPC members hold office in accordance with their terms of appointment[1199] and a person who ceases to be a member is eligible for re-appointment.[1200]

The Secretary of State may remove a member from office if the member; has become bankrupt, has been absent from two or more consecutive LPC meetings otherwise than for a reason approved by them, or if the Secretary of State is of the opinion that the member is unable or unfit to perform his/her duties.[1201] The Secretary of State determines the remuneration of the LPC members[1202] and provides the LPC with resources (as reasonably determined by the Secretary of State) to carry out their duties.[1203] The LPC determines the arrangements of their meetings.[1204]

[1198]Schedule 1 1 (2) NMWA 1998.

[1199]Schedule 1 1 (3) NMWA 1998.

[1200]Schedule 1 1 (5) NMWA1998. A member may resign by giving notice to the Secretary of State. Schedule 1 1 (4) NMWA 1998.

[1201]Schedule 1 1 (6) NMWA 1998.

[1202]Members may also receive other payments and compensation as determined by the Secretary of state. Schedule 1 2 NMWA1998.

[1203]Schedule 1 3 NMWA 1998.

[1204]Schedule 1 4 NMWA 1998.

The Secretary of State may by regulations make provision for determining the hourly rate of remuneration.[1205] Regulations may make provision for determining the hourly rate in cases where:

a) "the remuneration, to the extent that it is at a periodic rate, is at a single rate;
b) the remuneration is, in whole or in part, at different rates applicable at different times or in different circumstances;
c) the remuneration is, in whole or in part, otherwise than at a periodic rate or rates;
d) the remuneration consists, in whole or in part, of benefits in kind".[1206]

In addition, regulations may also establish provisions relating to:

a) instances where a person is to be treated as working, or not, and the extent that a person is to be treated so,[1207]
b) "the treatment of periods of paid or unpaid absence from, or lack of, work and of remuneration in respect of such periods",[1208]
c) the valuation of remuneration and of benefits,[1209]
d) provisions relating to various aspects of the period of work and the related remuneration.[1210]

These provisions may arguably ensure that the integrity of the NMW is protected across the labour market. It may also function against unfair discrimination due to

[1205]Section 2 NMWA 1998. Besides enabling various provisions, that may be made through regulation there are also certain provisions that cannot be made under Section 2 of the NMWA 1998. See Section 2 (8) NMWA 1998.

[1206]Section 2 (2) NMWA 1998.

[1207]Section 2 (3) (a) NMWA 1998. In addition, provision may be made for; treating a person as, or as not, working for a maximum or minimum time, or for a proportion of the time, in any period; determining any matter to which that paragraph relates by reference to the terms of an agreement. Section 2 (4) NMWA 1998.

[1208]Section 2 (3) (b) NMWA 1998.

[1209]Section 2 (5) NMWA 1998. Included in this provision are; the treatment of deductions of earnings and any charges or expenses a person is required to bear.

[1210]Section 2 (6) NMWA 1998.

certain differences in the labour market. Any power conferred by the NMWA 1998 to make an Order in Council, regulations or an order, includes power to:[1211]

a. "make different provision for different cases or for different descriptions of person; and
b. to make incidental, consequential, supplemental or transitional provision and savings" .[1212]

4.1.3.1 Adjustment of the UK's NMW framework

The series of minimum wages utilised by the UK's NMW framework is adjusted annually in April.[1213] The LPC is tasked to make recommendations on the adjustment of minimum wage by following an approach that seeks the optimal increase of minimum wage while not resulting in unemployment.[1214]

The adjustment approach followed with reference to the NLW is distinct, because the UK government tasked the LPC to recommend increases to the NLW to achieve 60% of median wages in 2020, which it has achieved.[1215] The established target was "subject to the condition of sustained economic growth, but there was a tolerance for some job loss".[1216] In December 2020 the UK unemployment rate wat 4.9%[1217] that is relatively low in global standards.[1218] The low unemployment rate may drive policy

---

[1211]Except to the extent that the NMWA 1998 makes provision to the contrary. Section 51 (1) NMWA 1998.

[1212]Section 51 (1) & (2) NMWA 1998. This does not affect; the single hourly NMW rate prescribed by the Secretary of State, as provided for in section 1 (3) NMWA, or the restriction of workers' rights afforded through the NMWA 1998 as provided for in section 49 NMWA 1998. Additional supplementary provisions are provided from subsections (3) to (8) of section 51 NMWA 1998.

[1213]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 4.

[1214]3.

[1215]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 3.

[1216]3.

[1217]Office for National Statistics "Employment in the UK: December 2020: Estimates of Employment, Unemployment and Economic Inactivity for the UK" (2020) *Statistical Bulletin* 1 10-16.

[1218]OECD "Unemployment Rate" (2020) *OECD* <https://data.oecd.org/unemp/unemployment-rate.htm> (accessed 5-1-2020).

maker's proclivity to take on more risk in minimum wage determination and adjustments.

Nonetheless, the intent and commitment of the UK government is evident in the pursuance of this target, in the tolerance for some job loss, yet the pursuance is not at all cost, because the target was to be pursued on the condition of favourable economic conditions (sustained economic growth).

The LPC considered favourable economic conditions to mean gross domestic product growth of above one percent.[1219] In terms of the extent of the tolerance for some job loss, a range was established between 20 000 and 110 000 jobs lost by 2020 as a result of the NLW.[1220]

The median wages assume a central role in the adjustment approach of the NLW which may not be the case in the adjustment approach of other categories of minimum wages. The LPC makes recommendations on adjustments of the NLW by utilising forecasts of the HM Treasury Panel of Forecasts for the UK and the Bank of England.[1221]

Looking to the future the NLW aims to achieve two targets:[1222]

a) is to raise the NLW to two-thirds of median earnings by 2024 and,
b) to lower the age requirement of the NLW to 21 years of age by 2024.

Notice should be taken of the fact that the UK government established specific targets for the NLW that was to be achieved with some tolerance for employment loss, that has not been prevalent up to date, and the LPC was mandated with the achievement of this target. The UK has social support measures in place that may mitigate the detrimental consequences of employment loss, should there be any as a result of the

---

[1219]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 3.

[1220]3.

[1221]4.

[1222]Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" *Government UK* 13.

ambitious adjustments. To this end the job seeker's allowance (hereafter referred to as the JSA) acts as a "safety net" that offers financial assistance to unemployed individuals while seeking employment.[1223]The subsequent part considers the legal enforcement of minimum wage in the UK.

4.1.4 Legal enforcement of minimum wage in the UK

The legal enforcement framework of minimum wage is well developed in the UK. However, the complexity of the different minimum wage rates has been identified as a challenge in effectively enforcing the NMW in the UK.[1224] The subsequent section considers monitoring of minimum wage before analysing applicable sanctions and remedies.

4.1.4.1 Monitoring compliance with minimum wage in the UK

Monitoring of minimum wage compliance is the responsibility of statutory bodies that utilise "compliance officers" or "officers" (similar to labour inspectors that will be elaborated on in the subsequent paragraphs)[1225] to fulfil such mandate. Workers are also responsible to monitor and to enforce compliance with minimum wage by lodging claims at employment tribunals or courts. Workers are therefore empowered to enforce their rights personally which places personal responsibility on workers to ensure compliance. The UK utilises five competent bodies (or enforcement bodies each with a different mandate) to do inspections in labour matters. These bodies are:

a) The Health and Safety Executive (hereafter referred to as HSE)
   The mandate extends to occupational health and safety matters only.[1226]

[1223]The JSA uses reduced benefits to act as a sanction with the purpose to encourage claimants to actively seek employment and to discourage the abandonment of employment through misconduct or without good cause. See Taulbut M, Mackay DF & McCartney G "Job Seeker's Allowance (JSA) Benefit Sanctions and Labour Market Outcomes in Britain, 2001-2014" (2018) 41 *Camb J Econ* 1417 1418.

[1224]Sargeant (2010) *Pol Stud* 352.

[1225]Compliance officers" or "officers" fulfil a role similar to labour inspectors based on afforded powers and rights. See section 14 NMWA 1998.

[1226]Mantouvalou (2011) *LAB/ADMIN Working Document* 1. Expenses incurred under the NMWA 1998 by; the Minister of the Crown or government department or a body performing functions on behalf of the Crown must

b) The Employment Agency Standards (hereafter referred to as EAS)
Focuses on agency workers and employment agency operation.[1227]

c) Her Majesty's Revenue and Customs (hereafter referred to as HMRC)
The HMRC functions on behalf of the Department for Business, Innovation and Skills (hereafter referred to as the BIS) and is responsible for the enforcement of NMW standards established by the NMWA 1998.[1228]

d) Department for Food and Rural Affairs (hereafter referred to as DEFRA)
Responsible for enforcing "the agricultural minimum wage in agriculture in England and Wales, under the National Minimum wage Act 1998".[1229]

e) Gangmaster's Licensing Authority (hereafter referred to as the GLA)
"Regulates those individuals that supply labour or use workers in the fields of agriculture, horticulture, shellfish gathering, food processing and packaging".[1230] A gangmaster is an individual who supplies labour directly or through an intermediary.[1231]

These enforcement bodies secure compliance with the law through various methods that include raising awareness, advising employers on legal aspects of minimum wage, targeted inspections as well as consequences against non-compliance in the form of imposing penalties[1232] and the conduction of criminal investigations into suspected non-compliance to the NMWA 1998.[1233] Labour inspections take place

---

be paid for by Parliament. Section 52 (a) NMWA 1998. Parliament shall also be responsible for any increase attributable to the provisions of the NMWA 1998 in the sums payable out of such money under any other Act. Section 52 (b) NMWA 1998.

[1227]Mantouvalou (2011) LAB/ADMIN Working Document 2.

[1228]2.

[1229]3.

[1230]Mantouvalou (2011) LAB/ADMIN Working Document 3.

[1231]3.

[1232]3.

[1233]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 13.

based on risk-assessment or after receiving a complaint through; "help lines, the internet or the post".[1234]

The different mandates of the respective enforcement bodies may promote specialisation between these bodies. A challenging aspect of the specialised approach is the coordination of activities between the various bodies.[1235] Consequently, various initiatives are utilised to promote co-ordination and effectiveness between the various enforcement bodies[1236] and the Fair Employment Enforcement Board has been established to promote collaboration between the different enforcement bodies.

The HMRC and the DEFRA enforcement bodies play an important role in enforcing minimum wage. The GLA is another enforcement body that also has a role to play in the enforcement of minimum wage; its activities can be divided into licencing and compliance concerning activities within the GLA's scope.[1237] To qualify for licensing, there must be compliance with certain standards, such as minimum wage. As a result, the GLA's inspection activities are divided into application inspections (for new licence applicants) and secondly compliance inspections for license holders.[1238]

The Secretary of State may appoint inspectors to act for the purposes of the NMWA 1998 and in addition to these appointments, or in substitution thereof, arrange with any relevant authority for officers of that authority to act for the purposes of the NMWA 1998.[1239] Relevant authorities are; any Minister of the Crown or government department; any body performing functions on behalf of the Crown; the Gangmasters

---

[1234]Mantouvalou (2011) LAB/ADMIN Working Document 3.

[1235]3.

[1236]3. Also see the role of the Director of Labour Market Enforcement as discussed in: BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 17.

[1237]Mantouvalou (2011) LAB/ADMIN Working Document 8.

[1238]8.

[1239]Section 13 (1) NMWA 1998. Officers acting for the purposes of the NMWA 1998, shall produce (if so required) some duly authenticated document indicating the authority to act. If someone does not appear to know that he is dealing with an officer for the purposes of the NMWA, then the officer shall identify himself as a officer. Section 13 (2) & (3) NMWA 1998.

and Labour Abuse Authority.[1240] Mention should be made of the stringent and comprehensive recruitment process for labour inspectors in the UK.[1241] The recruitment process involves various assessments that must be completed successfully before commencing with training that consists of a practical and theoretical nature.[1242] Successful completion of training enables candidates to be promoted to a main grade inspector.[1243]

Table 2 and figure 6 indicate that the number of labour inspectors in the UK are limited in comparison to other nations and international standards. The labour inspector to employee ratio is more than three times that of the international ILO standard. Despite this, the UK still achieves a respectable rate of compliance with minimum wage that indicates the correlation between the number of labour inspectors and the rate of compliance to be of a more complicated nature. As a result, the number of labour inspectors should not instinctively be associated with a degree of compliance as there may be other factors at play in this correlation, consideration thereof falls outside the scope of this study but may include cultural elements, perceptions of labour law, minimum wage and a general compliance ethos.

An officer acting for the purposes of the NMWA 1998 has the following rights:

a) to require the production of records as determined in section 9 of the NMWA 1998 by a relevant person and to inspect, examine and copy[1244] such records;
b) to require a relevant person to furnish to the officer, alone or in the presence of any other person as the officer sees fit, an explanation of any records or

[1240]Section 13 (1A) NMWA 1998.

[1241]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 30-38 & 65-68.

[1242]65-68.

[1243]65-68.

[1244]The power of an officer to copy records includes the right to remove such records from the place where they are produced to him in order to copy them; but such records must be returned as soon as reasonably practicable to the relevant person by whom they are produce. Section 14 (3A) NMWA 1998. Simpson (2009) *Ind Law J* 60. See BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 6.

any additional information known to the relevant person that may reasonably be needed to establish (past or current) compliance with the NMWA 1998;[1245]

c) to enter any relevant premises[1246] at all reasonable times, to exercise any of the rights mentioned in (a) and (b).[1247]
d) On reasonable written notice, to require a relevant person to produce any records mentioned under paragraph a to an officer at such time and place as may be specified in the notice; or to attend before an officer at such time and place specified in the notice, to furnish any such explanation or additional information as mentioned under paragraph b.[1248]

For the purposes of the above-mentioned rights of officers, 'relevant person' means:[1249]

a) the employer of a worker;
b) a person who for the purposes of agency workers[1250] is the agent or the principal;
c) a person who supplies work to an individual who qualifies for the NMW;
d) a worker, servant or agent of a person falling within paragraph (a), (b) or (c) above; or
e) a person who qualifies for the NMW.

The rights of officers appear to correspond with the traditional role of labour inspectors. Officers are afforded a wide range of powers in the UK legal

---

[1245]No person shall be required under paragraph (b) to; "answer any question or furnish any information which might incriminate the person or, if married or a civil partner, the person's spouse or civil partner" Section 14 (2) NMWA 1998.

[1246]"In this section "relevant premises" means any premises which an officer acting for the purposes of this Act has reasonable cause to believe to be—(a)premises at which an employer carries on business;(b)premises which an employer uses in connection with his business (including any place used, in connection with that business, for giving out work to home workers, within the meaning of section 35 below); or(c)premises of a person who for the purposes of section 34 below is the agent or the principal" Section 14 (5) NMWA 1998.

[1247]"This section does not apply to an officer acting for the purposes of this Act in relation to England and Wales if the officer is a labour abuse prevention officer within the meaning of section 114B of the Police and Criminal Evidence Act 1984 (PACE powers for labour abuse prevention officers)" Section 14 (A1) The NMWA 1998.

[1248]Section 14 (3) NMWA 1998.

[1249]Section 14 (4) NMWA 1998.

[1250]Section 34 NMWA 1998.

framework[1251] and can impose administrative sanctions, initiate criminal proceedings by conducting criminal investigations into alleged non-compliance, give advice and warnings.[1252]

The UK has similar provisions to the international standard about confidentiality of information obtained by labour inspectors (see chapter 2.4.3.1). Section 15 of the NMWA 1998, determines the utilisation of confidential information obtained by officers acting for the purposes of the NMWA 1998. Information for these purposes vests with the Secretary of State[1253] and may be utilised for any purpose relating to the NMWA 1998, by the Secretary of State or any eligible relevant authority whose officer obtained the information.[1254] Information obtained by agricultural wages officers, may (under certain circumstances) be supplied to other bodies or individuals for purposes relating to the NMWA 1998.[1255]

The Secretary of State may issue regulations that require employers to keep records, in the form and manner and for such period as may be prescribed.[1256] Non-compliance with recordkeeping provisions can result in criminal liability, as referred to in chapter 4.1.4.2. Section 31 of the NMWA 1998 determines that a person is guilty of a criminal offence if:

[1251]Mantouvalou (2011) LAB/ADMIN Working Document 4.

[1252]Mantouvalou (2011) *LAB/ADMIN Working Document* 4. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 1-8 & 13. "Where it is appropriate and proportionate to do so, HMRC is able to offer alternative out of court disposals when employers breach the 1998 Act and the level of culpability and harm caused is considered to be low" 13.

[1253]Section 15 (2) NMWA 1998.

[1254]Section 15 (3) NMWA 1998. In general, obtained information shall be utilised for any purpose relating to the NMWA 1998 and shall only be supplied to any other person or body if it is for the purpose of civil or criminal proceedings relating to the NMWA 1998, with the authorisation of the Secretary of State. There are however certain instances where such information may be required on account of other legislative measures. See section 15 NMWA 1998. Section 16A of the NMWA 1998, deals further with the disclosure of information by officers.

[1255]Section 16 NMWA 1998.

[1256]Section 9 NMWA 1998.

a) that person is required to keep and preserve any record and fails to do so. If this offence is due to the act or default of some other person, that other person is also guilty of the offence.[1257] Such other person may be charged and convicted of an offence whether proceedings are taken against any other person or not.[1258] This means that employees and directors may potentially held liable for not
b) That person makes, "or knowingly causes or allows to be made, in a record required to be kept"[1259] any entry which he/she knows to be false in a material particular,
c) That person "for purposes connected with the provisions of this Act, produces or furnishes, or knowingly causes or allows to be produced or furnished, any record or information which he knows to be false in a material particular".[1260]

The severity of criminal liability for legislative recordkeeping inadequacies indicates the importance placed on recordkeeping in the enforcement and monitoring frameworks of the UK. These provisions may assist in ensuring that records are kept by employers and that these records are accurate and a true reflection of employment circumstances, which may promote effective monitoring of compliance with minimum wage.

Workers have the right to inspect records if a worker reasonably believes that there was or is non-compliance with the NMW.[1261] In such instance, the a worker may require the employer to produce any relevant records and may inspect and examine these records and copy any part thereof.[1262] This right may only be utilised for the purpose of establishing the employer's state of compliance with minimum wage[1263]

[1257]Section 31 (2) & (6) NMWA 1998. Also see discussion in chapter 4.1.4.2.

[1258]Section 31 (7) NMWA 1998.

[1259]Section 31 (3) NMWA 1998.

[1260]Section 31 (4) NMWA 1998.

[1261]Section 10 (2) NMWA 1998. The worker's right to access records is only exercisable if there are reasonable grounds to suspect non-compliance with NMW by the employer.

[1262]Section 10 (1) NMWA 1998.

[1263]Section 10 (3) NMWA 1998.

and is exercisable by the worker or the worker accompanied by such person as considered fit to do so by the worker.[1264] The worker's right to inspect, is only exercisable if the worker gives his/her employer notice (production notice) requesting any relevant records for the period determined by the notice.[1265]

The relevant records must be produced at the worker's workplace or "any other place reasonable, in all circumstances, for the worker to attend to inspect the relevant records; or such other place as may be agreed between the worker and the employer".[1266] The requested records must be produced within fourteen days after receiving the production notice or "at such later time as may be agreed during that period between the worker and the employer".[1267]

Failure of an employer to allow the worker access to records, may result in the worker presenting a complaint to an employment tribunal before the expiry of three months calculated from: the end of the fourteen day period after receiving the production notice or in the case of a later agreed upon day, from that day.[1268] However, if the employment tribunal is satisfied that it was not reasonably practicable to present a complaint within the allowed three months, then the tribunal has the discretion to still allow the complaint.[1269]

A worker may present a complaint to the employment tribunal on either of the following grounds:[1270]

[1264]Section 10 (4) NMWA 1998. If the worker intends to be accompanied by anyone, then the production notice must contain a statement of that intention. Section 10 (6) NMWA 1998.

[1265]Section 10 (5) NMWA 1998.

[1266]Section 10 (8) NMWA 1998.

[1267]Section 10 (9) (b) NMWA 1998.

[1268]Section 11 (3) NMWA 1998.

[1269]Section 11 (4) NMWA 1998.

[1270]Section 11 (1) NMWA 1998. Also see; Mantouvalou (2011) *LAB/ADMIN Working Document* 7.

a) Failure to produce all or some of the requested records[1271] or
b) Failure to allow the worker to inspect, examine and copy any part of the records or the failure of the employer to allow the worker to exercise the right to documents while being accompanied by any person deemed fit by the worker.

If an employment tribunal finds a complaint well-founded, it will make a declaration to that effect and make an award, where the employer must pay the worker an amount calculated on eighty times the hourly amount of the NMW (the NMW value at the time of making the award).[1272]

The NMWA 1998 also promotes the effectiveness of officers by determining criminal liability for:[1273]

a) intentionally delaying or obstructing an officer acting for the purposes of the NMWA 1998 in exercising any power and right conferred on the officer or
b) refusing of neglecting to answer any question, furnish any information or produce any document when required to do so under section 14 (1) of the NMWA 1998.

The liability of a person found guilty of an offence under Section 31 is the same as an employer not complying to the NMW as discussed in chapter 4.1.4.2.

Provision is made for the protection of rights contained in the NMWA 1998. A worker has the right to exercise any of the rights afforded in the NMWA 1998.[1274] Any provision in any agreement (including a worker's contract) is void if it excludes or

[1271]Failure to produce records in accordance with Section 10 (8) and (9) of the NMWA 1998.

[1272]Section 11 (2) NMWA 1998.

[1273]Section 31 (5) NMWA 1998.

[1274]Section 49 NMWA 1998. See corresponding provisions in chapter 3.3.3.1.1 for South Africa and 4.2.4.1 for Australia.

limits the operation of any NMWA 1998 provisions or precludes a person from bringing proceedings under the NMWA 1998 before an employment tribunal.[1275]

Section 23 of the NMWA 1998 protects the right of workers not to be discriminated against. Workers must have the freedom and legislative protection to utilise their rights and not be discriminated against for doing so. The worker should not be subject to any detriment by any act or deliberate failure to act by his/her employer on the following grounds:[1276]

a) any action taken or proposed to be taken by the worker or on behalf of the worker with the view of enforcing a right of the NMWA 1998 for which the remedy to the infringement is to lay a complaint to an employment tribunal.1277
b) The employer was prosecuted in terms of section 31 of the NMWA 1998 as a result of action taken by the worker or on behalf of the worker to enforce the benefit to the worker or1278
c) The worker qualifies or will or might qualify for the NMW or a rate of the NMW.[1279]

If a worker has suffered any detriment according to these grounds, then a worker may present a complaint to an employment tribunal, subject to the provisions of section 24 of the NMWA 1998.[1280]

[1275]Section 49 (1) NMWA 1998. Subsection (2) to (11) provide further particulars regarding the protection of the rights of workers under the NMWA 1998.

[1276]Section 23 NMWA 1998. This section applies to; "any right conferred by, or by virtue of, any provision of this Act for which the remedy for its infringement is by way of a complaint to an employment tribunal; and (b) any right conferred by section 17 above" Section 23 (3) NMWA 1998.

[1277]Section 23 (1) (a) NMWA 1998, also see section 23 (3) thereof. For paragraph "a" and "b", it is immaterial whether or not the worker has the right or whether the right has been infringed, "but, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith" Section 23 (2) NMWA 1998.

[1278]Section 23 (1) (b) NMWA 1998.

[1279]Section 23 (1) (c) NMWA 1998.

[1280]Section 24 (1) NMWA 1998.

Section 25 of the NMWA[1281] 1998 confirms any right conferred by, or by virtue of any provision of the NMWA 1998 for which the remedy for infringement is to lay a complaint to an employment tribunal and any right a worker has to additional remuneration for non-compliance.[1282] These rights of employees are protected by considering any dismissal as unfair based on the following reasons:[1283]

a) for any action that "was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employees to which this section applies" 1284 or
b) for action that was taken by the employee or on behalf of the employee for the purpose of enforcing the right of an employee to which this section applies, that resulted in the prosecution of the employer in terms of section 31 of the NMWA 1998, or
c) where, the employee qualifies, or will, might qualify for the NMW or a particular rate of the NMW.

The following subchapter considers the consequences of non-compliance with the minimum wage in the UK.

4.1.4.2 Legal sanctions and remedies in terms of non-compliance with minimum wage in the UK

The non-compliance (alleged non-compliance) to minimum wage can be addressed through civil or criminal enforcement procedures. The statutory bodies responsible for enforcement (as referred to in chapter 4.1.4.1) generally utilise civil enforcement policies with a generally focus on cooperation. Criminal enforcement procedures are

---

[1281]Section 25 (3) NMWA 1998.

[1282]Section 17 NMWA 1998.

[1283]This section applies to Great Britain. If there is more than one reason for dismissal, it shall be regarded as an unfair dismissal if the principal reason for the dismissal is on the grounds subsequently mentioned in the text. Section 25 (1) NMWA 1998. Section 26 of the NMWA 1998 establishes the right of an employee not to be unfairly dismissed with reference to Northern Ireland.

[1284]Section 25 (1) (a) NMWA 1998. This section applies to any right, by virtue of the NMWA 1998 for which the remedy for infringement is to lay a complaint at the employment tribunal and any right conferred in terms of section 17 of the NMWA. Section 25 (1) (3) NMWA 1998.

generally reserved for a small minority of persistent non-compliant employers who refuse to cooperate with inspectors or where there is a public interest in prosecution.[1285]

As indicated in chapter 4.1.4.1, workers and labour inspectors have the ability and responsibility to enforce compliance to minimum wage. A worker can bring a claim for non-compliance with minimum wage in an employment tribunal (industrial tribunal in Northern Ireland) or alternatively a civil court for any money owned to them.[1286] This is similar to the South African approach where the CCMA is used (as opposed to employment tribunals) along with the civil courts see chapter 3.3.3.

With reference to civil enforcement procedures, if an officer (labour inspector), acting for the purposes of the NMWA 1998, is of the opinion that any sum is due to the worker under section 17 of the NMWA 1998, where there is underpayment of the NMW for any one or more pay reference periods,[1287] the officer may serve a notice (notice of underpayment) requiring the employer to pay the worker within twenty eight days,[1288] the sum as determined under section 17.[1289]

Section 17 of the NMWA 1998 determines that a worker is entitled to remuneration if underpaid the NMW. A worker is to be remunerated the higher of the following two calculations:[1290]

[1285]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 6.

[1286]The case of *Lyn Cartmell v Steven Moore* 2019 2405530 (UKET) is an example of individuals enforcing minimum wage personally without a competent body (HMRC) at a dispute resolution platform (employment tribunal).

[1287]A notice of underpayment may not relate to a pay reference period ending more than six years before the date of service of the notice. Section 19 (7) NMWA 1998.

[1288]The twenty-eight-day period begins from the date of service of the notice of underpayment. Section 19 (8) NMWA 1998. Also see BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 6-8.

[1289]Section 19 (1), (2) & (3) NMWA 1998.

[1290]Section 17 (1) NMWA 1998. This subsection ceases to apply to a worker, in any pay reference period when he is at any time paid the additional remuneration for that period which he/she is entitled to. Section 17 (5)

1. the difference between the remuneration received by the worker for the pay reference period and the remuneration that the worker was entitled to receive in accordance with the NMWA 1998 (the underpaid amount),[1291] and

2. the difference between the remuneration received by the worker for the pay reference period and the remuneration that the worker was entitled to receive in accordance with the NMWA 1998, which is the underpaid amount, is divided by the minimum wage rate that applied during the time of underpayment and then multiplied by the rate of the minimum wage that is currently in force.[1292]

These calculative provisions take account of the length of time that has lapsed since the underpayment and consequential changes in the NMW rate to ensure that the underpaid worker is fairly paid for any underpayment.[1293]

Section 18 of the NMWA 1998 extends the right to be entitled to additional remuneration, as provided for in section 17, to workers that may not traditionally be regarded as workers.[1294] This ensures the protection of workers' rights, specifically; it safeguards the integrity of the NMW and not to be remunerated less than the NMW.

The notice of underpayment is utilised in most instances where labour inspectors become aware of non-compliance with minimum wage.[1295] However, labour inspectors have a discretion over whether to issue a notice of underpayment based

---

NMWA 1998. Where any additional remuneration is paid to the worker in the pay reference period, but there is still underpayment of the NMW, then certain deductions may be made to the amount owing to the worker as described in section 17 (6) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 5.

[1291]Section 17 (2) NMWA 1998.

[1292]Section 17 (4) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 9.

[1293]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 9.

[1294]Section 18 NMWA 1998. Subsection 2 and 3 of section 18 of the NMWA 1998, assumes the existence of workers contracts in certain instances, that may also protect the rights of workers.

[1295] BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 7.

on their assessment of the case.[1296] The notice of underpayment must contain the following for each worker it relates to; the day a sum was due to a worker, the pay reference period, the amounts described in sections 17(2) and 17(4) in relation to the worker, in respect of each such period and the sum due to the worker under section 17.[1297] If financial penalty applies, the notice of underpayment must also contain the amount of any financial penalty and how that amount was calculated.[1298]

Besides requiring the employer to remunerate the worker for non-compliance with the NMWA 1998, the notice of underpayment must also require the employer to pay a financial penalty (specified in the notice of underpayment) to the Secretary of State within the twenty-eight-day period.[1299] Payment of the financial penalty to the state may be not be a good practice as the financial penalty may be better used as an incentive to promote the worker's personal compliance responsibility and to encourage workers to enforce their rights as is the case in the South African context.[1300]

The amount of the financial penalty is the total amounts for all workers to who the notice of underpayment relates, calculated as follows:

> the amount for each worker (to whom the notice of underpayment relates) is 200%,[1301] of the amount that is; the difference between the remuneration received

---

[1296]Labour inspectors may allow non-compliant employers to self-correct the non-compliance in certain instances. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 7-8.

[1297]Section 19 (4) NMWA 1998.

[1298]Section 19A (9) NMWA 1998. The HMRC has the power to issue more than one penalty notice with reference to the underpayment of the NMW see: *The Best Connection Group Ltd v HM Revenue and Customs* 2016 2403063 2200121/2017 (UKEAT).

[1299]Section 19A (1) NMWA 1998. The Secretary of State may specify circumstances in which a notice of underpayment is not to impose a requirement to pay financial penalty. Section 19 (2) & (3) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 9-10.

[1300]See: Guiseppe Caruso T/a Albro House Hotel Ltd vs The Commissioners for HM Revenue and Customs 2018 2206722 (UKET) & Jasleem Beauty Parlour Ltd v Commissioners for Revenue and Customs 2016 2208155 (UKET), where employment tribunals ordered that penalties be paid to the competent body and not the aggrieved parties.

[1301]Section 19A (5A) NMWA 1998.

and the actual remuneration to which the worker is entitled to according to the NMWA 1998 (as discussed in the beginning of 4.1.3.)[1302] for the pay reference period/s for which the employer is required to pay a sum to the worker.[1303] A framework is established in terms of minimum and maximum permissible financial fines; a maximum limit is placed at 20 000.00 Pounds (per worker) and the minimum amount of 100.00 Pounds (per worker) apply to financial penalties below that amount.[1304]

In accordance with international standards, as referred to in chapter 2.4.3.2, transgressors are liable to prompt resolution of non-compliance. As such, provision is made for the acquittal of an amount payable by the transgressing employer.[1305] If the employer pays the amount owed to the worker in accordance with section 19(2) of the NMWA 1998 and half of the financial penalty, within fourteen days after the notice of underpayment was served, then the employer will be regarded as having paid the financial penalty.[1306]

Section 19B of the NMWA 1998 makes provision for the suspension of the financial penalty payable under the notice of underpayment until such time as a notice terminating the suspension (penalty activation notice) is served on the employer.[1307] Such suspension occurs when it appears to the officer serving the notice of underpayment that criminal proceedings have been, or may be, instituted for not complying with the NMW[1308] in accordance with proceedings under section 31 of the

---

[1302]Section 17 (2) NMWA 1998.

[1303]Each pay reference period specified under section 19 (4) (b) NMWA.

[1304]Section 19A (5B) & (6) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 11.

[1305]Section 19A (10) NMWA 1998.

[1306]Section 19A (10) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 11.

[1307]Section 19B (1), (2) & (3) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 8.

[1308]Section 31 (1) NMWA 1998.

NMWA 1998.[1309] A penalty activation notice may be served on the employer if it appears to the officer that:

1. proceedings under section 31 have concluded without the employer being convicted of an offence[1310] or
2. proceedings (in terms of section 31 of the NMWA 1998) will not be instituted against the employer.[1311]

A penalty activation notice has the effect as if the notice of underpayment had been served on the date on which the penalty activation notice was served.[1312] If the employer was found guilty of an offence it terms of section 31 of the NMWA 1998, then the officer must serve a notice withdrawing the requirement to pay the financial penalty on the employer.[1313]

A notice of underpayment may be withdrawn after it has been served on the employer, if it appears to the officer that such notice "incorrectly includes or omits any requirement or is incorrect in any particular".[1314] Withdrawal is done through serving a notice of withdrawal on the employer and the employer may be reimbursed, with interest, for any financial penalty recovered.[1315] The service of a notice of withdrawal may coincide with the service of a replacement notice. The replacement notice must comply with and be dealt with according to provisions as stipulated in section 19G and 19H of the NMWA 1998.

A person on who the notice of underpayment was served, may appeal such notice of underpayment to the employment tribunal[1316] within twenty-eight days after service

---

[1309]Section 19B (1) NMWA 1998.

[1310]Section 19B (4) (a) NMWA 1998.

[1311]Section 19B (4) (b) NMWA 1998.

[1312]Section 19B (5) NMWA 1998.

[1313]Section 19B (6) NMWA 1998.

[1314]Section 19F (1) NMWA 1998.

[1315]Section 19F (2) NMWA 1998. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 8.

[1316]Section 19C (2) NMWA 1998.

of such notice.[1317] Appeal to the notice of underpayment may be made on one or more of the following grounds:[1318]

a) the decision to serve the notice,
b) any requirement imposed by the notice requiring a sum to be paid to a worker,
c) any requirement imposed by the notice requiring the payment of a financial penalty.

If the NOU is not appealed or if the appeal is unsuccessful then the statutory body will refer the case to the BEIS for the consideration of publicly naming the non-compliant employer.[1319] This practice originates from the recognition that: "some employers are more likely to respond to the social and economic sanctions that may flow from details of their payment practices being made public, than from financial deterrents".[1320] The BEIS considers all cases for naming where the total arrear payments total more than £500.00. However, a lower threshold, of more than £100.00 arrear payment will be considered where the employer:

[1317]Section 19C (3) NMWA 1998. The requirement of filing an appeal against the notice of underpayment within the statutory time limit (28 day period) is strictly adhered to, see: *Razor Sharp v Commissioners for Revenue and Customs* 2019 3321921 and *DF99 Ltd v Commissioners for Revenue And Customs* 1601350/2019 (UKET).

[1318]Section 19C (1) NMWA 1998.

[1319]The employer may make a written representation to the BEIS to halt the naming process if exceptional circumstances are applicable to the case. The circumstances are: naming carries risk of personal harm to an individual or their family or national security risks associated with naming or other factors that would not make it in the public interest to name the employer. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 18-21.

[1320]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 18: "The government envisages that raising awareness of minimum wage enforcement in this way could also encourage more workers who have been underpaid to come forward".

a) was issued with a previous NOU within the previous six years;
b) was subject to an outstanding labour market enforcement order or undertaking, or,
c) "has previously been convicted of an NMW offence which is not spent".[1321]

In the event of non-compliance with the notice of underpayment, recovery of the penalty is recoverable in various manners depending on the jurisdiction within the UK.[1322] An officer may:[1323]

a) present a claim to an employment tribunal in respect of any sum owed to the worker,
b) in the case of Northern Ireland, a complaint may be presented at an industrial tribunal or
c) civil proceedings may be commenced with for recovery of the sum owed to the worker, on a contractual claim or
d) initiate criminal proceedings.[1324]

The NMWA 1998 establishes the burden of proof to the advantage of workers in disputes. In any civil proceedings it is presumed that the individual (worker) qualifies or qualified "at that time for the national minimum wage unless the contrary is established".[1325] Where a complaint is made to a tribunal[1326] about deduction of wages "it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate

---

[1321]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 19. These criteria will be kept under review to ensure that the naming scheme meets its objectives.

[1322]Section 19E NMWA 1998.

[1323]Section 19D (1) NMWA 1998. "The powers conferred by subsection (1) above for the recovery of sums due from an employer to a worker shall not be in derogation of any right which the worker may have to recover such sums by civil proceedings" Section 19D (2) NMWA 1998.

[1324]Labour inspectors, "officers" generally have the rights that enable them to conduct criminal investigations that may then lead to criminal prosecutions by the CPS. BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 13.

[1325]Section 28 (1) NMWA 1998. Burden of proof rests with the defendant to establish compliance with minimum wage regulation see: *Ajayi v Abu* 2017 EWHC 3098 (QB) para 97.

[1326]Employment tribunal or industrial tribunal. Section 28 (2) NMWA 1998.

less than the national minimum wage unless the contrary is established".[1327] The employer therefore bears the burden to prove that the assumed legal position is inaccurate by presenting sufficient evidence to the contrary.

The use of criminal prosecutions may not necessarily result in workers being repaid what is owed to them. For this reason, criminal and civil proceedings may be pursued in parallel to ensure that workers are repaid what is owed to them.[1328] Section 31 of the NMWA 1998 determines that criminal liability can arise for the following offences:

a) refusing or wilfully neglecting to remunerate a worker at least equal to the NMW for any pay reference period.[1329] Where the commission of the offence is due to the act or default of some other person, that other person is guilty of an offence[1330] and a person may be charged and convicted of an offence even though proceedings are not taken against any other person.[1331]
b) The failure to provide accurate records and information as referred to in chapter 4.1.4.1,[1332]
c) The obstructing or delaying a labour inspector in the performance of duties as referred to in chapter 4.1.4.1.[1333]

A person guilty of an offence under section 31 of the NMWA 1998 is liable to;

a) "on conviction on indictment" to a fine, or
b) "on summary conviction" to a fine not exceeding the statutory maximum".[1334]

[1327]Section 28 (2) NMWA 1998. Also see subsection (3), in relation to contractual claims.

[1328]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 13.

[1329]Section 31 (1) NMWA 1998. See chapter 4.1.4.1.

[1330]Section 31 (6) NMWA 1998.

[1331]Section 31 (7) NMWA 1998. See 1258.

[1332]Section 31 (2), (3) and (4) NMWA 1998.

[1333]Section 31 (5) NMWA 1998.

[1334]Section 31 (9) NMWA 1998. Also see Mantouvalou (2011) *LAB/ADMIN Working Document* 7.

The statutory enforcement bodies utilise a "selective" approach in selecting cases for criminal investigation. The Crown Prosecution Service (hereafter referred to as the CPS) prosecutes after considering the following factors:[1335]

a) NMW offences committed over a long period of time will count in favour of prosecution as it indicates the cynical exploitation of workers,
b) NMW offences that affect workers with a vulnerable status including; disabled, individuals, will count in favour of prosecution
c) evidence that proves; "that victims have been held in slavery or servitude and have been forced to provide compulsory labour",[1336] are considered to be serious which means that prosecution can be expected, and
d) there may be cases with unique facts that may be less likely to be prosecuted e.g., if prosecution could result in the insolvency of the employer which means that the arrear wages will not be recovered. The interests of the workers will be considered in such circumstances. That being said, insolvency or the threat thereof will not prevent further criminal proceedings if it is warranted on the based on the extent, nature of the offence.[1337]

Section 32 of the NMWA 1998, determines that body corporates as well as the director, manager, secretary or other similar officer of the body corporate or a person claiming to act in any such capacity may also be found guilty of an offence. If it is proved that; the offence was committed with the consent or connivance of an officer[1338] of the body corporate or that the offence is attributable to any neglect of an

[1335]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 14-15. Also take note of additional factors that may indicate that prosecution is the appropriate proceedings, see 16-17.

[1336]14.

[1337]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 15.

[1338]Officer in relation to a body corporate, means "a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity" Section 32 (3) NMWA 1998.

officer of the body corporate, then the officer and the body corporate are liable to further proceedings and to be punished accordingly.[1339]

4.2 Compliance with minimum wage in Australia

As mentioned in chapter 1.4.2, minimum wage in Australia goes as far back as the 1890's, which makes it one of the first independently established minimum wages in the world.[1340] Since its establishment the Australian minimum wage had ample time to develop into a relatively complex system. Like the UK, Australia is a developed nation with its legal roots vested in the common law (see chapter 1.4.2). However, Australia has distinct socio-economic conditions and challenges that may result in unique compliance challenges.

In 1913, a process was initiated that updated the basic wage[1341] for changes in prices. This process was formalised in 1921 with the introduction of indexation that remained in place until its cessation in 1953.[1342] From 1953 to 1966 the basic wage was adjusted every one to three years by the Commonwealth Conciliation and Arbitration Commission. In 1966, the basic wage was replaced by a minimum wage applicable to adult males that was extended to females in 1974.[1343] The period of 1978 to 1995 was characterised by the use of decentralised bargaining in the wage determination process.[1344] A new federal minimum wage was introduced in 1997 after a review conducted by the Australian Industrial Relations Commission and it remains in place to date.[1345] McKenzie states that the Australian institutional system of wage

---

[1339]Section 32 (2) NMWA 1998. If the affairs of a body corporate are managed by its members, then this section applies; "in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate" Section 32 (4) NMWA 1998.

[1340]Bray (2013) SPI Working Paper 3.

[1341]The basic wage in this early context bears similarities to a minimum wage.

[1342] Bray (2013) *SPI Working Paper* 4-6.

[1343]Bray (2013) *SPI Working Paper* 6. Also see Howe J, Yazbek N & Cooney S "Study on Labour Inspection Sanctions and Remedies: The Case of Australia" (2011) 14 *LAB/ADMIN Working Document* 1 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154066.pdf> (accessed 23-2-2021).

[1344]Bray (2013) *SPI Working Paper* 6-8.

[1345]8-10.

regulation promoted wage growth across the labour market and greater earnings equality during the post-war decades.[1346] Changes in Australian industrial relations in the early 1980's that included growing restrictions on unions and industrial action and a shift of emphasis on market determined wages, led to a slowdown in wage growth:[1347]

> "The expressed intention of these cumulating changes to the industrial relations framework was to promote economic efficiency and productivity increases, through the unleashing of competitive market forces within the labour market. The so-called 'deregulation' of the labour market was a central plank in the broader vision of microeconomic reform that guided the implementation of Australia's version of neoliberal policy".[1348]

The change in the approach to minimum wage, meant that despite being one of the first nations to adopt minimum wage legislation, Australian minimum wages have stagnated in relation to overall wage growth in the Australian labour market.[1349] As indication hereof: "the real minimum wage in 2017 was just 3% higher than it was in 1983".[1350] The change in the approach to minimum wage coincided with a significant increase in inequality in Australia.[1351]

As referred to in section 2.2.4, Australia often utilises a system of capping or limiting of public sector wage increases.[1352] Slower public sector wage growth may influence

---

[1346]McKenzie (2018) *J Aus Pol Econ* 59 & 71; also see Bray (2013) *SPI Working Paper* 4-5.

[1347]McKenzie (2018) *J Aus Pol Econ* 59 & 71.

[1348]60.

[1349] McKenzie (2018) *J Aus Pol Econ* 55-56. Australian Council of Trade Unions "Modest Minimum Wage Rise Risks Increasing Inequality" (2014) *ACTU* 1-2 <https://www.actu.org.au/media/293542/ACTU%20Economic%20Bulletin%20-%20June%202014.pdf> (accessed 13-1-2021). Bray (2013) *SPI Working Paper* 13-14 & 51-54; Stewart et al *The Wages Crisis in Australia* 3-13. Wilson (2017) *Soc Pol Admin* 256-257.

[1350]McKenzie (2018) *J Aus Pol Econ* 55.

[1351]71. Stewart et al The Wages Crisis in Australia 279.

[1352]Stewart et al The Wages Crisis in Australia 119.

slower private sector wage growth that may simultaneously contribute to slower overall wage growth.[1353]

Australia is based on a federal governing system consisting of six Australian states that share law making powers with the Commonwealth.[1354] This system of jurisdictional division of power implied that workers could not directly be legislated by the Commonwealth because such responsibility vested in the particular Australian state.[1355] The system of jurisdictional division of powers has played a role in the complexity of labour regulation in Australia.[1356] Since 2006, there has been a gradual shift of many labour regulating powers from many of the Australian states to the federal government that ultimately led to the establishment of the NMW.[1357]

4.2.1 International legal measures ratified by Australia

As indicated under chapter 2.3 and table 1. Australia has ratified the following conventions which have reference to minimum wage compliance, as considered within the scope of this thesis:

- The Minimum Wage Fixing Convention, 1928, no. 26
- The Labour Inspection Convention, 1947, no. 81
- The Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87.
- The Right to Organise and Collective Bargaining Convention, 1949 no. 98.
- The Equal Remuneration Convention, 1951, no. 100.
- The Minimum Wage Fixing Convention, 1970, no. 131.
- The Labour Administration Convention, 1978, no.150.

[1353]There are various reasons why public sector wage suppression affects overall wage growth suppression. See Stewart et al *The Wages Crisis in Australia* 124-125.

[1354]Howe et al (2011) LAB/ADMIN Working Document 6.

[1355]6.

[1356]Stewart et al The Wages Crisis in Australia 64 & 295.

[1357]Howe et al (2011) LAB/ADMIN Working Document 2. Stewart et al The Wages Crisis in Australia 295-296.

To reiterate, Australia was among the first nations to experiment with modern minimum wage legislation, towards the end of the nineteenth century.[1358] The experiment proved to be successful as it resulted in the development of a comprehensive minimum wage framework, as will be seen from the discussion below.[1359]

4.2.2 Coverage of Minimum Wage in Australia

The Fair Work Act 28 of 2009 (hereafter referred to as the FWA) forms the legislative basis for employment in Australia. The Australian minimum wage is underpinned by the National Employment Standards (NES) which establishes minimum employment entitlements that must be provided to all employees. The NES cannot contractually be excluded and less favourable provision (than that established by the NES) cannot be made. The NES establishes the right of all employees covered by the national workplace relations system to certain rights including minimum wage.[1360]

The FWA assumes an important role in the Australian minimum wage framework because of its objective to:

> "provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by":[1361]
>
> a) "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders;[1362] and

[1358]Davidov (2009) *Mod Law Rev* 584.

[1359]Davidov (2009) *Mod Law Rev* 584.

[1360]The NES establishes the right to minimum wage through provision in the Fair Work Information Statement. The Fair Work Information Statement is one of the standards established by NES. See Section 125 FWA.

[1361]Section 3 FWA.

[1362]National minimum wage orders are discussed in chapter 4.2.3.

b) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system".[1363]

The FWA regulates 'national system'- employers and employees. In essence, these employers and employees are in jurisdictions that have referred legislative power (to create workplace laws) to the commonwealth (see the introduction of chapter 4.2). A "national system employee" is an individual employed or usually employed, as described in the definition of a "national system employer", by a national system employer, except on vocational employment.[1364] Section 14 of the FWA establishes a relatively wide definition of a "national system employer" that includes a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory or certain persons that employ or usually employ an individual.[1365]

Generally, the following categories of workers are excluded from the provisions of the FWA: [1366]

a) certain employees essential to the operation of State governments,
b) employees in Western Australia, and
c) independent contractor (subject to certain exceptions).

The Australian courts have distinguished between employees and independent contractors much the same as the South African courts have.[1367]

[1363]Section 3 (b) and (c) FWA.

[1364]Section 13 FWA.

[1365]Section 14 (1) FWA. An "employee" and "employer" with ordinary meaning. An ordinary employee is a person who is usually such an employee and excludes a person on vocational employment. An ordinary employer includes a reference to a person who is usually such an employer. Section 15 (1) & (2) FWA.

[1366]Howe et al (2011) LAB/ADMIN Working Document 3.

[1367]See the Australian case: *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* 2001 207 CLR 21 (HCA).

Australian minimum wage coverage is based on three legal mechanisms. Firstly, the Australian NMW establishes the legislative wage floor. The objective of the NMW is to provide a safety net that is fair, to the applicable employees.[1368] The FWC is responsible for realising this objective: "An employer of an employee to whom the national minimum wage applies must pay the employee a base rate of pay that at least equals the national minimum wage".[1369] The NMW applies to employees not covered by a modern award or an enterprise agreement except for:[1370]

a) a junior employee,
b) an employee to whom a training agreement applies; or
c) an employee with a disability.

These three groups of employees may be considered as vulnerable and minimum wage may potentially create a barrier for these workers to enter the labour market or continue their position in the labour market. For this reason, these employees are excluded from the general application of the NMW. Instead of the NMW coverage, numerous special national minimum wages are utilised to provide coverage to these individuals:[1371]

a) the special national minimum wage 1 applies to employees not covered in a modern award or enterprise agreement, who has a disability that does not affect their productivity,
b) the special national minimum wage 2 applies to employees not covered by a modern award or enterprise agreement, that have a disability that makes them:
    i) "unable to perform the range of duties to the competence level required of an employee within the class of work for which the employee is engaged because of the effects of a disability on their productive capacity; and

[1368]Section 283 (1) FWA. Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 3.

[1369]A4.3 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1370]Section 294 (3) FWA. Section 4.2 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1371]A6-10 Annual Wage Review 2018-19: National Minimum Wage Order 2019. Section 294 (4) FWA, establishes the coverage of special national minimum wage.

ii) who meets the impairment criteria for receipt of the Disability Support Pension".[1372]

c) The special national minimum wage 3 applies to junior employees that are not covered by a modern award or enterprise agreement,
d) The special national minimum wage 4 applies to apprentices that are not covered by a modern award or enterprise agreement,
e) The special national minimum wage 5 applies to an employee in a training arrangement (but who is not an apprentice) who is not covered by a modern award or enterprise agreement.

The special national minimum wages provide customised minimum wage coverage that establishes a wage floor for the applicable employees thereby protecting these employees against exploitive wages whilst not being a barrier to the employment of these employees in the labour market.

Secondly, minimum wage coverage can be based on a modern award or so called "award wages".[1373] The award wage is the mechanism most often utilised to establish minimum wage in Australia.[1374] Award wages establishes minimum terms and conditions (minimum wage) for a particular industry, occupation or job across industries.[1375] Award wages for adults cannot be lower than the Australian NMW.[1376] An award wage can be made up of numerous classifications that are based on the workers experience or training which establishes different minimum wage rates.[1377] This results in minimum wage coverage that is tailored for the category of work. However, it expands the differentiated system of minimum wage coverage that adds to its complexity.

[1372]A7.1 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1373]Section 139 (1) (a) FWA. McKenzie (2018) *J Aus Pol Econ* 61.

[1374]Stewart et al The Wages Crisis in Australia 297.

[1375]Section 5 (4) FWA. McKenzie (2018) *J Aus Pol Econ* 61. Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 3.

[1376]Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 1-3.

[1377]Stewart et al The Wages Crisis in Australia 297.

Thirdly, minimum wage coverage can be based in enterprise agreements. An enterprise agreement is a form of statutory collective agreement that determines the employment conditions (minimum wage) for a specific employee or group of employees and their employer. [1378] Enterprise agreements are made at the enterprise level and provides terms and conditions for those national system employees to whom it applies.[1379] The FWA encourages low paid employees and their employers to engage in collective bargaining, to conclude enterprise agreements that meet their needs.[1380] Enterprise agreements differ from employment contracts, in that they have been lodged with the FWC for approval.[1381] The FWC will only approve the enterprise agreement if it "leaves each affected employee 'better off overall' than they would be under an otherwise applicable award".[1382] An employment contract can still be utilised to establish wages on condition that it is more favourable than the NMW, award wages or enterprise agreement wages.[1383] Modern awards do not apply to an employer and employee that have an enterprise agreement in place. However, the base rate of pay under an enterprise agreement must not be less than the modern award rate or the NMW.[1384]

Casual or temporary employees are entitled to different minimum wage coverage to compensate for the lack of general benefits for these employees (see chapter 4.2.3).[1385] Casual and temporary employees may be considered as vulnerable and, on this basis, differential minimum wage coverage is necessary to protect these employees.

[1378]Howe et al (2011) LAB/ADMIN Working Document 6.

[1379]Section 169 FWA.

[1380]Section 241-246 FWA.

[1381]Howe et al (2011) LAB/ADMIN Working Document 6. Stewart et al The Wages Crisis in Australia 298.

[1382]Stewart et al The Wages Crisis in Australia 298.

[1383]Stewart et al The Wages Crisis in Australia 299.

[1384]Section 206 FWA. Howe et al (2011) *LAB/ADMIN Working Document* 6. Also see Section 206 (1),(2), (3) & (4) FWA.

[1385]S5 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

The Australian minimum wage coverage is complicated because of extended differentiated minimum wage coverage. Differentiation occurs between the three legal mechanisms and further differentiation occurs within each of these legal mechanisms as indicated in previous paragraphs. The result of the extended differentiation is that minimum wage application is not uniform but customised to different; geographical areas, industries, employees and employers.

4.2.2.1 Education and awareness

Section 125 of the FWA determines that the Fair Work Ombudsman must prepare a Fair Work Statement that must be published in the Gazette.[1386] The statement must contain the following information (among other):[1387]

a) national employment standards,
b) modern awards,
c) agreement-making under this Act;
d) the right to freedom of association;
e) the role of the FWC and the Fair Work Ombudsman and
f) right of entry.

The publishing of the Fair Work Statement may assist in creating awareness of labour standards including minimum wage. In addition, in the case of new employees, employers are obliged to provide them with the Fair Work Statement before or as soon as practicable after, the employee starts employment.[1388] As indicated in chapter 4.2.4.1, the functions of the Office of the Fair Work Ombudsman (hereafter

[1386]Any changes in the Fair Work Statement requires the publication of a new statement in the government gazette.

[1387]Section 124 FWA.

[1388]Section 125 FWA.

referred to as the FWO)[1389] places a responsibility on the FWO to raise awareness and to educating stakeholders on minimum wage.[1390]

The adjustment process of minimum wages (as discussed in chapter 4.2.3.2) may also create certainty and awareness as adjustments take place during the same time each year after being published on the government's website and after a wage review process has been finalised which includes the participation of stakeholders. The wage review process enables submissions from stakeholders that must be published along with relevant research.

Despite of these awareness measures; research indicate that Australian employers as well as employees face challenges obtaining useful information on rights and entitlements.[1391] The internet is predominantly utilised in Australia as the initial point of contact with reference to information on rights and entitlements and presents various challenges such as; private access to internet, computer literacy, user-friendliness of websites as well as unfamiliarity of the applicable legal instrument.[1392] The complexity of the minimum wage system may also be a factor contributing to these challenges.

4.2.3 Determination of minimum wage in Australia

The "Harvester decision" of 1907 by the Commonwealth Court of Conciliation and Arbitration defined a basic wage as one that is fair and reasonable, having regard to a human being living in a civilised community that enables a family of five to live in frugal comfort.[1393] Perhaps paradoxically then, the introduction of the new federal minimum wage in 1997 was not determined with a link to any defined benchmark of

---

[1389]The conceptual relationship between the Office of the Fair Work Ombudsman and the Ombudsman is further elaborated in 4.2.4.1.

[1390]S682 FWA. See Fair Work Ombudsman "Compliance and Enforcement Policy" (2020) *Fair Work Ombudsman* 3 <https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx> (accessed 20-2-2021). Howe et al (2011) *LAB/ADMIN Working Document* 8. Stewart et al *The Wages Crisis in Australia* 299.

[1391]Arup & Sutherland (2009) *Monash Uni Law Rev* 103.

[1392]103.

[1393]McKenzie (2018) *J Aus Pol Econ* 54.

needs.[1394] Instead it was determined in association with the minimum classification rate in most federal awards, which was the rate of the Metal Industry Award.[1395] Currently, the FWC assumes the role of determining and adjusting the NMW and modern awards in Australia,[1396] while minimum wage rates as part of enterprise agreements are established by collective bargaining (as referred to in chapter 4.2.2).

The NMW is set equivalent to the lowest rate in the manufacturing modern award and changes in other wages (modern awards) are determined as specified percentages or amounts above the NMW:[1397] "In this way, an increase in the NMW flows through automatically into the other wages specified in the various awards (most of which are above the NMW)".[1398] The role of modern awards is to act as a safety net for employees rather than a tool for "lifting wages and standards more broadly".[1399]

The differentiated minimum wage rates of modern awards are not discriminatory as is specifically provided for in section 153 of the FWA.[1400] The FWC may make, vary or revoke modern awards.[1401] The FWC must ensure that modern awards provide a safety net of terms and conditions taking into account various factors including, but not limited to the:[1402]

I. "relative living standards and the needs of the low paid, and

II. the need to encourage collective bargaining, and

[1394]Bray (2013) SPI Working Paper 8.

[1395]8.

[1396]McKenzie (2018) *J Aus Pol Econ* 61. Stewart et al *The Wages Crisis in Australia* 299; Wilson (2017) *Soc Pol Admin* 256 & 257.

[1397]McKenzie (2018) *J Aus Pol Econ* 61. Stewart et al *The Wages Crisis in Australia* 60, 61 & 74.

[1398]McKenzie (2018) *J Aus Pol Econ* 61. Also see Bray (2013) *SPI Working Paper* 9-13 and Stewart et al *The Wages Crisis in Australia* 52.

[1399]McKenzie (2018) J Aus Pol Econ 61. Stewart et al The Wages Crisis in Australia 75.

[1400]Section 153 (3) FWA.

[1401]Section 132 and 157 FWA.

[1402]The author only illustrates the factors most applicable to minimum wage.

III. the need to promote social inclusion through increased workforce participation,

IV. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden";[1403] and

V. "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

VI. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy".[1404]

The FWC must establish and maintain a safety net of fair minimum wages by considering:

a) "the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
b) promoting social inclusion through increased workforce participation; and
c) relative living standards and the needs of the low paid; and
d) the principle of equal remuneration for work of equal or comparable value; and
e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability".[1405]

NMW rates are established and adjusted by national minimum wage orders.[1406] A national minimum wage order requires employers to pay employees a base rate at

[1403]Section 134 (1) (a)-(c) FWA.

[1404]Section 134 (1) (g)-(h) FWA.

[1405]Section 284 (1) FWA.

[1406]Section 293-299 FWA.

least equal to the NMW, special national minimum wage or a casual loading rate.[1407] At the time of finalising this thesis the Australian NMW was $740.80 per week calculated on 38 ordinary hours, or $19,49 per hour.[1408]

The Australian minimum wage level in relation to global minimum wage levels is indicated in figure 5 of chapter 3.3.2. Within the global context the Australian minimum to mean wage ratio is in the higher spectrum of countries. Despite having a relatively high minimum wage in the global context literature indicates that minimum wage growth has stagnated in Australia as indicated in chapter 4.2. The discrepancies between minimum to mean and median wages is also less pronounced than most countries considered in figure 6, that may indicate less inequality.

The special national minimum wage 1 is similarly determined at $740.80 per week, calculated on a week of 38 ordinary hours, or $19.49 per hour.[1409]

The special national minimum wage 2 is determined at a percentage of the national minimum wage rate, depending on the assessed productive capacity of the employee.[1410] Figure 10 is utilised in determining the special national minimum wage 2.

[1407]Section 294 (2) FWA.

[1408]Section 4.1 Annual Wage Review 2018-19: National Minimum Wage order 2019.

[1409]Section 6.2 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1410]Section 7 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

Assessed capacity (cl.A.4) %	National minimum wage in cl.4.1 %
10	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

Figure 10: Australian disabled worker access to the NMW.[1411]

"Accessed capacity" refers to the productive capacity of the employee assessed by an approved assessor in accordance with certain provisions.[1412] From figure 10 it can be deducted that an employee with a relatively low accessed capacity will be entitled to receive a relatively small percentage of the ANMW. The opposite is also true with reference to a high accessed capacity. All assessments must be documented in an assessment agreement which must be kept by the employer and lodged with the FWC.[1413] The assessment should be reviewed annually or more frequently if reasonably requested.[1414]

There rests a duty on an employer wishing to employ a person under the special national minimum wage 2; to take "reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job".[1415] Such changes "may

[1411]A.3.1 Annual Wage Review 2018-19, National Minimum Wage Order 2019.

[1412]A.4.1 Annual Wage Review 2018-19, National Minimum Wage Order 2019.

[1413]A.4.2 and A.5.1 Annual Wage Review 2018-19, National Minimum Wage Order, 2019.

[1414]A.6 Annual Wage Review 2018-19, National Minimum Wage Order, 2019.

[1415]A.7 Annual Wage Review 2018-19, National Minimum Wage Order 2019.

involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area".[1416]

The special national minimum wage 3, must be paid at a rate at least equal to the calculation indicated in figure 11.

Age	% of rate of pay in cl. 4.1
Under 16 years of age	36.8
At 16 years of age	47.3
At 17 years of age	57.8
At 18 years of age	68.3
At 19 years of age	82.5
At 20 years of age	97.7

Figure 11: Youth workers access to the NMW.[1417]

In figure 11, the reference to "cl. 4.1" refers to the Australian NMW rate. The special national minimum wage 3 rates decline in relation with the descending age of employees. Employees under the age of 16 are entitled to the lowest minimum wage rate (at least 36.8% of the NMW) while employees at 20 years of age receive the highest special minimum wage rate 3 (at least 97.7% of the ANMW).

The special national minimum wage 4 must at least be paid at the rate determined for apprentices accordingly to the Miscellaneous Award 2010 or the school-based apprentices of that award.[1418] However, an employee who is an adult apprentice (i.e a person 21 years or older at the time of entering into the training agreement) is entitled to receive at least $622.20 per week for 38 ordinary hours worked, or $16.37

[1416]A.7 Annual Wage Review 2018-19, National Minimum Wage Order 2019.

[1417]A 8.2 Annual Wage Review 2018-19, National Minimum Wage Order 2019.

[1418]Section 9.3 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

per hour, if the employee was engaged in the employment before 1 July 2014 and is in year 1 of their apprenticeship.[1419]

The special national minimum wage 5 must at least be paid at a rate in "Schedule E-National Training Wage of the Miscellaneous Award 2010".[1420] As mentioned in chapter 4.2.2, casual or temporary employees have differentiated minimum wage coverage where they are generally entitled to an additional 25% on their wages.[1421] This is to compensate for the lack of leave or severance pay and may be a positive initiative to protect these vulnerable employees.

Cognisance should be taken of provision made that the FWC may make an order requiring equal remuneration for work of equal or comparable value.[1422] The FWA protects the integrity of wages by:

a) establishing conditions for any deductions from the employee's wages by the employer,1423
b) protecting the employee from unreasonable requirements to spend or pay an amount of the employee's money, payable to the employee in relation to the performance of work, to the employer or another person.[1424]

Similar provisions exist for protecting wage integrity in modern awards, enterprise agreements or a contract of employment.[1425]

4.2.3.1 The Fair Work Commission (FWC)

The FWC is an independent body with its legislative basis vested in the FWA that establishes a comprehensive framework for the functioning thereof.[1426] The FWC

[1419]Section 9.3 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1420]Section 10.2 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1421]S 5 Annual Wage Review 2018-19: National Minimum Wage Order 2019.

[1422]Section 302-306 FWA.

[1423]Section 324 FWA.

[1424]Section 325 FWA.

[1425]Section 326 FWA.

[1426]Chapter 5 FWA.

fulfils a similar role to the SANMWC in South Africa (chapter 3.3.2.1) and the LPC in the UK (chapter 4.1.3.1). The most relevant provisions for this study are outlined below.

The FWC consists of the President, two vice presidents, such number of deputy presidents as provided in the FWA, such number of Commissioners, as provided in the FWA and six expert panel members are to be appointed by the Governor-General after satisfying the Minister that:[1427]

1. the FWC president or vice president:
    a) is or has been a judge of a court created by parliament or
    b) the person must be qualified because of experience or knowledge in one or more of the following fields;
        I. workplace relations;
        II. law;
        III. business, industry or commerce,

2. the FWC deputy presidents:
    a) are or have been judges of a court created by parliament or of a court of a State or Territory or
    b) have a high level of experience in the field of workplace relations including a high level of experience that has been acquired:
        I. "through legal practice; or
        II. in the service of a peak council or another association representing the interests of employers or employees; or
        III. in the service of government or an authority of government; or
        IV. in academia",[1428]

3. the FWC commissioners:
    a) have qualified for appointment because of knowledge or experience in one or more of the following fields:

[1427]Section 575 (2), 626 (1) & 627 FWA. FWC members are appointed by the Governor-General of Australia on the recommendation of the Australian government.

[1428]S 627 (2) The FWA 2009.

I. workplace relations;
II. law;
III. business, industry or commerce,[1429]

4. the expert panel members:
   a) are qualified for appointment because of knowledge or experience in one or more of the following fields:
      I. workplace relations;
      II. economics;
      III. social policy;
      IV. business, industry or commerce;
      V. finance;
      VI. investment management;
      VII. superannuation.[1430]

The FWC may also be assisted in carrying out its functions, by certain parties[1431] and consultants.[1432] The FWA determines that certain functions of the FWC may be performed by a single FWC member, a full bench of the FWC panel or by an expert panel.[1433]

The period of appointment to the FWC panel of members varies according to the position held. The president, vice presidents and deputy commissioner hold the position until the earliest of; the attainment of 65 years of age or until resignation or the appointment is terminated.[1434] These provisions enable long-term appointments that may hold benefits for the effective functioning of the panel. Expert panel members are appointed for a specified period, which may not exceed five years.[1435]

[1429]S627 (3) The FWA 2009.

[1430]S627 (4) The FWA 2009.

[1431]S672 The FWA 2009.

[1432]S673 The FWA 2009.

[1433]S612-624 The FWA 2009.

[1434]S 629 (1) FWA 2009.

[1435]S 629 (4) FWA 2009.An expert panel member may be reappointed.

Mention should be made that the Governor-General may terminate a FWC panel member's appointment in accordance with the set requirements on the grounds of misconduct or incapacity.[1436]

To avoid conflict of interest with regards to the performance of panel members' duties, legislative restrictions apply to FWC panel members engaging in work outside of the FWC.[1437] Panel members, whether full time or part time, must not engage in work outside his or her FWC duties without the president's approval.[1438] Another measure to avoid potential conflict of interest is that FWC panel members are required to disclose any interest, pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC panel member's functions.[1439]

The FWA provides a remuneration framework for FWC panel members that may assist in establishing transparency and certainty; within the operation of the FWC itself but also to the general public.[1440]

The FWA also seeks to protect the operational efficiency, integrity and respectable public standing of the FWC by imposing criminal sanctions to the effect of 12 -months' imprisonment for:

a) insulting or disturbing an FWC member or delegate in the performance of powers or the exercise of functions associated with the position,1441
b) using insulting language towards an FWC member or delegate in performing functions, exercising powers associated with the position,1442
c) interrupting matters before the FWC,1443

[1436]S 641 FWA 2009.

[1437]S 633 (3) FWA 2009.

[1438]S 633 (1) (3) FWA 2009. Subsection (2) determines that the president's approval is not required for paid work in relation to the defence force.

[1439]S 640 (1) FWA 2009.

[1440]S 635-639 FWA 2009.

[1441]S674 (1) The FWA 2009.

[1442]S674 (2) The FWA 2009.

[1443]S674 (3) The FWA 2009.

d) creating or continuing a disturbance in or near a place where the FWC is dealing with a matter,1444
e) improper influencing an FWC member, delegate or person attending before the FWC,1445
f) adversely effecting public confidence in the FWC by publishing an unwarranted statement about misconduct of an FWC member, in the performing of functions or the exercising of powers.[1446]

Cooperation with the FWC is protected in that it is an offence that carries a penalty of 12 months' imprisonment, for threatening, intimidating, coercing or prejudicing someone for providing or intending to provide information or documents to the FWC.[1447]

The FWC has functions conferred by the FWA in relation to (among other subjects); the NES, modern awards, enterprise agreements, workplace determinations, minimum wages and dispute resolution.[1448]

The FWA legislatively encapsules the ethos by which the FWC is expected to perform its functions:

a) "is fair and just; and
b) is quick, informal and avoids unnecessary technicalities; and
c) is open and transparent; and
d) promotes harmonious and cooperative workplace relations".[1449]

In addition, the FWC is expected to take account of certain matters in performing its functions, namely:

[1444]S674 (4) The FWA 2009.

[1445]S674 (5) The FWA 2009.

[1446]S674 (7) The FWA 2009.

[1447]S 676 The FWA 2009. Also see S 677-678 of the FWA 2009, that promotes cooperation and the efficient functioning of the FWC.

[1448]S 576 The FWA 2009.

[1449]S 577 The FWA 2009.

a) the objectives of the FWA,
b) "equity, good conscience and the merits of the matter; and
c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin".[1450]

The president is responsible for ensuring that the FWC performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of the employers and employees throughout Australia.[1451] The vesting of this responsibility with the president indicates the value attributed to the FWC and its functioning, and emphasises the desire to balance the needs of employers and employees. The president is also mandated to deal with complaints regarding the FWC members[1452] and to establish a Code of Conduct for FWC members.[1453]

The president may also provide directions to the FWC, about the manner in which the FWC performs its functions, exercises its powers or deals with matters.[1454] A general or specific direction about a particular matter may be made to any member of the FWC.[1455] A direction may not, however be made relating to the decision of the FWC. The kinds of directions allowed for under the FWA[1456] may significantly influence the outcomes or decisions achieved by the FWC.[1457] A direction is not a legislative instrument,[1458] which may lead one to believe that it

[1450]S 578 The FWA 2009.

[1451]S 581 The FWA 2009.

[1452]S 581A The FWA 2009.

[1453]S 581B The FWA 2009. A Code of Conduct for FWC members may be established after consulting FWC members and such measure does not take the form of a legislative instrument.

[1454]S 582 The FWA 2009. S 584 FWA 2009 provides for the delegation of functions and powers of the President.

[1455]S 582 (2) FWA.

[1456]S 582 (4) FWA.

[1457]S 582 (3) FWA.

[1458]S 582 (6) FWA.

doesn't have to be followed, perhaps paradoxically then it is determined that a person to who a direction is given must comply with the provision.[1459]

4.2.3.2 Adjustment of minimum wage

Adjustments of enterprise agreements may be made by:

a) employers and employees jointly,1460
b) employers may request employees to approve a proposed variation of an enterprise agreement.[1461]

Following the adjustment of an enterprise agreement, application must be made to the FWC for approval of the adjustment.[1462] As mentioned in 4.2.2, to be approved, the enterprise agreement must, among other requirements, [1463] pass the "better off overall test".[1464] An enterprise agreement passes the better off overall test if; the FWC is satisfied that at the time of applying for approval, each modern award and potential employee covered, would be better off if the agreement applied rather than if the relevant modern award applied.[1465]

The FWC may also adjust enterprise agreements where there is ambiguity, uncertainty or discrimination.[1466] An enterprise agreement may be terminated by employers and employees[1467] or after the nominal expiry date of such agreement.[1468] The FWC must approve termination of the enterprise agreement if it is satisfied that

[1459]S 582 (5) FWA.

[1460]Section 207 FWA.

[1461]Section 208 FWA.

[1462]Section 210 FWA.

[1463]Section 211 FWA.

[1464]Section 211 (4) FWA.

[1465]Section 193 (1) FWA. Section 214 FWA, establishes the refusal of enterprise agreement adjustments.

[1466]Section 217-218 FWA.

[1467]Section 219-224 FWA.

[1468]Section 225-227 FWA.

certain requirements are met.[1469] In other words, the final decision with reference to adjustments of minimum wages rests with the FWC. The developments in Australia, in making enterprise agreements must be reviewed and research should be conducted about individual flexibility under modern awards and enterprise agreements every three years after which a report must be compiled and tabled in each house of the parliament.[1470]

Because the Australian NMW and modern awards are determined in relation to one another they are adjusted simultaneously every year.[1471] The FWC decides on the extent of adjustments on a national level and adjustments are applied consistently across modern awards by either the addition of a flat dollar amount or a percentage amount that raises all modern awards.[1472] The FWC may adjust a modern award if it is satisfied that the adjustment is justified by work value reasons[1473] and "making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective".[1474]

Adjusted modern awards are usually implemented on the first of July of the next financial year[1475] and must be published as soon as practicable on the FWC's website or by any other means that the FWC considers appropriate.[1476] The Australian NMW is adjusted annually after completing an annual wage review. The evidence of each

---

[1469]The requirements that must be met are established in section 223 FWA, in respect of termination by employers and employees and section 226 FWA, in respect of termination of expiry of the enterprise agreement.

[1470]S653 FWA.

[1471]Adjustments are generally effected by the 1st of July each year. Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 4.

[1472]Bishop "The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss" *Reserve Bank of Australia* 4.

[1473]Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:(a) the nature of the work;(b) the level of skill or responsibility involved in doing the work; (c) the conditions under which the work is done. Section 157 (2) (b) and 2A FWA.

[1474]Section 157 (2) (b) FWA.

[1475]Section 166 (1) FWA.

[1476]Section 168 FWA. Also see S 292 of the FWA that states that varied wages must be published.

review must be considered independently from other years.[1477] In the annual wage review, the FWC:[1478]

a) must review modern award minimum wage rates and the NMW rate,
b) may determine, adjust or revoke modern award minimum wages and
c) must make a national minimum wage order.

The FWC must ensure that all persons and bodies have reasonable opportunity to make written submissions to the FWC for consideration in the annual wage review.[1479] Subject to certain conditions,[1480] the FWC must publish all submissions made to it for consideration in the annual wage review on the FWC website or any other means that the FWC consider appropriate.[1481] If the FWC undertakes or commissions research for the purpose of the annual wage review, such research must be published in order to allow submissions that address the issues considered in the research.[1482] The President may direct that a matter be investigated and a report be prepared for consideration in an annual wage review.[1483]

Subsequent to the annual wage review a NMW order is issued, that determines any changes, adjustment of the NMW.[1484] Similar to the time frame applicable to the adjustment of modern awards, adjustments of the NMW usually commence on 1 July with the use of a NMW order and remains in place until the next NMW order comes into operation.[1485] A NMW order must contain the monetary amount of the NMW and

---

[1477] McKenzie (2018) *J Aus Pol Econ* 62.

[1478]Section 285 FWA.

[1479]Section 289 (1) FWA.

[1480]Submissions that contain information that is confidential may possibly not be published by the FWC, see section 289 (3) FWA.

[1481]Section 289 (1)-(6) FWA.

[1482]Section 291 (1) FWA.

[1483]Section 290 (1) FWA.

[1484]Section 598 (3) FWA.

[1485]Section 2 Annual Wage Review 2018-19: National Minimum Wage Order 2019. Section 166 (1) 285 and 299 FWA.

the special national minimum wage and may also contain terms of how the order applies.[1486] Annual NMW orders are utilised to determine:[1487]

a) the NMW and special national minimum wage;
b) the special national minimum wages for all junior employees, employees to whom training agreements apply, disabled employees not covered by modern award or enterprise agreements; and
c) the casual loading rate for employees not covered by modern award or enterprise agreement.

The NMW order may also be utilised by the FWC to correct an error, remove ambiguity or to remove uncertainty, after which the adjustment/s must be published on the FWC website and by other means that deemed appropriate according to the FWC.[1488]

The FWC must provide reasons for its decisions that must be published.[1489] The FWC may vary or revoke a decision on its own initiative or on application by someone thereby affected.[1490] Provision is made for the appeal of decisions of the FWC.[1491]

4.2.4 Legal enforcement of minimum wage in Australia

As indicated earlier in this thesis, enforcement of minimum wages is a problem in Australia. McKenzie indicates widespread non-compliance with minimum wage in various sectors of the Australian labour market.[1492] Young people and migrant employees are, in particular, subject to minimum wage non-compliance.[1493]

[1486]Section 295 FWA.

[1487]Section 294 (1) FWA.

[1488]Section 296 FWA.

[1489]S 601 (4) FWA.

[1490]S 603 (2) FWA.

[1491]S 604-711 FWA. Also see Fair Work Commission "Practice Note: Appeal Proceedings" (2014) *Fair Work Commission* <https://www.fwc.gov.au/resources/practice-notes/appeal-proceedings> (accessed 20-2-2021).

[1492]McKenzie (2018) *J Aus Pol Econ* 57. Also see Stewart et al *The Wages Crisis in Australia* 177.

[1493]57.

4.2.4.1 Monitoring compliance with minimum wage in Australia

The administrative function of the FWA is done by establishing the FWC and the FWO. The FWO is the competent body responsible for enforcement of the FWA,[1494] but individual employees and trade unions may also enforce minimum wage.[1495] The FWO functions are:[1496]

a) to promote:
   i) harmonious, productive and cooperative workplace relations; and
   ii) compliance with the FWA and fair work instruments; "including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;"1497
b) to monitor compliance with the FWA and fair work instruments;
c) to inquire into and investigate any act or practice that may be contrary to the FWA, fair work instrument or contractual entitlement,
d) "to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;
e) to refer matters to relevant authorities;
f) to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;
g) any other functions conferred on the Fair Work Ombudsman by any Act".[1498]

[1494]Section 4 (1) (d) & 8 (1) FWA. Howe et al (2011) *LAB/ADMIN Working Document* 8.

[1495]"Unions also continue to have standing to bring legal proceedings against employers for breach of minimum employers, and therefore still play a role in the enforcement of minimum employment standards", Howe et al (2011) *LAB/ADMIN Working Document* 1 & 9.

[1496]S682 The FWA 2009. See Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 3. Howe et al (2011) *LAB/ADMIN Working Document* 8.

[1497]S682 (1) (a) (ii) The FWA 2009.

[1498]S 682 (1) (d) – (g) The FWA 2009.

The FWO consists of the Fair Work Ombudsman, staff of the FWO office, and inspectors known as Fair Work Inspectors (hereafter referred to as FWI) [1499] and may be assisted by consultants that are suitably qualified and experienced.[1500] The Governor-General appoints someone as a Fair Work Ombudsman, that is a position in the office of the FWO, after being satisfied that the person has suitable qualifications or experience and is of good character.[1501] The Fair Work Ombudsman holds office on a full-time basis for a period not exceeding five years.[1502] The Fair Work Ombudsman must not engage in work outside the duties of his or her office without the Minister's approval.[1503] The Governor General must terminate the appointment of the Fair Work Ombudsman (among other reasons):

a) is absent for a specified period,[1504]
b) engages in outside work without the Ministers approval,[1505]
c) fails to disclose certain interests.[1506]

The Fair Work Ombudsman appoints a FWI once satisfied that the person is of good character for a period not exceeding 4 years.[1507] Table 2 and figure 6 indicate that the number of labour inspectors in Australia, in relation with international standards determined by the ILO, is sufficient. In fact, the Australian labour inspector to worker ratio is better than the international determined standard. Despite exceeding the international standard, compliance remains problematic in Australia (as indicated

[1499]S 696 (2) The FWA 2009. Howe et al (2011) *LAB/ADMIN Working Document* 8. The Office of the FWO is an extended term that includes all personnel under its ambit of which the Fair Work ombudsman (an individual) forms part of.

[1500]S 699 The FWA 2009.

[1501]S 687 (1) – (2) The FWA 2009.

[1502]S 687 (3) – (4) The FWA 2009.

[1503]S 690 The FWA 2009.

[1504]S 693 (2) (b) The FWA 2009. S 693 (1) The FWA 2009 determines that the Fair Work Ombudsman may also be terminated for misbehaviour or incapacity.

[1505]S 693 (2) (c) The FWA 2009.

[1506]S 693 (2) (d) The FWA 2009.

[1507]S 700 The FWA 2009.

elsewhere) that correlates with observations in chapter 4.1.4.1 indicating that the correlation between the number of inspectors and the rate of compliance is complex. The Fair Work Ombudsman: Compliance and Enforcement Policy 2020;[1508] establishes the FWO's enforcement framework. Monitoring is generally conducted by using risk assessments to identify high risk sectors and by receiving complaints.[1509]

Where the FWO becomes aware of potential non-compliance or where it is monitoring compliance, without any reports of non-compliance, an FWI may commence with an investigation or inquiry into the matter of interest to adopt appropriate remedial action as discussed in 4.2.4.2.[1510] In dealing with potential non-compliance the FWO may provide assistance (if requested to do so) involving workplace disputes, that includes education, advice and various dispute resolution tools. Such assistance may even resolve potential non-compliance.[1511]

The investigation or inquiry generally follows a case assessment process.[1512] During the assessment, among other factors, the jurisdiction of the FWO is considered and whether it is in the public's interest to utilise the investigative powers of the FWO.[1513] Additional public interest factors considered as part of the assessment process are whether:[1514]

a) the matter involves vulnerable workers;
b) the matter demonstrates a blatant disregard of laws or repeat offending;
c) the matter is of significant scale or impact on workers or the community;

[1508]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman*.

[1509]Fair Work Ombudsman "The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2019-20" (2020) *Fair Work Ombudsman* <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports> (accessed 5-2-2021) 47.

[1510]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 3.

[1511]3.

[1512]3.

[1513]Public interest referring to; "any proposed compliance activity would be an efficient, effective and ethical use of public resources" Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 3.

[1514]3.

d) the employment relationship is ongoing, or how long ago the employment ended;
e) there is likely to be reliable evidence available to support a finding or view that a contravention has occurred; and
f) confidentiality issues (where the employee does not want the FWO to advise the employer that they have raised allegations of potential non-compliance with the FWA and/or fair work instruments).[1515]

The assessment process sorts through cases and based on the public interest factors, identify cases that are worth pursuing, thereby reducing the wastage of FWO resources.[1516] This may ultimately contribute to the efficiency of the FWO by focussing on cases that may facilitate optimal use of resources.

There are a wide range of outcomes available to the FWI after the conclusion of the investigation or inquiry. This may include the utilisation of a written enforceable undertaking or a compliance notice, that are both considered in chapter 4.2.4.2 of this study. As mentioned in previous paragraphs, an infringement notice may also be issued if there is reasonable belief for non-compliance with record keeping or payslip obligations. If there is no sufficient evidence to support non-compliance with the FWA, an assessment letter may be utilised to notify a party accordingly.[1517] An assessment letter may also caution or recommend that a party take steps to ensure compliance with the law.[1518]

Also, where an FWI is satisfied that there is non-compliance with the FWA 2009, regulations or a fair work instrument, a contravention letter may be issued in writing notifying the transgressor of the following:

[1515]See chapter 2.4.3.1 regarding confidentiality required by labour inspectors.

[1516]Arup & Sutherland (2009) *Monash Uni Law Rev* 112.

[1517]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 8.

[1518]8.

a) "inform the person of the failure; and
b) require the person to take the action specified in the notice, within the period specified in the notice, to rectify the failure; and
c) require the person to notify the inspector in accordance with the notice of any action taken to comply with the notice; and
d) advise the person of the actions the inspector may take if the person fails to comply with the notice".[1519]

Depending on the nature of the non-compliance and the response received from the transgressor, the FWO may utilise further enforcement mechanisms, as discussed in chapter 4.2.4.2.[1520] The contravention letter may be considered as a soft enforcement measures as it does not contain punitive measures and is directed at guiding and correcting non-compliance.

The powers and functions of FWI are contained in the FWA and provides the legal framework used to carry out investigations or inquiries.[1521] The Fair Work Ombudsman may by way of legislative instrument give a general written direction to inspectors relating to the performance of their functions or exercise of their powers, that inspectors must comply with.[1522] Functions and powers of FWI are referred to as compliance powers.[1523] FWI may exercise their powers for the purpose of determining compliance (past or present) with the FWA or fair work instrument or contractual entitlement.[1524] The FWI may exercise compliance powers with reference to contractual entitlements if the FWI reasonably believes that a person has contravened any of the following:[1525]

[1519]Regulation 5.05 The Fair Work Regulations 2009.

[1520]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 8.

[1521]S 703 – 717 The FWA 2009.

[1522]S 704 The FWA 2009.

[1523]S 703 (1) The FWA 2009.

[1524]S 706 (1) (a) – (b) The FWA 2009.

[1525]S 706 (2) The FWA 2009. Howe et al (2011) *LAB/ADMIN Working Document* 9.

a) the NES;
b) a modern award term;
c) an enterprise agreement term;
d) a workplace determination term;
e) a national minimum wage order;
f) an equal remuneration term.

FWI's are impartial officers mandated to ensure that industrial laws are properly observed.[1526] With reference to the FWI's powers of entry to premises:

a) An FWI has the power to enter any premises without force, if it is reasonably believed by the FWI that the FWA or a fair work instrument applies to work performed on the premises;1527 or
b) The FWI may enter any business premise without force if the FWI reasonably believes that there are records or documents relevant to compliance purposes on the premises or accessible from a computer on the premises.[1528]

An FWI is issued with an identity card identifying the FWI as such. The identity card must be carried with the FWI in carrying out any of the functions or powers of an inspector.[1529] An FWI may be assisted by an assistant on any of the mentioned premises if the Fair Work Ombudsman is satisfied that the assistant is necessary and reasonable, and the assistant is suitably qualified and experienced to assist the FWI.[1530] The assistant may do such things on the premise as required by the FWI in exercising the compliance powers of the FWI.[1531]

[1526]Arup & Sutherland (2009) *Monash Uni Law Rev* 112. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 4.

[1527]S 708 (1) (a) The FWA 2009. "Despite paragraph (1)(a), an inspector must not enter a part of premises that is used for residential purposes unless the inspector reasonably believes that the work referred to in that paragraph is being performed on that part of the premises" S 708 (2) The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 4.

[1528]S 708 (1) (b) The FWA 2009.

[1529]S 702 The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 4.

[1530]S 710 (1) The FWA 2009.

[1531]S 710 (2) The FWA 2009.

While the FWI is on the premises (on any premise mentioned in the previous paragraphs) the FWI has the following powers:

a) "inspect any work, process or object,
b) interview any person;
c) require a person to tell the inspector who has custody of, or access to, a record or document;
d) require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period;
e) inspect, and make copies of, any record or document that:
    i) is kept on the premises; or
    ii) is accessible from a computer that is kept on the premises;
f) take samples of any goods or substances in accordance with any procedures prescribed by the regulations".[1532]

The FWI has the power to request a person's name and address if the FWI reasonably believes that the person has contravened a civil remedy provision.[1533] The failure of a person to provide a FWI with the person's name or address carries a maximum penalty of $6 300 for individuals and $31 500 for body corporates.[1534]

A FWI may exercise compliance powers at any time during working hours or any other time the FWI reasonably believes to be necessary for compliance purposes.[1535] The efficient functioning of FWI and the FWO are protected in that intentional hindering or obstructing in the performance of compliance powers are prohibited.[1536]

[1532]S 709 The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 4.

[1533]S 711 (1) The FWA 2009.

[1534]Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" (2019) *Australian Government: Attorney-General's Department* 15 <https://www.ag.gov.au/sites/default/files/2020-03/strengthening-penalties-for-non-compliance-discussion-paper.pdf> (accessed 2-2-2021).

[1535]S 707 The FWA 2009.

[1536]S 707A The FWA 2009.

Hindering or obstructing the FWO and FWI carries a maximum penalty of $12 600 for individuals and $63 000 for body corporates.[1537]

In addition, the FWA prohibits someone from knowingly or recklessly providing information or documentation that is false or misleading or information that omits any matter or thing without which the information is misleading.[1538] Providing false or misleading documents to the FWO carries a maximum penalty of $12 600 for individuals and $63 000 for body corporates.[1539]

Recordkeeping and employee payslips are instruments that assume a crucial role in providing information utilised in monitoring compliance with minimum wage. The FWA places obligations on the employer to make and keep true and accurate employee records for a period of 7 years.[1540] Employee record must be made and kept by the employer in:

- readable English language;
- a form that is readily accessible to an inspector.[1541]

If an FWI reasonably believes that there has been non-compliance with the FWA or the Fair Work Regulations about record keeping or pay slip obligations, then the FWI may issue an infringement notice.[1542] An infringement notice must be issued within 12 months after the contravention/s allegedly took place[1543] and requires the alleged

---

[1537]Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

[1538]S718A (1) The FWA 2009. Also see the accompanied provisions in subsections (2) to (6) in the same section of the FWA 2009.

[1539]Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

[1540]S 535 (1) & (4) The FWA 2009.

[1541]Regulation 3.31 Fair Work Regulations 2009.

[1542]Regulation 4.04 Fair Work Regulations 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 9.

[1543]Regulation 4.04 (2) Fair Work Regulations 2009.

transgressor to pay a penalty for the non-compliance. The maximum penalties that can be required to pay under an infringement notice are:

I. "$1,332 for an individual or $6,660 for a body corporate for contraventions of the FW Act; and
II. $444 for an individual or $2,200 for a body corporate for contraventions of the FW Regulations".[1544]

Compliance with an infringement notice is not regarded as an admission of non-compliance and the FWO cannot commence court proceedings for that alleged non-compliance as contained in the infringement notice.[1545]

The following two instruments may be utilised to obtain information:

Firstly, a FWI may require a person to produce a record or document within a minimum period of fourteen days, by serving a written notice to produce (hereafter referred to as the NTP) on such person.[1546] Failure to comply with the NTP, without a reasonable excuse, may result in litigation where the court may order penalties up to $13,320.00 for individuals or $66,600.00 for body corporates.[1547]

Secondly, the Fair Work Ombudsman may apply[1548] to the Administrative Appeals Tribunal (hereafter referred to as the AAT) presidential member for a Fair Work Ombudsman notice (hereafter referred to as the FWO notice) requiring a person to

---

[1544]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 9. S 558 (2) The FWA 2009. Also see: Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 14.

[1545]Regulation 4.09 The Fair Work Regulations 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 9.

[1546]S 712 (1) – (2) The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 5-6.

[1547]S 539 (2) item 32 The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 5. Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

[1548]Application must be in the prescribed form and must be accompanied with an affidavit. S 712AA (3) – (5) The FWA 2009.

provide information, documents or to attend before the FWO,[1549] if the FWO believes on reasonable grounds that a person:[1550]

a) has information or documents relevant to an investigation of a FWI regarding non-compliance with the FWA, a fair work instrument or a safety net contractual entitlement that directly or indirectly relates to:
   i) underpayment of wages and monetary entitlements;
   ii) unreasonable deductions owed to employees;
   iii) unreasonable requirements to spend amounts paid to employees;
   iv) unfair dismissal of an employee;
   v) bullying of a worker at work;
   vi) unlawful discrimination of a person in relation to employment;
   vii) non-compliance with NES;
   viii) coercion of an employee by an employer; and
b) can give evidence that is relevant to such an investigation.

A record or document produced, may be inspected or copied by an FWI or a person authorised to do so and may be kept for such period as necessary.[1551] Failure to comply with a FWO notice may result in a penalty of up to $133,200.00 for individuals and $666,000 for body corporates.[1552]

A nominated AAT presidential member must issue the FWO notice if they are satisfied that:

[1549]S 712AA (2) The FWA 2009.

[1550]S 712AA (1) The FWA 2009.

[1551]S 714 The FWA 2009.

[1552]S539 (2) item 32 & S 712B (1). Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 5. Fair Work Ombudsman "A Guide to FWO Notices" (2020) *Fair Work Ombudsman* 7 <https://www.fairwork.gov.au/ArticleDocuments/725/Guide-to-FWO-Notices.pdf.aspx> (accessed 20-2-2021). Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

a) the FWI has commenced with investigation to which the application relates;
b) there are reasonable grounds to believe that the person to which the application relates has information, documents or is capable of giving evidence relevant to the investigation,
c) all other methods of obtaining the information, documents or information have been attempted unsuccessfully or is not appropriate;
d) the information, documents or evidence would likely assist the investigation;
e) having regard to all circumstances, it would be appropriate to issue the FWO notice,
f) any other matter prescribed by regulation.[1553]

Based on these elements, an FWO notice will only be issued if there is a high likelihood that it would assist the inquiry or investigation. An FWO notice is valid for three months[1554] after date of issue and must at least provide fourteen days for compliance with such notice.[1555] A FWO notice must be complied with[1556] and reasonable costs incurred by a person attending to give evidence, based on a FWO notice, may be claimed by such person.[1557] A person that provides information, produces a record, document, or answers a question in good faith, as required by FWO notice, is not liable for any proceedings.[1558]

The Australian legislative framework provides for an overview of FWO conduct in that the Commonwealth Ombudsman must be notified of the issuing of a FWO notice.[1559] The Commonwealth Ombudsman must review the exercising of the powers of the

[1553]S 712 (1) The FWA 2009.

[1554]S 712AD (2) The FWA 2009.

[1555]S 712AD (3) (b) & (5) The FWA 2009.

[1556]S 712B The FWA 2009.

[1557]S 712C The FWA 2009.

[1558]S 712D The FWA 2009. Also see S 713 The FWA 2009, regarding self-incrimination.

[1559]S 712E The FWA 2009.

FWO and prepare a report that must be presented to parliament at certain intervals.[1560]

A significant component in an effective enforcement framework is the provision of legal workplace rights that are considered in the subsequent paragraphs. Australian workplace rights are protected in that "[a] person must not take adverse action[1561] against another person:

a) because the other person:
   i) has a workplace right; or
   ii) has, or has not, exercised a workplace right; or
   iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
b) to prevent the exercise of a workplace right by the other person".[1562]

Reference is made to a person and not to an employee, presumably to broaden the scope of application of workplace rights, which may be affirmed by the fact that prospective employees also have workplace rights.[1563]

A workplace right is where a person:

a) "is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
c) is able to make a complaint or inquiry:

[1560]S 712F The FWA 2009.

[1561]Meaning of adverse action is established in section 342 FWA. See corresponding provisions in chapter 3.3.3.1 for South Africa and 4.1.4.1 for the UK.

[1562]Section 340 (1) FWA. Howe et al (2011) *LAB/ADMIN Working Document* 6.

[1563]Section 341 (3-5) FWA.

i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
ii) if the person is an employee-in relation to his or her employment".[1564]

The FWA 2009 lists numerous processes or proceedings under a workplace law or workplace instrument.[1565] Applicable to this study are the following:

a) "a conference conducted or hearing held by the FWC;
b) court proceedings under a workplace law or workplace instrument;
c) protected industrial action;
d) a protected action ballot;
e) making, varying or terminating an enterprise agreement;
f) appointing, or terminating the appointment of, a bargaining representative;
g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
h) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
i) any other process or proceedings under a workplace law or workplace instrument".[1566]

Protection is also provided against coercion or intimidation in that a person must not; "organise or take, or threaten to organise or take, any action against another person with the intent to coerce the other person, or a third person".[1567] An employer must also not exert undue influence or pressure on an employee to:

a) "make, or not make, an agreement or arrangement under the National Employment Standards; or

[1564]Section 341 (1) FWA.

[1565]Section 341 (1) FWA.

[1566]Section 341 (2) FWA.

[1567]Section 343 FWA.

b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
c) agree to, or terminate, an individual flexibility arrangement; or
d) accept a guarantee of annual earnings; or
e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work".[1568]

The FWA 2009 guards against misrepresentations of workplace rights, stating that a person must not knowingly or recklessly make a false or reckless representation regarding the workplace rights of another person or the exercise or the effect of the exercise of a workplace right.[1569] Certain rights with reference to industrial activities (being involved in an industrial organisation such as a union) are also protected in that no adverse action must be taken against a person who:[1570]

a) "is or is not, or was or was not, an officer or member of an industrial association; or
b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g)".[1571]

A person engages in industrial activity if the person:

a) "becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
b) does, or does not:
    i) become involved in establishing an industrial association; or

[1568]Section 344 FWA.

[1569]Section 345 FWA.

[1570]See chapters 3.3.3.1. for corresponding provisions in South Africa and 4.1.4.1 for the UK.

[1571]Section 346 The Fair Wage Act 2009. Also see Stewart et al *The Wages Crisis in Australia* 298.

ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
iv) comply with a lawful request made by, or requirement of, an industrial association; or
v) represent or advance the views, claims or interests of an industrial association; or
vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or
vii) seek to be represented by an industrial association; or

c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or
d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or
e) complies with an unlawful request made by, or requirement of, an industrial association; or
f) takes part in industrial action; or
g) makes a payment".[1572]

A person must not be coerced to engage in industrial activity.[1573] Misrepresentations are prohibited regarding another's obligation to engage in industrial activity or another's obligation to disclose whether they or a third person is involved in an association.[1574] A person must not be induced to take or propose to take membership action.[1575]

Discrimination is also prohibited against an employee, or prospective employee, by an employer on various ground including but not limited to race, age, marital status

[1572]Section 347 The Fair Wage Act 2009.

[1573]Section 348 The Fair Wage Act 2009. See Howe et al (2011) *LAB/ADMIN Working Document* 6.

[1574]Section 349 The Fair Wage Act 2009.

[1575]A person that must not be induced in this provision refers to; an employee or independent contractor. Section 350 The Fair Wage Act 2009.

or religion.[1576] Discrimination against the employer is also prohibited on the grounds that the employees of the employer are or are not covered by:[1577]

a) national employment standards,
b) a particular type of workplace instrument, or
c) an enterprise agreement.

The subsequent section considers the Australian legislative framework after possible non-compliance has been identified in an assessment as described above.

4.2.4.2 Legal sanctions and remedies in terms of non-compliance with minimum wage in Australia

As mentioned in previous paragraphs, after the investigation or inquiry has concluded there are a range of measures that may be pursued. There are generally three "hard enforcement" measures utilised to remedy minimum wage non-compliance or possible non-compliance in the Australian labour market:

Firstly, the FWA allows for enforcement by means of enforceable undertakings relating to civil remedy provisions. If the FWO reasonably believes that a person is non-compliant with a civil remedy provision, then the FWO may accept a written enforceable undertaking by the non-compliant person.[1578] In practice, "[t]he FWO will generally only accept enforceable undertakings in limited circumstances. These may include matters involving self-disclosure and where a person has demonstrated a willingness to rectify underpayments, address any other impact of their contraventions and fully cooperate with the FWO".[1579]

[1576]Section 351 The Fair Wage Act 2009.

[1577]Section 354 The Fair Wage Act 2009.

[1578]S 715 (1) – (5) The FWA 2009. A written undertaking may not be accepted by the FWO if a notice in relation to S716 has been issued.

[1579]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 7.

A written enforceable undertaking prohibits the FWO from commencing with further proceedings about the enforceable undertaking until it is withdrawn.[1580] The FWO may apply to court for one of the following orders if it believes that the written enforceable undertaking has not been complied with:

a) "an order directing the person to comply with the term of the undertaking;
b) an order awarding compensation for loss that a person has suffered because of the contravention;
c) any other order that the court considers appropriate".[1581]

Secondly, if an FWI reasonably believes that a person is non-compliant with, among other:

a) a provision of NES;
b) a term of a modern award;
c) a term of a workplace determination;
d) a term of a national minimum wage order,[1582]

then the FWI may give such non-compliant person a compliance notice requiring either one or both of the following within a reasonable time:

a) taking specified action to remedy the non-compliance;
b) producing reasonable evidence of the person's compliance with the notice.[1583]

A compliance notice is a non-punitive mechanism used to address alleged non-compliance with the FWA as an alternative to court proceedings.[1584] Notice may not

---

[1580]S 715 (4) The FWA 2009. Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 7.

[1581]S 715 (7) Also see: The FWA 2009. Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

[1582]S 716 (1) Also see: The FWA 2009. Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 15.

[1583]S 716 (2) The FWA 2009.

[1584]Fair Work Ombudsman "Compliance and Enforcement Policy" Fair Work Ombudsman 14. Hindu Society of Victoria (Australia) Inc v FWO [2016] FCCA 221.

be provided if written undertaking has been provided and such undertaking has not been withdrawn.[1585] Failure to comply with the compliance notice without a reasonable excuse may result in a penalty of up to $6,660.00 for individuals and $33,300.00 for body corporates.[1586] A person served with a compliance notice may apply to court for a review of the notice on either or both of the following grounds:

a) the person served with the notice did not commit a contravention as determined in the notice;
b) the notice does not comply with the requirements established by the FWA.[1587]

The court may confirm, cancel or vary the notice after reviewing it.[1588]

Lastly, the FWO may pursue litigation (generally referring to civil legal proceedings) as an enforcement mechanism, that is generally reserved for more serious cases of non-compliance.[1589] The FWO is more likely to litigate in cases involving:

a) “deliberate and/or repeated non-compliance with Commonwealth workplace laws;
b) exploitation of vulnerable workers;
c) failure to cooperate with us (the FWO) and fix contraventions after being given the opportunity to do so; and/or
d) parties who have a prior history of contraventions who have not taken adequate steps to ensure compliance despite being advised of the consequences in the past”.[1590]

[1585]S 716 (4) The FWA 2009.

[1586]S 539 (2) item 33 & 716 (5) The FWA 2009. S 546 (2) of the FWA 2009, determines that for body corporates the peculiarly penalty must not be more than five times the penalty units referred to in s 539 (2) The FWA 2009. Fair Work Ombudsman “Compliance and Enforcement Policy” *Fair Work Ombudsman* 7.

[1587]S 717 (1) The FWA 2009. The notice must comply with the requirements established in s 716 (2) and (3) of the NWA 2009. Fair Work Ombudsman “Compliance and Enforcement Policy” *Fair Work Ombudsman* 7.

[1588]S 717 (3) The FWA 2009.

[1589]Fair Work Ombudsman “Compliance and Enforcement Policy” *Fair Work Ombudsman* 9.

[1590]Fair Work Ombudsman “Compliance and Enforcement Policy” *Fair Work Ombudsman* 10.

The FWO will only, after careful consideration, [1591] commence with legal proceedings if it believes that there is sufficient evidence and if it is in the public's interest to do so.[1592] In deciding whether the FWO will institute any appeal in a matter, it will consider the prospects of success and whether the appeal is in the public's interest.[1593] Costs and available resources are further factors that have to be considered before commencing with legal proceedings or launching an appeal.[1594] The public interest factors that the FWO considers in its decision making process depends on the circumstances. The decision-making of the FWO must be impartial and independent, also from "any inappropriate consideration of race, religion, sex, national origin or political association".[1595] Table 7 indicates some of the factors that the FWO typically consider.

[1591]Arup & Sutherland (2009) *Monash Uni Law Rev* 112.

[1592]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 12.

[1593]12.

[1594]12.

[1595]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 13.

Table 7: Factors considered by the FWO

Public interest factors	Examples of matters the FWO considers
Nature, seriousness and circumstances of the alleged contraventions	■ The seriousness of the alleged contraventions ■ Prevalence in the community of the type of behaviour ■ Any mitigating or aggravating circumstances ■ Whether the person(s) alleged to have committed the contraventions sought and relied on relevant professional advice ■ Evidence of deliberate or reckless conduct including omitting to take steps to ensure compliance ■ Whether contraventions have been admitted and/or fixed
Characteristics of person(s) alleged to have committed the contraventions	■ Compliance history ■ Business experience and size ■ Whether the person has actively assisted the FWO's inquiries and whether they genuinely accept their non-compliance ■ What steps they have taken to prevent further contraventions
Characteristics of person(s) affected by the alleged contraventions	■ Any special vulnerability, such as whether the person has a disability, is a young or mature worker, is present in Australia on a visa or is from a culturally and linguistically diverse background ■ Whether the person has the ability and resources to commence their own proceedings
Impact of the alleged contraventions	■ Direct and indirect impact on the people who have been affected by the alleged contraventions ■ Impact on any other person(s), including other businesses/competitors ■ The impact of the alleged contraventions and their size, such as the number of people affected or the quantum of any underpayments
Impact of litigation on general and specific deterrence	■ Whether litigation will reduce the likelihood that others will engage in similar behaviour (general deterrence) ■ Whether litigation will reduce the likelihood of further contraventions of workplace laws by the person(s) involved in the proceedings (specific deterrence)
Effect of litigation	■ Suitability and efficacy of other enforcement mechanisms as an alternative to litigation ■ Likely outcome in the event the contraventions are found to have occurred (e.g. penalties, compensation or other orders)

Public interest factors	Examples of matters the FWO considers
	■ Whether the likely outcome would be unduly harsh or oppressive
Administration of justice	■ Passage of time since the alleged contraventions ■ Likely length and cost of litigation ■ Whether proceedings are necessary to maintain public confidence in the administration of workplace laws

The FWO considers litigation as an essential enforcement mechanism for three reasons:[1596]

a) it acts as a general deterrence, thereby sending a powerful public message to others not to engage in similar conduct,
b) "stopping and deterring people from engaging in unlawful behaviour now and in the future makes the need to comply with Commonwealth workplace laws real for individuals (specific deterrence)",1597 and
c) it assists in clarifying the law thereby promoting public understanding of workplace rights and obligations.

The punitive sanctions for non-compliance with the FWA may see an eligible court making a wide range of orders. The following orders are among the orders that can be made by the eligible court: [1598]

a) that underpayments be rectified and interest be paid;
b) that compensation be paid to person(s) affected by the contraventions. Such compensation would be paid by person(s) responsible for contraventions and/or other persons who were 'involved' in them (extended liability);
c) for a civil penalty to be paid to the Commonwealth or, where appropriate, the penalty be redirected to an impacted party;
d) that a person pays any civil penalty personally, without seeking or accepting indemnity from a third party;

[1596]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 9.

[1597]9.

[1598]15.

e) for injunctions to stop, prevent or restrain further contraventions from occurring; and/or
f) that a person take specific steps (risk mitigation), for example by undertaking training or conducting wage audits.

The FWO may decide to initiate legal proceedings even though non-compliance has been corrected, with the aim to obtain a penalty against the transgressor that may act as general or specific deterrence.[1599] Australian legislation prohibits cost orders, but penalties may be awarded by the court if determined that it is warranted.[1600] The courts are responsible for deciding the amount of any civil penalty but the FWO will seek penalties that:[1601]

1. are appropriate to the nature of the behaviour,
2. will achieve general and specific deterrence and
3. avoid a harsh or oppressive outcome.

A reduced penalty may be awarded where a transgressor cooperates with the legal process, in which case the FWO will draw the court's attention to such conduct.[1602] Contraventions are generally classified as either a "contravention" or a "serious contravention" that carry a maximum penalty level or amount applicable to either

[1599]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 10. "A primary purpose of civil penalties is to promote compliance by putting a price on contraventions that is sufficiently high to act as a deterrent, both to the contravener, and to others who may be tempted to contravene the relevant legislation", *Fair Work Ombudsman v IE Enterprises Pty Ltd* 2021 60 (FCA) para 9. *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* 2015 46 (HCA); *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* 2015 46 (HCA) para 55 states: "the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance: Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."

[1600]Arup & Sutherland (2009) *Monash Uni Law Rev* 111.

[1601]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 16.

[1602]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 16. *Mornington Inn Pty Ltd v Jordan* 2008 70 (FCA) para 74 & 76.

individuals or body corporates.[1603] The penalty level for individuals are less in relation to body corporates that may be based on different financial resources available to these parties. In other words, a multimillion-dollar body corporate with an extended business structure does not endure the same extent of punitive sanctions as an individual does. Underpayment of minimum wage carries the following maximum penalties:[1604]

a) contravention: $12 600 for individuals, $63 000 for body corporates, and
b) serious contravention: $ 126 000 for individuals, $630 000 for body corporates.

The serious contravention category serves as the ultimate minimum wage non-compliance deterrent because criminal sanctions are reserved for a limited scope of matters that include contempt of court, instances of slavery and forced labour.[1605] However, the Australian Government is in the process of drafting legislation to criminalise the underpayment of minimum wage to employees that will penalise the most serious and culpable non-compliance.[1606]

The penalty amount may often exceed the rate of underpayment.[1607] Arup and Sutherland state that it seems that workers may seek any penalty amount, rather than an amount that offsets legal costs.[1608] Unions that represented workers, have

---

[1603]Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 14.

[1604]14.

[1605]11.

[1606]11.

[1607]Arup & Sutherland (2009) *Monash Uni Law Rev* 110.

[1608]Arup & Sutherland (2009) *Monash Uni Law Rev* 110. The courts have a discretion to assess the appropriate penalty, see, *Fair Work Ombudsman v IE Enterprises Pty Ltd* 2021 60 (FCA*)* para 11. The use of the discretion of the courts are outlined in *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* 2017 1301; 275 1R 148 (FCA) para 36:

"(1) the first step is to identify the separate contraventions involved. Each breach of each separate obligation found in the FW Act and Award is a separate contravention of a civil remedy provision for the purposes of s 539(2) of the FW Act;

claimed and succeeded in obtaining substantial penalties that serves to encourage unions to enforce legal provisions.[1609]

The FWA extends the liability for non-compliance by determining that the involvement in a contravention is treated in the same way as an actual contravention.[1610] Someone "who is involved in a contravention of a civil remedy provision is taken to have contravened that provision".[1611] A person is involved in a contravention on any of the following grounds where he/she:

a) "has aided, abetted, counselled or procured the contravention; or
b) has induced the contravention, whether by threats or promises or otherwise; or
c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
d) has conspired with others to effect the contravention".[1612]

Franchisors and holding companies can be liable for workplace law breaches in their business networks.[1613] The broadening of non-compliance liability extends beyond

---

(2) the second step is to consider whether any of the contraventions constitute a single course of conduct such that they are treated as a single contravention under s 557(1) of the FW Act;

(3) the third step is to consider whether there should be further adjustment to ensure that, to the extent of any overlap between groups of separate aggregated contraventions, there is no double penalty imposed, and that the penalty is an appropriate response to what each respondent did;

(4) the fourth step is to consider the appropriate penalty in respect of each final individual group of contraventions, taken in isolation, having regard to all the circumstances of the case and the maximum penalties available for each contravention; and

(5) the final step is, having fixed an appropriate penalty for each contravention (or, if relevant, each group of contraventions), to consider the overall penalties arrived at and apply the totality principle to ensure that the penalties for each respondent are appropriate and proportionate to the conduct viewed as a whole".

[1609]Arup & Sutherland (2009) *Monash Uni Law Rev* 110.

[1610]S 550 The FWA 2009. Also see Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 7-8.

[1611]S 550 (1) The FWA 2009.

[1612]S 550 (2) The FWA 2009.

[1613]Section 558B FWA 2009. Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" *Australian Government: Attorney-General's Department* 8.

those directly responsible for the non-compliance to those indirectly responsible, therefore. On this basis parties are held accountable for their own business practices and perhaps also in certain circumstances, the business practises of their business associates or those they do business with. Fair labour practises based on legislative compliance is therefore encouraged throughout the supply chain. The extended liability may result in the FWO commencing with legal proceedings against any of the following stakeholders:

a) "employers;
b) registered organisations;
c) company directors or company secretaries;
d) officials of organisations;
e) human resources managers or other managers;
f) external agents or advisors, such as accountants, bookkeepers or external human resources consultants;
g) companies and people involved in supply chains involving the procurement of labour;
h) a holding company of a subsidiary employing entity or its directors; and/or
i) a franchisor".[1614]

The FWO will conduct itself as a model litigant in legal proceedings.[1615] Any admissions or payments to effect arrear settlements just before or after legal proceedings have commenced will usually not justify discontinuation of proceedings but will be considered by the FWO in conducting legal proceedings.[1616]

If judicial proceedings are entered into, the court may mandate participation in alternative dispute resolution.[1617] As mentioned in chapter 4.2.4.2, a function of the FWC is to deal with disputes.[1618] A dispute about minimum wage may be referred to

---

[1614]Fair Work Ombudsman "Compliance and Enforcement Policy" *Fair Work Ombudsman* 10-11.

[1615]14.

[1616]15.

[1617]Arup & Sutherland (2009) *Monash Uni Law Rev* 108.

[1618]S 576 (2) (a) The FWA 2009. An example of employment dispute handled by the FWC is *Rajesh Dharanikota v AAA Filling and Food Pty* Ltd 2021 134 (FWC)

the FWC on application by a party to the dispute,[1619] if such procedure is provided for by a term of a modern award, an enterprise agreement or an employment contract.[1620] If allowed for by a term of the award, agreement or contract, the FWC may arbitrate the dispute.[1621] The FWC may also mediate or conciliate the dispute or make a recommendation or express an opinion.[1622] The worker can at any stage take action to recover outstanding wages, either independently or with the Workplace Ombudsman's assistance.[1623] The next section identifies the best and worst minimum wage compliance practises of the foreign jurisdictions analysed.

4.3 The best and worst minimum wage compliance practises of the foreign jurisdictions considered

The UK and Australia's minimum wage policies are structured differently, ultimately influencing compliance. In this chapter, the author considers some of the "best" and "worse" minimum wage compliance practices utilised in these jurisdictions.

4.3.1 Coverage of minimum wage

The differentiated minimum wage coverage system is used by the foreign jurisdictions considered. Australia utilises differentiated minimum wage more elaborately than the UK. Australia has pursued the simplification of minimum wage coverage in recent years. However, the Australian minimum wage differentiation remains excessive that may be highlighted as a possible weakness.[1624] The UK also aspires to reduce its minimum wage differentiation in the future. As previously mentioned, differentiated coverage is desirable (in warranted instances) because it may provide a better application to the applicable workers because of its focused and customised nature compared to more universal minimum wage coverage systems. However, the more elaborate a minimum wage system becomes, the more complex

---

[1619]S 739 (6) The FWA 2009.

[1620]S 739 The FWA 2009.

[1621]S 739 (4) The FWA 2009.

[1622]S 739 (4) The FWA 2009.

[1623]Arup & Sutherland (2009) *Monash Uni Law Rev* 108.

[1624]Bray (2013) *SPI Working Paper* 1.

it becomes. It is difficult for stakeholders to obtain and understand information about the demarcation of coverage, changes thereof and the general application thereof.

The excessive differentiated minimum wage coverage in Australia may stem from the legacy of jurisdictional division of power traditionally held by the Australian states that coincided with a lack of centralised legislative provision by the federal government. The division of power allowed Australian states with an extent of legislative autonomy that may have driven the differentiated minimum wage coverage approach that we currently see in the Australian minimum wage system. The jurisdictional division of power is that the ANMW does not provide coverage to the entire Australian geographic territory.[1625] This may circumvent the purpose of an NMW in establishing uniform national labour standards.

A possible weakness in Australian regulation is that legislative provisions may promote legal exclusion and exclusivity because of a lack of legislative accessibility to a layperson.[1626] The legal profession should not be undermined by improper language or the oversimplification of legislative provisions. However, the law ultimately serves all people, and as such, it should be accessible to all. In achieving this, lawmakers should be careful not to overcomplicate legislation and to use language to this effect. Legal inaccessibility may drive legal uncertainty that may result in more dispute referrals that may increase the overall burden on dispute resolution frameworks. Inaccessibility may also be a demoralising factor to stakeholders that do not understand the legislation and do not have the resources to obtain clarity in terms of information, interpretation of legislation (with the help of legal professionals). Inaccessibility may also result in non-compliance to legal provisions that may be done either deliberately or not.

Age is used as a criterion for differentiated minimum wage coverage in both foreign jurisdictions. A general minimum wage may be an employment barrier to younger

[1625]See chapter 4.2.2.

[1626]The Australian Human Rights Commission writes that "there is a significant gap between the law and its implementation" Australian Human Rights Commission "Chapter 5: The legal and policy framework" (2021) *Australian Human Rights Commission* <https://humanrights.gov.au/our-work/chapter-5-legal-and-policy-framework> (accessed 15-1-2021).

workers with low skills, limited experience, and perhaps lower productivity. As a result, differentiated minimum wage coverage based on age as criterion attempts to address these challenges. The Australian special national minimum wage determines reduced minimum wage rates for younger workers (under 21 years of age) following certain percentages of the NMW, which reduces with reference to the applicable age.

Both jurisdictions also use training or apprenticeships as a criterion for differentiated minimum wage coverage. The lack of experience, skills and knowledge may present employment barriers to workers, which this criterion aims to rectify. This criterion promotes training and development of inexperienced workers by making the labour of these workers more affordable to employers.

Workers with disabilities are a further category of differentiation in Australia. The minimum wage may be an employment barrier to entry to the labour market for disabled individuals with lower productivity. As a result, Australia assesses the productive capacity of disabled employees and determines minimum wage in relation to this capacity in its special national minimum wage 2. Assessments are not once-off occurrences but are reviewed annually or more frequently if required. Reviews assure that disabled workers are remunerated according to their actual productivity over time.

Concerning awareness of minimum wage, both foreign jurisdictions conduct a minimum wage review process annually. The review process facilitates stakeholder input and involvement, which aids awareness and general cooperation. The review results and the recommendation and the reasons should be published in both foreign jurisdictions that promote awareness, transparency, and a general understanding of the minimum wage.

The framework by which minimum wage determination and adjustments occur may also facilitate awareness in both foreign jurisdictions because of the predictability linked thereto. Determinations and adjustments are generally effected consistently at the same time annually using an established procedure.

Australia utilises Fair Work Statements to increase awareness of various legal provisions about minimum wage. These statements are published and provided to new employees to increase awareness. Similarly, written statements with information on minimum wage should be provided with remuneration in the UK.

The UK utilises a quarterly educational bulletin to raise awareness. Included in the bulletins are statistics on non-compliance and case studies that may provide invaluable information to employers regarding the applicable law and common factors about breaches or non-compliance. The subsequent chapter considers the “best” and “worst” foreign practices concerning minimum wage determination.

4.3.2 Determination of minimum wage

Both foreign jurisdictions utilise competent bodies that assume a fundamental role in determining and adjusting minimum wage. The FWC in Australia and the LPC in the UK are independent bodies that do not form part of the government structure that may be beneficial in terms of pursuing its functions without political influence or favour.

Both jurisdictions establish legislative requirements for membership of the competent bodies. Membership of the LPC in the UK is broadly determined not to be too restrictive. For example: “members with knowledge or experience of, or interest in trade unions or matters relating to workers generally”[1627] should be appointed as members of the LPC. This determination qualifies a broad scope of individuals for appointment, not exclusively union leaders or representatives, which extensive scope appears appropriate.

The stringent requirements associated with the management hierarchy of the FWC in Australia should be highlighted as desirable as it determines that these positions be filled by someone who is or was a judge or someone with relevant experience or knowledge. These requirements may help ensure that competent individuals fulfil the leadership and management roles in competent bodies.

[1627] Schedule 1 1 (2) NMWA 1998.

As indicated in chapter 4.1.3., the LPC membership compilation in the UK enables three general categories of stakeholders to be represented; workers, employers, and other individuals. Each of these stakeholder categories is afforded equal representation by requiring three members for each respective category. Equal representation of a diversity of stakeholders in the compilation of these statutory bodies promote diverse interests that may contribute to better, more balanced, decision-making. In Australia, unlike in the UK, the FWC has no requirements for the equal representation of different categories of stakeholders. The risk associated hereto is the over-representation of certain interests and the under-representation of others (e.g., over-representation of the labour interests and the under-representation of business), that may result in biased decision making.

Both jurisdictions require integrity and a respectable work ethos of the members of their statutory bodies by imposing certain restrictions on members (e.g., FWC members are generally restricted to take on outside work and must report any conflict of interest while LPC members should not be declared bankrupt or be absent from operational activities). Legislative provision is made to remove members not conforming to these requirements. Legislative protection also ensures the efficiency, integrity and respectable public standing of the FWC in Australia (e.g., criminal sanctions may be imposed for disrupting, insulting, interrupting, creating a disturbing and improper influencing (among others) the FWC or its delegates).

The FWC panel members in Australia are subject to a remuneration framework that aims to promote transparency and foster public trust in the operation of the FWC and its panel members.

The LPC has played a central role in the effectiveness of minimum wages in the UK.[1628] A key element of this success is the effective determination and adjustment of minimum wage that ensured sufficient increases to improve the position of low paid workers while minimising detrimental effects on the labour market. Both foreign jurisdictions usually adjust minimum wage during an established and well-known time of the year (April for the UK and June for Australia) using an established procedure

[1628]Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 4, 9 & 10.

that includes a wage review. This consistency may be beneficial in managing expectations of stakeholders and, moreover, for creating awareness of adjustments.

In the UK, the LPC established procedure for minimum wage determination and adjustments – ensure, among other aspects, consultation with stakeholders and the consideration of evidence-based advice and information. A similar legislative structured approach is followed in the Australian determination and adjustment of minimum wage. The involvement of stakeholders in the adjustment process is crucial in reaching well-considered decisions. Varied minimum wage rates and reasons for the adjustments that promote awareness and transparency must be published.

Although the Australian adjustment process is rigid to the degree that it establishes a determined structure and operation, it does allow some degree of flexibility in that the FWC may vary or revoke a recommendation or decision it made, either on own accord or by application of an affected party. The FWC decisions may also be reviewed.

The FWC in Australia assumes a central authoritarian position in adjusting minimum wage by either directing minimum wage adjustments (the Australian NMW and modern awards) or approving adjustments (made by enterprise agreements). The authoritarian position may act as the gatekeeper to ensure effective adjustment and therefore requires well-functioning institutions. The differentiated minimum wage coverage in Australia is adjusted by adding a flat dollar amount to minimum wages or using a percentage amount that raises all wages.

An underlying difference in the functioning of the LPC and the FWC is the vision and future aspirations of these bodies. McKenzie indicates that Australia adopted a relaxed minimum wage policy approach since the 1980s that manifests in slow minimum wage growth compared to other countries (as indicated in the introduction of chapter 4.2).[1629] Contrary to this approach, the UK has followed an ambitious

[1629]McKenzie (2018) *J Aus Pol Econ* 58. Also see Stewart et al *The Wages Crisis in Australia* 168-170. Wilson (2017) *Soc Pol Admin* 256-257.

approach concerning minimum wage adjustments that have led to no significant detrimental effects on the labour market.

The character of the Australian minimum wage determination and adjustments is captured in the FWA's objective to ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through modern awards and the NMW orders.[1630] One can conclude that the intent of the Australian minimum wage framework (as far as modern awards and the NMW are concerned) is to provide a safety net to employees, which effectively establishes a minimum wage floor that arguably protects the most essential, basic level of wages. Within this utilisation, the focus arguably rests with subsistence and not actively promoting and driving decent work principles.

The focus of minimum wage as the bare minimum may foster a cautious or conservative utilisation of minimum wage, which may be based on a variety of reasons including, minimum wage's perceived detrimental effects on employment and the economy and general anxiety of (over-) regulating the labour market.[1631] This view on minimum wage may be premised on a neoclassical microeconomic model in which minimum wage increases above the equilibrium results in unemployment. Contrary to this premise, research on the Australian labour market correlates with the growing international evidence on the impact of minimum wage on employment, in that little or no negative impact of minimum wage or other wage increases on employment is found.[1632]

This cautious approach of minimum wage may therefore not have the primary intent of actively increasing wages through adjustments in the general labour market (or increasing the labour share of low paid employees); but instead it establishes a bare minimum rate. The cautious approach to minimum wage determination and

---

[1630]Section 3 FWA. See the objective of the NMW, Section 284 (1) FWA.

[1631]"[T]he minimum wage (and corresponding modern awards objectives) have clearly embedded neoliberal assumptions, whereby raising the minimum wage 'too much' is held to be detrimental to business, employment and the broader economy" McKenzie indicates wide spread non-compliance with minimum wage in various sectors of the Australian labour market, McKenzie (2018) *J Aus Pol Econ* 62.

[1632]McKenzie indicates widespread non-compliance with minimum wage in various sectors of the Australian labour market, McKenzie (2018) *J Aus Pol Econ* 68.

adjustment may have contributed to the stagnating of wages and the NMW divergence from average wages that is a prominent reason for widening inequality in Australia.[1633]

It seems that the inflation-adjusted minimum wage did not succeed in keeping up with the growth of overall wage levels in the Australian labour market.[1634] The effect of the objectives of the Australian minimum wage framework may best be illustrated by McKenzie:

> "The stagnation of the real minimum wage in Australia over the last 35 years raises questions about the adequacy of the 'minimum wage objective' defined under Australia's Fair Work Act 2009".[1635]

The cautious utilisation of minimum wage, particularly the slow growth of minimum wage is a factor in the increased wages inequality.[1636] The detrimental effects of excessive inequality are considered in chapter 2.1.

According to figure 5, both the foreign jurisdictions determine minimum wage relatively high within the global sphere about mean and median wages. Despite the general stagnation of Australian minimum wage, mention should be made that the absolute level of Australia's minimum wage is still high compared to other nations as indicated in figure 5. This indicates the importance of evaluating and adjusting minimum wage within the national context. It is not to say that global minimum wage levels are insignificant or irrelevant as minimum wage levels should also be seen within the broader global context to ensure global competitiveness and workers' protection. However, the country-specific national context should also be considered to ensure an appropriate minimum wage level with real value. The stagnation of the

---

[1633]"It is clear that, contrary to the stated minimum wage objective, the real minimum wage has lagged far behind ongoing growth in real labour productivity", McKenzie (2018) *J Aus Pol Econ* 62 & 70.

[1634]McKenzie (2018) *J Aus Pol Econ* 55 & 58. Stewart et al *The Wages Crisis in Australia* 229.

[1635]61.

[1636]McKenzie (2018) J Aus Pol Econ 70. Stewart et al The Wages Crisis in Australia 279.

Australian minimum wage is not assisted by Australia's minimum wage enforcement challenges considered in the subsequent sub-chapter.

In contrast to the Australian minimum wage approach, the UK's approach does not utilise minimum wage as the bare minimum or absolute lowest wage floor that merely protects basic needs. Instead, minimum wage is utilised as a progressive instrument that promotes a dignified existence by providing a wage that is above the bare necessity of basic existence. A prominent characteristic of UK minimum wage determination is its emphasis on long term future goals and its commitment towards these goals. In this context, the notion of minimum wage is far-reaching. It assumes an active role in addressing wider issues in the labour market and the economy, such as raising wages in general and the increase of the labour share of the lowest-paid employees.

In line with contemporary research on the effects of minimum wage on the labour market and, in particular employment, the UK's notion of minimum wage, despite its progressive and ambitious nature, has not had overall detrimental effects on the UK labour market or economy. Instead, there seems to be a positive effect in the labour market and the UK economy that may at least in part be contributed to its relatively far-reaching and progressive utilisation of minimum wage determination.

These contrasting approaches may stem from the context that minimum wage is considered. In the Australian context, minimum wage may be regarded within the traditional neo-classical perspective where minimum wage is seen as a detrimental intrusion to the labour market that must be carefully and moderately applied. In the UK, the importance of utilising minimum wage to increase low pay in the labour market is predominant because of a holistic perspective of its overall benefits.

4.3.3 Legal enforcement of minimum wage

4.3.3.1 Monitoring compliance with minimum wage

Australia generally utilises a single enforcement body (FWO) responsible for monitoring and enforcing compliance with all minimum wage provisions and other labour standards in the labour market. Australia establishes certain requirements and

standards associated with the head of the enforcement body (FWO), which is a recommendable practice. In the FWO structure, the position of Fair Work Ombudsman is held full-time for a maximum period of five years. The maximum period may be enough to allow progression and the attainment of goals while ensuring institutional stability. Specific requirements are established concerning the work ethic and ethos of the Fair Work Ombudsman that can lead to nonadherence termination.

Australian FWI should be of good character and is appointed for a period not exceeding four years. The maximum appointment periods of the Fair Work Ombudsman and FWI's ensure the intake of new personnel after the lapse of the period which may promote innovation and new ideas associated with new talent while prohibiting the establishment of undue relationships or practices.

In contrast to Australia's single enforcement body, monitoring and compliance of different labour standards are conducted by different legislative bodies in the UK (known as the specialist enforcement approach). Various enforcement bodies with different mandates may promote specialisation between statutory bodies in certain defined fields of the law. Various enforcement bodies may require additional resources to equip, train and maintain an effective operational framework efficiently coordinated between the statutory bodies. There may also be administrative challenges because non-compliance of a sort may often not take place in isolation from other non-compliance of labour law, which may result in more than one body being involved.

Labour inspections remain an important measure in monitoring compliance in both foreign jurisdictions. Both jurisdictions generally monitor compliance based on risk assessments and complaints. Consequent, risk assessments allow resources to be focussed on the most at-risk areas, which may promote the effective use of resources. Monitoring compliance based on complaints necessitates using an effective system to capture the complaint in a manner accessible to workers accurately.

When becoming aware of non-compliance allegations, Australian authorities assess the matter to determine the appropriate response. Certain public interest criteria play

a central role in assessing the appropriate action of the FWO and ensures that FWO resources are optimally utilised. An assessment process is generally conducted before lodging an investigation into compliance to establish crucial preliminary information such as jurisdiction. The assessment is a recommended practise to all nations as it enables the effective use of resources and minimises resource wastages. However, inefficiencies or inaccuracies in the assessment process may result in certain cases “falling through the cracks” and not being investigated or pursued further because of the nonfulfillment of the assessment criteria. This may be relevant in less significant non-compliance cases that do not fulfil the assessment criteria but qualify as non-compliance, nonetheless. This risk should be acknowledged and continuously monitored.

Concerning the recruitment criteria of labour inspectors, Australia requires inspectors to be of good character while the UK has stringent recruitment criteria coupled with assessments of practical and theoretical training that must be satisfied before placement as a labour inspector professional. These recruitment criteria established a desirable ethos of the labour inspector profession.

The functions of labour inspectors are largely dictated by the framework of enforcement bodies utilised in each nation. As mentioned in previous paragraphs, the numerous enforcement bodies in the UK narrow the functions of labour inspectors to specialist areas. In contrast, the use of a single enforcement body in Australia results in more general functions of labour inspection that are not focussed on a particular area of specialisation.

Both jurisdictions promote labour inspectors’ capacity by providing certain labour inspector rights and powers. Labour inspector rights and powers are important for fulfilling functions and enabling statutory enforcement bodies to operate effectively. The general rights afforded to labour inspectors in both jurisdictions include:

a) to enter any premises at any reasonable time,
b) keeping, production, inspection and copying of records,
c) the requirement to furnish an inspector with an explanation of records or any additional information.

As previously mentioned, workplace inspections are a traditional monitoring measure that may present problems based on privacy constraints and the fact that an increasing percentage is being digitalised (platform work). Solutions to these problems should be pursued and are discussed in chapter 5.4.1.

Obtaining information is an important element in monitoring compliance: Both jurisdictions provide a framework to ensure that information is assessable to labour inspectors. Both jurisdictions have legislative measures that protect the integrity of recordkeeping. It is an offence in the UK if an employer fails to keep accurate records or endorse accurate information. Australia has similar provisions requiring the employer to keep true and accurate employee records that are readable in the English language in a form readily accessible to an inspector for seven years. Australian legislation provides penalties for failure to keep accurate records or payslip obligations while transgressors in the UK may be criminally liable.

Both jurisdictions assume a position of shared enforcement responsibility between stakeholders, for example, individuals (workers), unions and the statutory enforcement bodies. The shared responsibility broadens the enforcement responsibility that may contribute to the more effective monitoring of minimum wage good practice. In facilitating shared enforcement responsibility, both jurisdictions protect the rights of unions and individuals (workers) and the right not to be discriminated against for using any of their rights. This protection is crucial to involve stakeholders in enforcement without intimidation or discrimination. In the UK, workers have the right to inspect workplace records under certain circumstances, promoting individual enforcement responsibility among workers and may be a beneficial enforcement measure.

Both jurisdictions protect the effectiveness of labour inspectors. In the UK, it is a criminal offence to intentionally or negligently obstruct or delay labour inspectors to exercise any of their rights effectively. In Australia, the intentional hindering or obstructing labour inspectors and knowingly or recklessly providing information that is false or misleading or omitting any matter or thing without which the information is misleading are prohibited and punishable by a fine.

Australia also provides for the periodic review of certain operations of the enforcement body that may promote accountability. Measures utilised to increase check and balances in enforcement bodies is good practice and advisable.

As indicated in chapters 4.1.4.1 (for the UK) and 4.2.4.1 (for Australia), the relationship between the number of labour inspectors and compliance should be considered carefully. Better compliance should not necessarily be correlated with more labour inspectors. There may be various factors at play in this relationship. As indicated in table 2 and figure 6, the UK has an insufficient number of labour inspectors in reference to ILO standards but still achieves respectable compliance with minimum wage. In contrast, Australia has an adequate number of labour inspectors to ILO standards, yet it coincides with minimum wage compliance problems.

4.3.3.2 Legal sanctions and remedies in terms of non-compliance with minimum wage

As indicated in the previous chapter, both jurisdictions utilise a combination of hard and soft enforcement measures that encapsulates the three approaches to compliance (persuasion, management and enforcement) as mentioned in 1.3.1. The Australian legislative framework provides the FWC with a wide range of powers including mediation, conciliation, recommendation or expressing an opinion, and arbitration. In the UK, labour inspectors also have a wide scope of powers that include providing advice, recommendations and issuing sanctions.

Both jurisdictions provide various dispute resolution platforms which is a good practice for relieving pressure and workload on a single dispute resolution platform. Civil proceedings may be sought in both jurisdictions. Simultaneously, alternative dispute resolution may also be sought through employment tribunals in the UK, and the FWC in Australia also has a dispute resolution function. The UK enables criminal prosecution, which may serve as an additional deterrent to civil proceedings. Australia only has criminal prosecution in limited instances, as indicated in 4.2.4.2.

The foreign jurisdictions utilise various hard and soft measures to enforce minimum wage compliance. The competent bodies provide education, advice and assistance

in both jurisdictions as part of soft measures. A possible weakness associated with using hard and soft measures is the discretionary use of these measures by labour inspectors. Labour inspectors in both jurisdictions often have a discretionary role in deciding which enforcement measures to take that may result in the unfair or inconsistent use of measures between different labour inspectors, geographical inspectorate areas or between cases.

In Australia, numerous hard and soft enforcement measures may be used. Litigation is an example of a hard measure used in serious cases, where it is utilised after a stringent assessment based on certain predetermined criteria. This approach may be regarded as selective litigation and may be useful in nations with limited resources, to ensure the optimisation of resources. A possible threat to this approach is that the decision to litigate may be influenced by factors outside the litigation criteria (such as political alliance) that may result in injustice. This threat may be of concern in nations where there are insufficient checks and balances to ensure the impartiality and independence of the statutory body concerned.[1637]

Besides, too many legal measures to enforce compliance may complicate the enforcement system and be troublesome. To this end, the UK utilises a general enforcement measure in the form of a notice of underpayment that may be a simplified yet effective enforcement measure. The notice of underpayment measure in the UK is subject to a possible appeal process that is a good practice. It serves as additional checks and balances to deter the unfair use of such measure.

Noteworthy is employers' enforceable undertaking to rectify possible non-compliance in collaboration with the FWO in Australia. An enforceable undertaking is desired as it facilitates employers' self-disclosure, and it builds collaboration between the FWO and employers while effecting compliance.

The sanctions against non-compliance in the foreign nations generally compose two elements: the recovery of underpaid wages and penalties. These elements enable

[1637]Dube "Impacts of Minimum Wages: Review of the International Evidence" *Government UK* 9-10.

the worker to recover any amounts legally owed to them, and the non-compliant employer is penalised for the non-compliance.

Both jurisdictions provide for the recovery of underpayment, although the approaches are different. In determining the underpayment amount, the UK may take new minimum wage rates into account that ensures that the worker receives underpayment that is relevant and fair. Consideration is not given to new minimum wage rates in Australia, but the eligible court may award interest on the underpaid amount.

Australia establishes a framework concerning contraventions by classifying the seriousness of contraventions and linking such classification with certain penalty limits dependent on whether the transgressor is an individual or business. Differentiated penalty rates for individuals and businesses may promote fairness by providing penalties per resources and economic standing. In other words, businesses representing larger employers with more resources and economic footprint are liable to greater penalties about individual employers with fewer resources.

The structure for sanctions is different in foreign jurisdictions. Australia sets maximum penalties, whereas the UK penalty rate is double what is owed to the worker subject to a minimum and maximum penalty per worker. The UK structure for sanctions may provide a greater degree of certainty and transparency regarding the determination of penalties in relation to the Australian structure, where there is no rigid penalty determination.

Penalties are paid to the secretary of state in the UK and in Australia penalties may either be paid to the Commonwealth or where appropriate the impacted party. Directing penalties to the affected party may be a better practice as it encourages workers to pursue compliance actively.

The Australian FWA extends non-compliance liability to those involved in the non-compliance.[1638] This provision effectively extends non-compliance liability to not only

[1638]S 550 The FWA 2009.

include parties directly responsible for the non-compliance, but also parties indirectly responsible therefor.[1639] This approach may hold parties besides the employer accountable for involvement in non-compliant minimum wage practices, creating a shared legislative compliance responsibility in the marketplace. This may promote general compliance because parties may be held accountable for business practices that extend beyond their own business to those with whom they associate or do business. The extended non-compliance liability approach may, therefore, promote general compliance in the whole supply chain. Similarly, the UK legislation provides that body corporates, directors, managers, the secretary or similar officers of the body corporate (or any person claiming to act in such capacity) may be held responsible and liable for offences if it is proved that the offence was committed with the consent, connivance or any neglect by an officer of the body corporate.

The UK legislative framework promotes the timeous settlement of non-compliance by offering reduced punitive measures for quicker settlement of matters. An effective remedy should provide relief in a timeous manner to avoid unnecessary delays that may be detrimental to the worker and their relatives. In Australia, the FWO should draw the court's attention to cooperation by the transgressor that may benefit the transgressor.

Subject to the appeals process, the UK publicly names non-compliant employers as soon as non-compliance is established. Naming elaborates the extent of sanctions in the UK that promotes the effectiveness of a comprehensive system of sanctions. The timing of naming non-compliant employers should also be highlighted as a strong point: naming is done as soon as non-compliance is established. This promotes the effectiveness of sanctions and enforcement, as delays are avoided.

With the minimum wage compliance framework of South Africa and the foreign jurisdictions as the backdrop, one can formulate an effective minimum wage compliance model based on the criteria of this research.

[1639]S 550 (2) The FWA 2009.

Chapter 5: An effective minimum wage compliance model

An effective minimum wage model must account for various factors in its formation. The formation must promote compliance, but it should also take account of other factors, including that it must be meaningful and of value to employees but not have an undue adverse effect on employers. An effective minimum wage compliance model must be realisable and pragmatic while taking account of national and international standards and practices, and it should provide for a degree of adaptability depending on the unique socio-economic circumstances in which it functions.

This chapter deliberates an effective minimum wage compliance model by considering international legal measures before moving on to the criteria identified as important for this study.

5.1 International legal measures

As indicated in chapter 2.3, the ratification of international measures may not necessarily indicate an effective or holistic minimum wage model. In other words, ratification of international measures does not necessarily translate into better labour standards or practices in a national level. However, the ratification of international measures establishes a just and sound framework as a reference point that may ultimately reflect in national frameworks – if there is the political will to do so. The role of national and international stakeholders is essential in driving the national ratification and incorporation of international legal measures. Employers, employers' organisations, employees and employee organisations, the international community that includes foreign nations and bodies such as the ILO, the World Bank and the International Monitory Fund all need to actively and progressively drive the utilisation of international measures on a national level.

The active and progressive drive of the utilisation of international measures on a national level may require leverage, which may take on various forms. Trade agreements, international aid and resources, and political support may be utilised as leverage measures to promote international labour standards on a national level. This approach may be considered a reciprocal approach that is somewhat mechanical.

However, the incidence of multiple ratifications of international measures without necessarily reflecting change on a national level is an indication that there is a problem at national governing level that is not going to disappear or be rectified on its own account. This arguably necessitates the recognition of the role of stakeholders to drive and actively promote implementing international measures on a national level.

5.2 Coverage of minimum wage

The importance of an effective functioning central administrative body to establish the framework for competent bodies (responsible for making recommendations concerning coverage) is referred to in chapter 5.3.1. Competent bodies should monitor and evaluate minimum wage coverage regularly to ensure optimal functioning of the minimum wage framework. In establishing minimum wage coverage, the competent body should consult with various stakeholders to optimise decision-making concerning coverage.[1640]

A crucial element in decision-making is the availability of up to date and accurate information about the labour market, the economy and other relevant factors. There should be legislative provisions establishing the frequency, the scope and the authority responsible for obtaining and providing information. Labour inspectors should play a role in providing information or data regarding their functions to the competent body (see again chapter 5.4.1). Information systems can be utilised to improve efficiency in collecting and analysing data, as indicated in chapter 2.4.3.1. Information systems can be costly to establish and maintain, but it may prove to be a fundamental cost-saving investment over the long term. Information systems are useful and relevant for minimum wage compliance in general and specifically to the elements of this study.

To extend the protection offered to workers minimum wage coverage should apply to as many workers as is reasonably possible (e.g., by imposing a national minimum wage). General minimum wage coverage simplifies minimum wage as opposed to

[1640]Huysamen (2018) *De Jure* 296.

differentiated coverage and has compliance benefits. However, any effective minimum wage policy should allow a degree of flexibility concerning coverage to alleviate undesirable consequences. Provision should therefore be made for flexibility in certain warranted instances that may include temporary exemptions and exclusions to minimum wage coverage. The nonstandard flexible minimum wage coverage should ideally be kept to a minimum to keep minimum wage coverage as uniform and simplified as possible. It should only be used in essential instances. Any nonstandard flexible minimum wage coverage provisions (exemptions and exclusions) should periodically be reviewed to ascertain the continued suitability and relevance of these provisions.

Regarding flexible minimum wage coverage, the literature indicates that the age of workers may present employment challenges under minimum wage legislation. As a result, numerous countries, including the foreign jurisdictions considered, utilise age as a criterion for differentiated minimum wage coverage. The implication is that workers of various ages are subject to different minimum wage coverage. Apprenticeships or traineeships may also, at least partially, be correlated with age as a criterion for differentiated minimum wage coverage.

An example of a warranted minimum wage coverage exception include that it may apply to disabled workers. Such exception may be warranted because it promotes the employability of disabled workers while taking account of their possible reduced productivity because of their disability. Since disability is a listed ground in section 9 of the South African Constitution, any differentiation must be justified. The application of flexible minimum wage coverage should consequently be closely monitored. Its application should be subject to stringent and objectively determined criteria and limitations to prevent abuse and maximise the potential held by minimum wage in ensuring maximum coverage.

Pragmatism is an essential concept regarding coverage because inefficient minimum wage coverage may undermine compliance. Therefore, differentiated minimum wages should not undermine a high compliance rate. The differentiated minimum wage poses major, far-reaching challenges and may compromise compliance. Therefore, it is submitted that simplicity in minimum wage coverage is essential. This

is not to say that nations should not strive towards differentiated wages, because they should, but differentiation should occur above the generally determined minimum wage coverage. This is to say that individual wage coverage above the general minimum wage coverage should be promoted where wage coverage application is established on an individual or collective level through employment contracts and agreements. Workers should not necessarily be content with having minimum wage coverage as it acts as a wage floor and is not representative of a decent wage that is needed for dignified value-driven and flourishing human beings. To this end, there must be a legal framework with rights-based meaningful consultation and negotiation on an individual and collective basis to establish differentiated wage coverage. The adjustments of these wage agreements and the enforcement thereof place the worker (individual) or the collective (through representative organisations) central to that. It may be argued that personal responsibility regarding differentiated minimum wage coverage is the most effective manner to ensure compliance.

5.2.1 Awareness of coverage

As mentioned in the previous chapter, in deciding on the extent of minimum wage coverage and its determination, the competent bodies responsible, therefore (see chapter 2.4.1) should engage in consultation with various stakeholders that may increase awareness and cooperation concerning minimum wage. Chapter 2.4.2 indicates the central position of labour administration in establishing an administrative framework that ultimately affects compliance with minimum wage. The framework established by labour administration can promote optimal and efficient coverage and awareness of minimum wage through various measures such as consultation and research-driven initiatives.

Simplistic minimum wage coverage goes a long way in easing awareness challenges as it is less troublesome to explain and grasp, resulting in increased awareness thereof. The awareness of minimum wage coverage requires the legislative backing of well-formulated and comprehensive legislative measures that actively promote awareness in the labour market. Adequate legislative backing enables three broadly classified stakeholders, namely the government, employers, and employees, to actively promote minimum-wage coverage awareness.

Through the various governing agencies, the government is primarily responsible for creating and promoting awareness of minimum wage coverage. The government can be required to publish minimum wage coverage on various platforms that may include any State publications, reports or papers. The role of the competent bodies within the general administrative national frameworks should be highlighted in assisting workers through accessible platforms on minimum wage information in a timely and efficient fashion. The personnel of the competent bodies and the national administrative framework that include labour inspectors should also create awareness through the fulfilment of their everyday employment functions, including awareness campaigns. As mentioned in chapter 5.4.1, the soft enforcement measures utilised by the competent bodies and labour inspectors should play an important role in driving awareness of minimum wage.

Employers and their representatives should also be responsible for creating awareness among themselves and their employees regarding minimum wage coverage. Legislation may require employers to display the relevant minimum wage coverage rules at the workplace. The employer may be required to inform the employee in writing, at the commencement of employment and periodic intervals after that, of the relevant minimum wage coverage.

Employee and their representatives should take responsibility for keeping themselves and others informed and up to date with relevant legislative provisions that include the coverage of minimum wage. Legislative provisions, in the form of workplace rights, should protect and enable employees and their representatives to freely exchange information and enforce their rights without fear of intimidation or prejudice. The awareness of minimum wage coverage must be a comprehensive and collaborative effort between these stakeholders each having a distinct role in establishing awareness.

5.3 Determination of minimum wage

Minimum wage must be meaningful to have any positive impact on workers, and the level of determination of minimum wage assumes a substantial part in achieving this. To this end and as indicated in chapter 2.4.2, minimum wage should, at the least satisfy workers' basic needs. As is the case regarding coverage and the need for

available and clear information, relevant, up-to-date, and accurate information assumes a central position in effectively determining and adjusting minimum wage.[1641] Without such information, it may be impossible to engage in any meaningful minimum wage determination. The need for accurate and relevant information establishes the need for a legislative framework to ensure that information is available. As mentioned above in chapter 5.2, information systems play a fundamental role in providing the information needed to make good decisions concerning minimum wage determination and adjustment. Consultation with stakeholders is also an important element in effectively determining the minimum wage. Consultation allows concerns, potential challenges and achievements to be considered in the determination process.

Chapter 4.3.2 indicates the importance of determining a minimum wage level that is not disconnected from global minimum wage levels while also being appropriate (that is to offer real value) in a national context. Therefore, a twofold consideration is needed to determine the minimum wage level. Firstly, minimum wage levels should be established with global minimum wage levels in mind to ensure global competitiveness while also protecting workers. Secondly, national context should be evaluated and considered to ensure that the minimum wage level is appropriate in that it offers real value to workers and the national labour market.

As indicated in figure 5, minimum wage is determined at different median and mean ratios across various nations. The reason being that each nation has unique national conditions that must be individually considered to establish the most suitable minimum wage level. On a national level, consideration should be taken of average (mean) and median wages.

Significant disparity between the levels of median and mean wages in a nation may indicate substantial wage inequality that requires the utilisation of median wage as a benchmark for establishing a minimum wage level. As indicated in chapter 3.3.2, median wages may be a more realistic and representative indicator of overall wage levels in nations with high wage inequality. The median as benchmark is not affected

[1641]Dube A 2019 Impacts of minimum wages: review of the international evidenc3 9-10.

by any single value being too high or too low (outliers). That is why it may be better suited as a benchmark for skewed or excessively unequal distributions. In skewed and unequal labour markets there may often be a compression of most wages at the lower sphere of the labour market, which means that including outliers (especially at the top of the wage distribution) will provide a distorted benchmark.[1642] Excessive wage inequality may necessitate a more far-reaching or proactive determination of minimum wage concerning median wages (perhaps a Katz ratio of beyond 70%) to address the overall disparities in the labour market actively.

Less significant disparity between levels of median and mean wage (perhaps within 10%) may be indicative of less unequal and skewed wage distribution where it may be best to utilise the mean as benchmark. The mean as benchmark is affected by any single value being too high or too low (outliers) compared to the rest of a sample. In a more equal wage distribution structure, it is submitted that outliers become increasingly relevant and useful to provide a comprehensive reflection of overall wages. To ignore outliers in these circumstances will perhaps provide a distorted reflection of overall wages. In terms of the practical implication hereof, the minimum to mean wage ratio most frequently lies between 40 and 55%.[1643]

5.3.1 Adjustment of minimum wage

As mentioned in this study, labour administration assumes a central position in compliance with minimum wage. The central administrative body (the DOL or Ministry of Labour) responsible for national labour policy serves as the operational basis for the competent bodies responsible for minimum wage coverage, determining, adjustments and enforcement.[1644] Therefore, it is important that the operational basis effectively establish suitable competent bodies (specialised units). Inefficiencies in the central administrative body could detrimentally affect the competent bodies (specialised units or departments) it is responsible for establishing (as is the case in South-Africa, see chapter 3.3.3.1 and 3.6.3). Therefore, it is essential for all the

[1642] ILO "Global Wage Report 2016/17: Wage Inequality in the Workplace" *ILO* 27 & 28.

[1643] ILO "Global Wage Report 2016/17: Wage Inequality in the Workplace" *ILO* 27.

[1644] Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 12.

compliance elements in this study to have a sound and efficient central administrative body. One may argue that key to an effective central administrative body is a personnel corps that reflects a particular ethos and integrity associated with the value of labour administration. This should also translate to the personnel of the various competent bodies, especially the bodies responsible for enforcement. The effective functioning of the national administrative body requires adequate resources that will ultimately help establish an able and qualified personnel corps and a sound infrastructure.

Minimum wage adjustments need to occur at regular and fixed intervals, preferably annually, to promote stability, predictability and to ensure the relevance of minimum wage levels. Adjustments should take effect after a wage review process that includes consultation with stakeholders and reviewing relevant and accurate labour market data to reach informed conclusions. The minimum wage adjustment through the wage review process should be transparent and based on an established procedure aiming to achieve long-term targets.

Transparency in the adjustment process promotes understanding (also of the rationale behind adjustments), contributing to stakeholders' support. Also, an established procedure enables stakeholders to be prepared, plan and perhaps adapt more easily to adjustments. Not establishing and following a defined procedure may undermine the stakeholders' planning and forecasting, which may hold detrimental effects on stakeholder confidence. The involvement of stakeholders in the wage review process is important for creating minimum wage awareness, stimulating stakeholder collaboration and support, and to reach well considered decisions regarding adjustments.

Minimum wage should be regarded as a long-term measure that requires an extended period to effect true change in the labour market and economy. Long term goals and targets should be assisted with medium- and short-term targets that act as stepping stones towards these long-term targets. Reaching these targets are ultimately dependent on the appropriate adjustment of minimum wage.

Two common approaches to minimum wage determination and adjustment are evident from the comparative research of this study. The first approach may be

considered a more cautious approach to minimum wage determination that ultimately translates into moderate minimum wage adjustments. The underlying ideology may be vested in the neo-classical belief that minimum wage results in employment loss. Therefore, the cautious approach to minimum wage determination and adjustments. South Africa and Australia both share this approach towards minimum wage determination. It may be that developing nations (characterised by high unemployment) and nations that are introducing minimum wage to the labour market may be inclined to adopt the cautious approach. This tendency is understandable to monitor effects on the labour market and economy. However, cognisance should be taken that globally the labour share has failed to keep up with the productivity increases that translates into minimal real wage growth in the lower spectrum of distribution. Consequently, minimum wage earners may not be in a better position today than they were a few decades ago because wage inequality may still be rife, which may coincide with minimum wage earners forming part of the so-called working poor.

The second approach to minimum wage determination may be classified as a more far-reaching or ambitious approach where minimum wage is determined at a high percentage to national median or mean wages. This approach arguably does not ignore the conservative, traditional neoclassical view, where minimum wage is considered a catalyst for employment loss. Instead, it may be best described as acknowledging the neoclassical view on employment loss but choosing to intentionally direct its focus towards establishing a level of wages that represents more than the bare necessity that one needs to survive. It represents a wage that actively pursues fairness in income distribution and the decent work principle. The UK has adopted such an approach with overwhelming benefit to various stakeholders and its economy. It is recommended that developing nations with relatively low unemployment adopt a more ambitious approach to minimum determination and adjustments.

5.4 Legal enforcement of minimum wage

5.4.1 Monitoring compliance with minimum wage

The optimal monitoring of minimum wage compliance requires a collaborate effort between stakeholders. These stakeholders include government officials with monitoring responsibility (labour inspectors), employees, employers, representatives of employees and employers.[1645] The collaborated effort extends the monitoring responsibility beyond government and extends the reach of traditional monitoring practises, as is the international practice indicated in chapter 2.4.3.1. The collaborated approach establishes a shared monitoring responsibility among stakeholders that requires the legislative backing (through worker rights) that enable and protect stakeholders from fulfilling this role without fear of discrimination or victimisation.

As indicated in chapter 5.3.1, the central administrative body must be operational and efficient to establish competent bodies such as enforcement bodies. The competent bodies should comprise suitable individuals to fulfil the various roles. Labour inspection should be regarded as a professional occupation because of the importance of its functions that are often extensive and of a specialised nature. There are certain requirements that labour inspectors should meet and these should be contained in legislative frameworks as specified in international legal provisions in chapter 2.4.3.1.

Firstly, during the recruitment process, the selection criteria should be formulated and met. The selection criteria should reflect the professional nature and responsibilities associated with the occupation of labour inspectors. They should require a substantial education level, experience, and the mental and emotional attitude and aptitude suitable to the profession.[1646] The candidate should also have a reputable

---

[1645]Landau I, Cooney S, Hardy T & Howe J "Trade Unions and the Enforcement of Minimum Employment Standards in Australia" (2014) *Labour Law Research Network* 4 <http://www.labourlawresearch.net/sites/default/files/papers/Union%20Enforcement%20Report%20%28FINAL%2019%20Feb%202014%29.pdf> (accessed 23-2-2021).

[1646]Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 31.

history with no criminal convictions. The same requirements may also be established concerning other employees of the competent (enforcement) body. The leadership positions of competent bodies must also have specific and stringent requirements for the execution of those responsibilities.

Labour inspection should be recognised as a profession consisting out of "a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others".[1647] International instruments (as mentioned in chapter 2.4.3.1) and the principles of the IALI (see chapter 2.4.3) may be used to establish ethical frameworks for labour inspectors globally.[1648]

Secondly, once employment commences labour inspectors should maintain the ethos expected form the labour inspectorate as discussed in chapter 2.4.3.1. Labour inspectors should be subject to stringent requirements about ethically, morally, and socially responsible practices that include disclosure of business, financial and other noteworthy interests that may affect the fulfilment of their functions.[1649] Confidentiality and nondisclosure of personal and commercial information are also of significant importance to the ethos of labour inspectors (see chapter 2.4.3.1). Nonfulfillment of the requirements should be dealt with swiftly and decisively with suitable sanctions because of the profession's professional nature and responsibility. Inspector wellness (worker wellness) that includes work-life balance is an important aspect in motivating and retaining inspectors and increasing productivity.[1650] Through

[1647]Australian Council of Professions "What is a Profession?" (2003) *ACP* <https://professions.org.au/what-is-a-professional/> (accessed 28-02-2021).

[1648]International Association of Labour Inspection "International Common Principles for Labour Inspection" (2014) *IALI* <http://www.iali-aiit.org/resources/International%20Common%20Principles.pdf> (accessed 28-02-2021).

[1649]See Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 12 & 16.

[1650]52.

remuneration and benefits, the rewards should reflect the professional nature of the profession to attract and retain suitable employees.

The recruitment of suitable labour inspectors may be a challenge in the labour markets of developing nations that are often characterised by a scarcity of skilled labour. This challenge can be aided by establishing effective training and development initiatives that identify candidates with potential and guide them to meet the selection criteria for labour inspectors. Besides these initiatives, labour inspectors' salaries should reflect the associated professional nature and substantial responsibilities to attract suitable candidates. The increased workload of wide-mandated labour inspectors should be relieved by establishing a strong administrative support framework.[1651] The supportive framework consists of administrative personnel that may be utilised in completing mundane, but important, labour inspectorate tasks such as documentation and recordkeeping duties.

As indicated by international standards in chapter 2.4.3.1, labour inspectors' functions should generally include hard and soft enforcement measures. As part of soft measures, labour inspectors should have an advisory and educational role in enforcing legal measures that may contribute to creating awareness of minimum wage (refer to chapter 5.2.1). For hard measures, labour inspectors should also be able to rely on legal consequences against non-compliant parties, as discussed in chapter 5.4.2.

The functions of labour inspectors will depend on the scope of utilisation and labour inspectors' mandate in a given context. This thesis and literature[1652] highlight two distinct approaches to the scope of utilisation and mandate of labour inspectors:

First, labour inspectors can be utilised within a wide- (generalist) mandate, responsible for enforcing compliance with multiple legal provisions that entail various labour law branches such as health and safety and workers' social security. The approach requires extensive knowledge and experience on a wide range of different

[1651] Rodríguez "A Study on Labour Inspectors' Careers" *ILO* 22 & 28.

[1652] 20 & 21.

legislative provisions that place substantial responsibility, pressure and demands on labour inspectors. Transgressions may often involve various pieces of legislation and different areas of labour and social law that may complicate matters and require the increased emphasis on labour inspector discretion. The wide-mandated approach may also lead to an increased workload of labour inspectors because of extended enforcement responsibilities. The general nature of legislative responsibilities and functions associated with the generalist approach demands substantial general labour experience coupled with adequate qualifications and knowledge. These factors must be considered in the recruitment and selection process.

Secondly, the scope of utilisation can have a more focused- (specialist)mandate responsible for enforcing compliance with more limited legal provisions such as the exclusive focus on workers' health and safety (as is the case in the UK). The focussed-mandate approach may hold less responsibility, pressure and demands for labour inspectors because of it's the more focused, narrowed, and specialised nature. Labour inspectors may have to rely less on their discretion, relative to the wide-mandated approach, because the focussed approach may coincide with a more regulated bureaucratic framework with less room for discretion. However, it does not mean that the focused approach is easy or inferior to the wide mandated approach; it simply means that the focussed approach entails specialisation in a narrow, focussed area of labour law while the wide-mandated approach requires specialisation in multiple areas of labour law.

The focussed-mandate approach requires the appointment of labour inspectors in differentiated areas of labour law that necessitates numerous appointments that require the delegation, cooperation and facilitation of responsibilities and cases between the differentiated areas. An administrative authority may be tasked with delegating, cooperating, and facilitating the responsibilities and cases between the differentiated areas.

Because non-compliance may present across various labour law areas, cooperation between various differentiated labour inspectorates is necessary. This may present significant challenges that may be addressed by the central administrative body responsible for integrating and delegating cases and responsibilities.

In terms of the adoption of the two approaches, the author makes the following recommendations:

1. The focused-mandate approach requires more resources than the wide-mandated approach. Therefore, it may be best suited for developed nations with more human, financial, and technological resources to realise this approach effectively. Developed nations may also have more developed and comprehensive legislative frameworks that increase the bureaucratic landscape and possibly decrease labour inspector discretion.

2. The wide-mandated approach may be best suited for developing nations because of limited human, financial and technological resources. Developing nations must use their limited resources optimally. The wide legislative responsibility may require an increased emphasis on labour inspector discretion that needs well experienced, qualified and suitable labour inspectors. Effective employment practices are needed to recruit and retain suitable candidates.

Following international standards (described in chapter 2.4.3.1) labour inspectors should have a general reporting of data function to the competent body (central inspection authority or specialised area or department) (also see chapter 5.2). Data can provide information needed to improve and develop compliance practices further.

Chapter 2.4.3.1 indicates the international significance of affording labour inspectors' and workers' rights to promote compliance. Labour inspectors require certain rights to enable them to pursue their functions effectively. Rights should be clear and unambiguous to promote certainty. Also, rights should be adequate to enable labour inspectors to fulfil their functions effectively and for workers to promote compliance. Workers' rights should include issuing of monthly salary slips, access to information, the right to disclose information to labour inspectors or a relevant authority without fear of prejudice or discrimination, and the right of association. Labour inspector rights should include the right to enter work premises, inquire about and determine the legal compliance status in a workplace, employers' requirement to keep accurate employment records and to inspect records and other relevant information and objects.

A problematic area of monitoring compliance with minimum wage rests with workers employed at private residences. These workers include but are not limited to domestic workers, chefs, caretakers, and gardeners. The owners' right to privacy may present obstacles for labour inspectors to monitor compliance at these locations effectively. Labour inspectors cannot apply the same procedures to commercial and public workplaces than those required for private residences. Physical labour inspector visits to workplaces may be considered a standard monitoring measure utilised by labour inspectors. The increased digitalisation of work (or so-called platform work) may also be a problematic area for monitoring compliance as traditional monitoring measures may not be sufficient.

Problematic instances for on-site monitoring, such as private residences, digitalised work and the challenge of limited resources may necessitate an alternative approach that technology may provide. It is recommended that standard labour inspector practices to monitor compliance be adjusted or expanded in keeping with the changing nature of employment.

Technological platforms can be established where certain employers can be identified and required to prove compliance with minimum wage by physically or electronically submitting monthly salary slips and additional substantive records. Workers of these employers can then be contacted to verify the accuracy of the information provided. Administrative personnel who may be less skilled and more easily recruited than labour inspectors may be utilised for these purposes, leaving labour inspectors free to attend to physical inspections. The technological approach bridges the problems often associated with monitoring residential workplaces and digitalised work that may be a good alternative to the current status quo.

As indicated in chapter 4.3.3.1, it is recommended to begin any case (of possible non-compliance) with an assessment process that acts as a preliminary basis to establish the case's validity or status. The assessment facilitates the effective use of resources and limits resource waste. The assessment criteria must be reliable and provide assessment outcomes that have integrity. Inefficiencies in the assessment process may leave workers vulnerable to exploitative labour practices.

From a critical perspective, if there is non-compliance with minimum wage provisions that coincides with limited resources available to effect compliance, it may be beneficial to adopt a strategic, focused and targeted approach directed primarily at excessive non-compliance with minimum wage provisions. Instances, where there is the most significant deviation from minimum wage rates, may arguably be the most detrimentally significant when considered with other instances of non-compliance. As indicated in chapter 5.2, information systems have a fundamental role in providing information that can identify significant deviation from minimum wage.

It may be that employers that deviate the most from minimum wage rates attain the most benefit for their non-compliance, which translates into a more significant competitive advantage when compared to employers that have less significant deviation from minimum wage rates or that comply. It may also be that employees that receive wages that deviate the most from minimum wage rates are the worst affected by minimum wage non-compliance because they may be further away from receiving a monetary wage indicative of the decent wage principle and therefore worse off than employees with less significant deviation from minimum wage rates. Within this context, resources should be focussed on cases with the most significant non-compliance with minimum wage rates. This targeted approach is also followed by other public institutions, including, for example, the South African Receiver of Revenue (SARS).

Legislative provisions should prescribe the required number of labour inspectors and the number of labour inspector visits conducted per inspector for a specified period that should be aligned with foreign and international standards, see chapter 3.3.3.1.1, and international standards analysed in, chapter 2.4.3.1.

5.4.2 Legal sanctions and remedies in terms of non-compliance with minimum wage

As mentioned, enforcement should consist of hard and soft measures that should encapsulate three compliance approaches (persuasion, management and enforcement) as mentioned at the onset of this thesis in chapter 1.3.1. Soft measures should generally consist of advising and directing employers or stakeholders on minimum wage (that stimulates minimum wage awareness) while hard measures

serve to punish transgressors through civil or criminal procedures. A risk associated with utilising hard and soft measures is that utilising these measures, often requires the discretion of labour inspectors to decide on using a measure that may result in the inconsistent use thereof, an outcome that may not promote fairness and justice. Clear frameworks and guidelines should be established to promote the consistent use of these measures across various circumstances, thereby counteracting the threat with the discretionary use of hard and soft measures.

Alternative dispute resolution platforms in the form of tribunals or competent bodies with such functions should be available to pursue compliance along with civil courts. Alternative dispute resolution platforms are important to relieve pressure on courts while saving time and costs associated with litigation. Criminal liability should also be pursued in serious and warranted non-compliance cases but it should not substitute civil proceedings, it should operate parallel thereto.

Following the international standards as shown in chapter 2.4.3.2, effective sanctions should consist of two general elements; It should reimburse workers any amount of underpayment, and it should include a punitive measure in the form of a penalty.

Reimbursement of underpayment should be done in line with relevant interest or updated, new, minimum wage rates to ensure that the worker does not lose any real wage value. Under international provisions as referred to in chapter 2.4.3.2, reimbursement should also be effected in a timeous manner that avoids lengthy delays and escalating costs. Incentives to promote timeous resolution of disputes and cooperation may be rewarded with discounted punitive measures in the form of reduced penalty rates.

Punitive measures are essential in deterring and punishing non-compliance, so it must be utilised in non-compliance instances. The discretionary utilisation of punitive measures may not be the best non-compliance deterrent, and it may not promote certainty, transparency and understanding of sanctions. A fixed punitive scale based on the extent of non-compliance or underpayment is recommended as an identifiable, understandable and simplified measure to establish punitive amounts. The punitive scale may be set at 200% of the underpayment to deter non-compliance. According to the business type, individual or corporate entity, the classification of punitive

measures could establish appropriate punitive measures related to the transgressor's resources. This may establish a fair punitive framework that establishes punitive measures according to the transgressor's resources and standing that may offer proportional punitive measures.

Ideally, punitive amounts, or part thereof, should be paid out to the aggrieved employees and not to other parties to serve as additional compensatory measure for the aggrieved worker and to be a financial incentive for employees to enforce minimum wage.

Publicly naming non-compliant employers should also form part of a comprehensive sanction system. The negative publicity associated with "naming and shaming" may have detrimental social and economic consequences for the non-compliant employer that extends further than solely punitive financial measures.[1653] Besides potentially having an economic influence on the non-compliant employer, naming affects the social- status, standing and public image of transgressors that may be a more effective deterrent to some employers than mere punitive financial measures. Subject to finalisation of possible appeals, naming should be done as soon as non-compliance is established instead of waiting until underpayment has been recovered. This is necessary to avoid delays and to ensure effective and timely sanctions. Besides being a punitive measure, naming also serves two additional roles; it acts as a deterrent to other employers in the labour market, and it may act as a catalyst for employees to come forward against non-compliant employers[1654] because of the sense of safety and security provided for in the enforcement system.

To promote compliance throughout the supply chain, non-compliance responsibility and liability should extend to include parties, directly and indirectly, responsible for non-compliance. This promotes responsible and accountable business practices where parties should ensure that their business partners are compliant. Also, body corporates, managers, directors, secretaries or other officers acting in such capacity

---

[1653]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 18.

[1654]BEIS "National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law" *Government UK* 18.

should be held responsible and liable for consensual, collusion or negligent actions resulting in non-compliance.

Chapter 6: Conclusion

This thesis establishes how minimum wage compliance is pursued and achieved through the South African legal framework by considering the coverage, the determination, the legal enforcement of minimum wage, and the sanctions and remedies for non-compliance with minimum wage. Secondly, this thesis sets out to identify weaknesses in legal regulation of minimum wage and based thereon; it seeks to make recommendations for more effective regulation and implementation of a minimum wage in South Africa. The following concluding responses are provided to the research objectives set out in chapter one.

When conducting this research, the South African minimum wage framework consisted of three measures: the SANMW, sectoral determinations, and collective agreements (that include bargaining council agreements). There may be a degree of uncertainty on the future utilisation of sectoral determinations. The uncertainty is identified as an aspect that needs clarification to promote stability in the labour market. The multiple measures in the South African minimum wage framework create a system of differentiated minimum wage coverage that may present compliance challenges due to increased coverage complexity. The simplification of South African minimum wage coverage is recommended as indicated in chapter 3.6.1. Simplification can be achieved by eliminating sectoral determinations and utilising collective agreements or individual employment contracts for differentiated wage coverage above the SANMW level.

The SANMW presents the basic floor of minimum wage coverage and offers comprehensive coverage while still allowing a degree of flexibility in the form of exclusions and exceptions in certain instances as indicated in chapter 3.6.1. Minimum wage coverage is established in collaboration with stakeholder input that facilitates support and awareness. A degree of flexibility is an important aspect of minimum wage coverage as it promotes economic functioning and resilience while alleviating possible non-compliance. In general, but even more so in a country with a high unemployment rate, flexibility measures should be carefully constructed and monitored to avoid abuses. The differentiated approach to domestic workers, agricultural workers, and workers in public work programmes may be justifiable

because of these workers' vulnerable nature. However, the long-term target should be to include these workers to the fullest extent of the NMW coverage.

A major segment in the South African labour market is youth workers characterised by limited experience and qualifications. As a result, the youth worker segment may face a greater risk of non-compliance with the SANMW (refer to chapters 3.3.1 and 3.6.1). It may require a long-term differentiated minimum wage to mitigate the risk of non-compliance and promote the employability of these workers.

The South African legislative framework arguably provides an adequate basis to create awareness of the minimum wage coverage. The central administrative body responsible for national labour policy (DOL) should assume a predominant role in creating awareness through the competent bodies (specialist areas) under its ambit. The legislative basis should encourage a comprehensive awareness effort among stakeholders. The labour administration framework may not be functioning optimally because of inefficiencies in the central administrative body being the DOL (refer to chapter 3.6.3). These inefficiencies may affect the operation of the specialist areas or competent bodies under the DOL's ambit, detrimentally affecting compliance with minimum wage. Inefficiencies in the administration framework may influence the compliance elements of this study and would have to be addressed.

SANMW determination may be regarded as relatively conservative within the international range (refer to chapter 3.6.2). The conservative approach may, however, be understandable considering the recent introduction (2019) of the SANMW and South Africa's structural unemployment challenge. Sectoral determinations are determined and adjusted by the minister of labour assisted by the SANMWC while collective agreements are determined and adjusted through the parties in the bargaining relationship. The NMWA makes provision for annual adjustment of the SANMW using the SANMWC composed of various stakeholders and involving a process that includes collaboration with stakeholders. The minimum wage adjustment should be done using an established method at fixed periods to stimulate stakeholder confidence and stability.

The legislative omission of long-term SANMW determination targets is problematic for two reasons: Firstly, minimum wage should be regarded as a long-term measure

that takes time to address its aims of reducing inequality issues. Secondly, long-term targets promote stability and transparency in the labour market where stakeholders know what to expect in terms of the general aim of the minimum wage that includes the adjustment thereof.

A possible risk in the SANMWC legislative membership compilation is that it may not establish various labour market interests on equal footing because it may advance workers interests more so than business or employer interests that may influence the functioning of the SANMWC. The same risk may be present in the Australian context in the membership of the FWC. The NMWA may also hold certain contradictions and incoherencies in the rationale behind a diverse SANMWC membership. The absence of detailed legislative criteria and stringent requirements for SANMWC membership should also be highlighted as an improvement area. The SANMWC should consist of an equal number of independent members that fulfil predetermined stringent membership criteria based on experience and qualification that promote diverse interests and facilitate balanced decisions.

South Africa and the foreign jurisdictions considered, use all three compliance approaches, namely persuasion, management, and enforcement (see chapter 1.3.1) that establishes a robust and diversified strategy. In South Africa and the foreign jurisdictions, establishing a shared enforcement responsibility among stakeholders is noticeable. The shared enforcement responsibility requires a legal framework to facilitate such responsibility through worker rights (including the right against victimisation and discrimination and the right to join a union).

As previously indicated, within the context of enforcement of minimum wage in South Africa, the DOL assumes an important role in establishing and maintaining the infrastructural and administrative framework wherein the labour inspectorate functions. Inefficiencies and operational weaknesses in the DOL functioning, specifically its human resource department, may adversely affect enforcement effectiveness in the South African context.

Four problematic occurrences are identified: underutilisation of resources that results in underemployment of labour inspectors; weak retention of labour inspectors; insufficient targeted recruiting of labour inspectors that coincides with a lack of

stringent selection criteria in the form of suitable qualifications and experience as prerequisites. Lastly, inadequate training and development initiatives should also be identified as problem areas in the labour inspection sphere. These problems are significant against the background of the general utilisation of labour inspection to enforce various labour legislative provisions, including minimum wage that coincide with other challenges and work pressures associated with the profession.

In dealing with the underemployment of labour inspectors and the lack of appropriate selection criteria, the following may be considered; the labour inspectorate profession should be transformed into a specialist profession that requires a proactive recruitment plan with stringent criteria and moreover, internship or development initiatives to ensure a pool of specialist candidates available continuously. Career and personal advancement opportunities and remuneration reflective of the specialist profession should form part of the profession. As corruption is a serious threat to an effective compliance system, the necessary ethical codes and safety nets should be in place to ensure that labour inspectors do not compromise or undermine compliance through dishonest practices. It may also be desirable to appoint labour inspectors for fixed periods to mitigate the risk associated with establishing improper relationships with inspectors.

The efficiency of the labour inspectorate in South Africa and abroad may be improved by realigning traditional practices associated with the occupation or profession. Technological platforms should be integrated into monitoring practices and more traditional measures such as physical workplace inspections as part of a comprehensive enforcement strategy. Technological platforms and the legislative requirement placed on employers to keep accurate and accessible labour records may help overcome certain monitoring challenges associated with limited resources, legislative obstacles associated with entering workplaces and the prevalence of digitalised work (platform work) that is particularly relevant in the current COVID-19 pandemic. Administrative personnel (that may be more easily recruited than specialist labour inspectors) should be increased to assist with technological platforms and information systems. Administrative personnel can monitor employment records for legislative compliance (including minimum wage compliance) using technological platforms that may increase the reach of monitoring

while optimising effectivity and minimising operational costs. The increased utilisation of administrative personnel in a controlled manner may alleviate pressure from labour inspectors and allow labour inspectors to focus on serious non-compliance cases.

Disputes referred to the labour inspectorate should also be accessed according to reliable criteria before starting investigations to minimise resource wastages and improve efficiency. South Africa and the foreign jurisdictions use hard and soft enforcement measures that may be beneficial and necessary. However, the interaction between these measures creates a risk of inconsistent discretionary use of these measures. Therefore, clear guidelines are necessary to mitigate the risk and promote consistent use of hard and soft measures.

The lack of cases about minimum wage non-compliance that have reached the South African courts indicates that in the relatively short period since the introduction of the SANMW, the alternative dispute resolution mechanisms are absorbing these cases and relieving pressure from already overburdened courts. However, the CCMA as the main alternative dispute resolution platform for the SANMW runs the risk of being overburdened that may result in various inefficiencies. It is recommended that the functions of bargaining councils be extended to include a dispute resolution function about the SANMW to mitigate the risk.

Sanctions against non-compliance generally include reimbursement of the legally entitled wage and interest to protect its real value. The categorisation of punitive measures according to the different minimum wage measures does not create a simplified punitive framework that may have various negative consequences. A standard punitive framework for all the minimum wage measures is desirable as a solution. The insignificant punitive measures, especially collective agreements and sectoral determinations, should also be addressed to represent more severe punitive sanctions. The payment of penalties to aggrieved workers should also be promoted along with a system of reduced penalties in the timeous settlement of cases.

Thirdly, what lessons good and bad can be learned from the foreign national comparative legal minimum wage compliance frameworks?

The foreign jurisdictions have ratified a modest number of international measures concerning the minimum wage compliance elements of this study (refer to table 1). Developed nations, in the calibre of the UK and Australia, should arguably have ratified more international instruments because of their advanced legal and socio-economic state of development. Developed nations, in particular, should show their commitment to decent work and the values associated with that by actively pursuing international standards through the adoption of international measures.

The Australian context indicates that excessive differentiated minimum wage coverage may complicate the minimum wage framework and present significant compliance challenges, indicating that simplistic coverage may be better (see chapter 4.3.1). The lack of general minimum wage coverage to the entire Australian geographic should also be mentioned.

Both foreign jurisdictions allow a degree of flexibility in minimum wage coverage. Examples hereof are the exemption of disabled workers in the Australian context and volunteers in the UK. Differential coverage should be considered carefully to optimise effectiveness while not compromising compliance. In foreign jurisdictions, age and training and apprenticeship agreements are used as a criterion for differentiated wage coverage because younger and unskilled workers with a lack of skill and experience have challenges entering the labour market. These criteria may help promote the employability of the applicable workers and may alleviate non-compliance with minimum wage in this segment of the labour market.

The legal framework in Australia may be too elaborate and complicated so that it may not promote the law as an accessible instrument to everyone and as an unintended consequence, it may contribute to compliance challenges. Without devaluing the skill and competency of the legal profession, the language used in minimum wage instruments should be more concisely used to promote the accessibility of the law to the people it aims to serve.

Both jurisdictions have established recruitment criteria for employment in the competent bodies responsible for determination and adjustments and values, reflecting a particular ethos. These competent bodies in both jurisdictions are

independent that may be beneficial concerning alleviating political pressure or influence.

The countries that served as comparators have contrasting approaches towards minimum wage determination and adjustment. The UK has an ambitious approach where the minimum wage is determined and adjusted at a rate representing more of a living wage than a wage floor (refer to chapters 4.1.3 & 4.3.2). A cautious approach is followed in Australia (without long-term adjustment targets see chapters 4.2.3 & 4.3.2) and South Africa (refer to chapters 3.3.2 & 3.6.2). In South Africa, the minimum wage is regarded as the wage floor protecting the absolute minimum and not representing a living or decent wage. As a result, a neo-classical consideration of minimum wage is taken that assumes the existence or result of employment loss and other detrimental effects. The cautionary approach is understandable in developing nations with high unemployment and in nations that first introduce minimum wage in the labour market. However, developed nations (such as Australia) with relatively low unemployment and stagnating lower wages should ideally take on a more ambitious minimum wage determination approach to effect true change in the labour market and economy.

The UK utilises its ambitious minimum-wage determination approach in line with long-term targets that seem to confirm the position of modern literature on economic impacts of minimum wage in that employment loss and other detrimental effects should not inevitably be assumed to be associated with, or resultant from, minimum wage (refer to chapters 4.1.3 & 4.3.2). The ambitious determination and adjustment of minimum wage in the UK positively affect employees, the general labour market, and the UK economy. The central administrative framework in the UK may establish the framework that promotes the efficient functioning of the competent bodies under its ambit that ultimately translate to the success of its minimum wage.

Both foreign jurisdictions utilise an annual wage review process to adjust minimum wage. The wage review process includes stakeholder consultation and the adjustment of minimum wage at fixed periods annually that must be published and reasons for recommendations. These measures establish stability, certainty, and the support of stakeholders.

In terms of legal enforcement, foreign jurisdictions take on different compliance approaches. As adopted in the UK (see chapter 4.1.4), the specialised approach may be desirable in developed countries with more resources. In comparison, the generalist enforcement approach, as adopted in Australia (see chapter 4.2.4), should be more desirable in developing nations with fewer resources.

The specialised nature of the labour inspection profession in both jurisdictions, but more so in the UK, should be highlighted. The specialist nature emanates from stringent recruitment and selection criteria that involve elaborate training and development of relevant public servants. The legislative frameworks of foreign jurisdictions facilitate labour inspectors' functioning by affording certain rights and powers to labour inspectors.

A combination of dispute resolution platforms in both jurisdictions is available to enforce desirable compliance. The UK allows civil and criminal proceedings to be pursued parallel in warranted cases. The Australian criminal liability about minimum wage non-compliance could be expanded to enhance the sanctions against non-compliance.

The foreign jurisdictions establish increased social corporate responsibility in the supply chain by extending the liability for non-compliance of minimum wage to parties indirectly associated with the non-compliance. The extension of liability forces stakeholders in the supply chain to take more ownership for their business practices and their suppliers in the supply chain.

Both jurisdictions offer the ability to be reimbursed the real value of underpayments while allowing punitive sanctions (refer to chapter 4.3.3.2). The UK also provides for the publication of transgressors that may act as an additional deterrent. Australia categorises sanctions proportional to the transgressing party, offering more suitable and fair financial sanctions. However, punitive sanctions are not established at a fixed rate, a fact that may not promote transparency and certainty. A fixed punitive scale should ideally be utilised to this end, as is the case in the UK. The UK, moreover encourages timeous settlement of cases by offering financial discount on punitive sanctions.

It is submitted that minimum wage is a necessary and useful tool to improve the living conditions of wage earners and their households, contributing to the pursuit of realising human dignity and decent work for all South African people. This is the case in both developed and emerging economies. Although minimum wage requires a well-designed legal framework and a careful and complex process of consultation and decision-making to further its intended aims, it is possible to determine the scope of coverage, rate and adjustment of the minimum wage as well as flexibility measures in a manner that is not unduly burdensome on employers and that gives effect to the objectives set out in the NMWA. However, the success of the whole system ultimately depends on the effective enforcement thereof, and this research therefore attempts to contribute to this important aspect of minimum wage regulation.

Bibliography

Literature

Adams Z "Understanding the Minimum Wage: Political Economy and Legal Form" (2019) 78 *Camb Law J* 42

Akram M, Faheem MA, Bin Dost MK & Abdullah I "Globalisation and Its Impacts on the World Economic Development" (2011) 2 *Int J Bu Soc Sci* 291

Anker R "Estimating a Living Wage: A Methodological Review" (2011) 29 *Conditions of Work and Employment Series* 1

Arndt C, Davies R, Gabriel S, Harris L, Makrelov K, Modise B, Robinson S, Simbanegavi W, Van Seventer D & Anderson L "Impact of Covid-19 on the South African Economy: An Initial Analysis" (2020) 111 *SA-TIED Working Paper* 1

Arup C & Sutherland C "The Recovery of Wages: Legal Services and Access to Justice" (2009) 35 *Monash Uni Law Rev* 96

Ayres I & Braithwaite J *Responsive Regulation: Transcending the Deregulation Debate* (1992)

Blumkin T, Sadka E & Shem-Tov Y "A case for maximum wage" (2013) 120 *Econ Let* 374

Boëttger JF & Rathbone M "The Marikana Massacre, Labour and Capitalism: Towards a Ricoeurian Alternative" (2016) 81 *Koers* 1

Bray JR "Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future" (2013) 1 *SPI Working Paper* 1

Çalışkan HK "Technological Change and Economic Growth" (2015) 195 *Procedia* 649

Card D & Krueger AB "Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania" (1994) 84 *Am Econ Rev* 772

Cebo K *Exploring Factors that Prevent Non-Compliance with the Basic Conditions of Employment Act; Sectoral Determination 9: The Case of Sunflower Retail Store, Western Cape* Master's thesis Stellenbosch University (2019)

Chen MA "The Informal Economy: Definitions, Theories and Policies" (2012) 1 *WIEGO Working Paper* 1

Chibba M & Luiz JM "Poverty, Inequality and Unemployment in South Africa: Context, Issues and the Way Forward" (2011) 30 *Econ Pap* 307

Cloete A "Youth Unemployment in South Africa: A Theological Reflection Through the Lens of Human Dignity" (2015) 43 *Missionalia* 513

Cornia GA & Court J *Inequality, Growth and Poverty in the Era of Liberalization and Globalisation* (2001)

Coslovsky S, Pires R & Bignami R "Resilience and Renewal: The Enforcement of Labor Laws in Brazil" (2017) 59 *L Am Pol Soc* 77

Currie I & de Waal J *The Bill of Rights Handbook* (2013)

Davidov G "A Purposive Interpretation of the National Minimum Wage Act" (2009) 72 *Mod Law Rev* 581

Davies R & Thurlow T "Formal-Informal Economy Linkages and Unemployment in South Africa" (2009) 00943 *IFPRI Discussion Paper* 1

De Melo FLB, Figueiredo A, Mineiro AS & Mendonça "Rescuing the Minimum Wage as a Tool for Development in Brazil" (2012) 4 *Int J Lab Res* 27

Du Plessis AJ (ed) *Human Resource Management and Employment Relations in SA* (2015)

Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B & Steenkamp A *Labour Relations Law: A comprehensive guide* (2015)

Edling C & Rydgren J (eds) *Sociological Insights of Great Thinkers: Sociology Through Literature, Philosophy and Science* (2011)

Eyraud F & Saget C *The Fundamentals of Minimum Wage Fixing* (2005)

Fana M, Torrejón Pérez S & Fernández-Macías E "Employment Impact of Covid-19 Crisis: From Short Term Effects to Long Terms Prospects" (2020) 47 *J Ind Bus Econ* 391

Finn A "A National Minimum Wage in the Context of the South African Labour Market" (2015) 1 *Wits Working Paper Series* 1

Finn D "The National Minimum Wage in the United Kingdom" (2005) 1 *Graue Reihe des Instituts Arbeit und Technik* 1

Garnero A "The Dog That Barks Doesn't Bite: Coverage and Compliance of Sectoral Minimum Wages in Italy" (2018) 7 *IZA Journal of Labor Policy* 1

Giupponi G & Machin S "Changing the Structure of Minimum Wages: Firm Adjustment and Wage Spillovers" (2018) 11474 *IZA Institute of Labor Discussion Paper Series* 1

Gray A "The Common Law and the Constitution as Protectors of Rights in Australia" (2010) 39 *Common Law World Rev* 119

Green D *From Poverty to Power: How Active Citizens and Effective States can Change the World* 2 ed (2012)

Grogan J *Workplace Law* 12 ed (2017)

Guerriero M & Kunal S "What Determines the Share of Labour in National Income? A Cross-country Analysis*"* (2012) 6643 *IZA Discussion Paper Series* 1

Hargreaves RJ *The Development of Minimum Wage Legislation in the United Kingdom* Master thesis Sheffield Hallam University (2017)

Heppell E *Minimum Wages: A Legal Analysis With Reference to Examples From Developing Countries* LLM-dissertation NWU (2016)

Heppell E "The South African National Minimum Wage: Potential or Concern?" (2021) 6 *J Law Soc Dev* 1

Huchet-Bourdon M, Le Mouël C & Vijil M "The relationship between trade openness and economic growth: Some new insights on the openness measurement issue" (2018) 41 *World Econ* 59

Huysamen E "The Future of Legislated Minimum Wages in South Africa: Legal and Economic Insights" (2018) 51 *De Jure* 271

Jacobs M & Mazzucato M *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth* (2016)

Jowett B *Politics Aristotle* (1999)

Kay DD *The Relationship Between Formal and Informal Employment in South Africa* MSc Thesis University of Illinois (2011)

Keeley B "How Does Income Inequality Affect Our Lives?" in Keeley B (ed) *Income Inequality: The Gap between Rich and Poor* (2015) 63

Kristen L "Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity" (2015) 52 *J Manag Stud* 621

Machin S & Manning A "Employment and the Introduction of a Minimum Wage in Britain" (1996) 106 *Econ J* 667

Mantouvalou V "Study on Labour Inspection Sanctions and Remedies: The case of the United Kingdom" (2011) 19 *LAB/ADMIN Working Document* 1

Marinakis A "Non-Compliance With Minimum Wage Laws in Latin America: The Importance of Institutional Factors" (2016) 155 *Int Labour Rev* 133

McKenzie M "The Erosion of Minimum Wage Policy in Australia and Labour's Shrinking Share of Total Income" (2018) 81 *J Aus Pol Econ* 52

McLachlin B "Bills of Rights in Common Law Countries" (2002) 51 *Int Comp Law Q* 197

Mellet A "The role of technology in the economic growth of South Africa: The case of frequency allocations to cellular operators" (2007) 3 *J Trans Res S Africa* 351

Mohr P, Fourie L & Associates *Economics for South African Students* 4 ed (2008)

Office for National Statistics "Employment in the UK: December 2020: Estimates of Employment, Unemployment and Economic Inactivity for the UK" (2020) *Statistical Bulletin* 1

O'Higgins N & Moscariello V "Labour Market Institutions and Youth Labour Markets: Minimum Wages and Youth Employment Revisited" (2017) 223 *ILO Employment Working Paper* 1

Oude Nijhuis D "Low Pay Wage Relativities, and Labour's First Attempt to Introduce a Statutory National Minimum Wage in the United Kingdom" (2016) 28 *J Pol His* 81

Piek M & Von Fintel D "Sectoral Minimum Wages in South Africa: Disemployment by Firm Size and Trade Exposure" (2020) 37 *Dev S Africa* 462

Piketty T *Capital in the Twenty-First Century* (2014)

Prasad E & Keane MP "Consumption and Income Inequality in Poland During the Economic Transition" (1999) 14 *IMF Working Papers* 1

Ramsay M "A Modest Proposal: The Case for a Maximum Wage" (2005) 11 *Cont Pol* 201

Rani U, Belser P, Oelz M & Ranjbar S "Minimum Wage Coverage and Compliance in Developing Countries" (2013) 152 *Int Labour Rev* 381

Ritchie F, Veliziotis M, Drew H & Whittard D "Measuring Compliance with Minimum Wages" (2016) 1608 *UWE Economics Working Paper Series* 1

Ronconi L "Enforcement of Labor Regulations in Developing Countries" (2019) 457 *IZA World of Labor* 1

Sargeant M "The UK National Minimum Wage and Age Discrimination" (2010) 31 *Pol Stud* 351

Simpson B "The Employment Act 2008's Amendments to the National Minimum Wage Legislation" (2009) 38 *Ind Law J* 57

Smith A *Wealth of Nations* (2007)

Stabile D *The Political Economy of a Living Wage: Progressives, The New Deal and Social Justice* (2016)

Stancanelli EGF, Keese M & Gittleman M "Making the Most of the Minimum: Statutory Minimum Wages, Employment and Poverty" in OECD (ed) *Employment Outlook* (1998) OECD Paris

Stewart A, Stanford J & Hardy T *The Wages Crisis in Australia: What it is and What to do About it* (2018)

Taulbut M, Mackay DF & McCartney G "Job Seeker's Allowance (JSA) Benefit Sanctions and Labour Market Outcomes in Britain, 2001-2014" (2018) 41 *Camb J Econ* 1417

Taylor M "Beyond the Maximum Wage: The Earnings of football Professionals in England, 1900-39" (2001) 2 *Soccer & Society* 101

Thornthwaite L "The Living Wage Crisis in Australian Industrial Relations" (2017) 27 *Lab Ind* 261

Van Niekerk A, Smit N, Christianson M, McGregor M & Van Eck BPS *Law@work* 4 ed (2018)

Wills J & Linneker B "In-work Poverty and the Living Wage in the United Kingdom: A Geographical Perspective" (2014) 39 *Trans Inst Br Geogr* 182

Wilson S "The Politics of 'Minimum Wage' Welfare States: The Changing Significance of the Minimum Wage in the Liberal Welfare Regime" (2017) 51 *Soc Pol Admin* 244

Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2013)

Żukowski A "Land Reform in the Republic of South Africa: Social Justice or Populism?" (2017) 12 *Werkwinkel* 71

International instruments

Collective Bargaining Convention, 1981, no. 154

Constitution of the International Labour Organisation, 1919.

Equal Remuneration Convention, 1951, no. 100

Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998

Labour Administration Convention, 1978, no. 150

Labour Administration Recommendation, 1978, no. 158

Labour Clauses (Public Contracts) Recommendation, 1949, no. 84

Labour Inspection (Agriculture) Convention, 1969, no. 129

Labour Inspection (Agriculture) Recommendation, 1969, no.133

Labour Inspection Convention, 1947, no. 81

Labour Inspection (Mining and Transport) Recommendation, 1947, no. 82

Labour Inspection Recommendation, 1947, no. 81

Minimum Wage Fixing Convention, 1928, no. 26

Minimum Wage Fixing Convention, 1970, no. 131

Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, no. 99

Minimum Wage Fixing Machinery (Agriculture) Recommendation, 1951, no. 89

Minimum Wage Fixing Machinery Recommendation, 1928, no. 30

Minimum Wage Fixing Recommendation, 1970, no. 135

Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 2020

Protocol of 1995 to the Labour Inspection Convention, 1947

Protection of Wages Convention, 1949, no. 95

Protection of Wages Recommendation, 1949, no. 85

Right to Organise and Collective Bargaining Convention, 1949, no. 98

Transition from the Informal to the Formal Economy Recommendation, 2015, no. 204

Legislation

Australia

Annual Wage Review 2018-19: National Minimum Wage Order 2019

Factory and Shops Act, 1896

Fair Work Act, 2009, no. 28

Fair Work Regulations, 2009, no. 112

South Africa

Basic Conditions of Employment Amendment Bill GN R1274 in GG 41257 of 17-11-2017

Basic Conditions of Employment Amendment Act, 2017

Compensation for Occupational Injuries and diseases Act, 1993, no. 130

Constitution of the Republic of South Africa, 1996

Employment Equity Act, 1998, no. 55

Employment Services Act, 2014, no. 4

GN R310 in GG 43026 of 17-2-2020

GN R531 in GG 37795 of 1-06-2014

GN R668 in GG 44136 of 08-02-2021

GN R987 in GG 43703 of 11-9-2020

GN R1396 in GG 42121 of 19-12-2018

GN R1402 in GG 42124 of 19-12-2018

GN R1446 in GG 25515 of 10-10-2003

Labour Relations Act, 1995, no. 66

National Minimum Wage Act, 2018, no. 9

National Minimum Wage Bill (draft) in GG 41257 of 17-11-2017

National Minimum Wage Regulations, 2018

Occupational Health & Safety Act, 1993, no. 85

Unemployment Insurance Act, 2001, no. 63

Unemployment Insurance Amendment Act, 2016, no. 10

United Kingdom

National Minimum Wage Act, 1998

National Minimum Wage (Amendment) (No. 2) Regulations, 2020

Caselaw

Australia

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate 2015 46 (HCA)

Fair Work Ombudsman v IE Enterprises Pty Ltd 2021 60 (FCA)

Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown 2017 1301; 275 1R 148 (FCA)

Hollis v Vabu Pty Ltd (t/as Crisis Couriers) 2001 207 CLR 21 (HCA)

Mornington Inn Pty Ltd v Jordan 2008 70 (FCA)

Rajesh Dharanikota v AAA Filling And Food Pty Ltd 2021 134 (FWC)

Burkina Faso

Worokuy Esaie v. Clinique des Genêts 2009 Judgment No. 008

Zongo v. Owner of the Bataille du Rail Mobil Garage 2003 No. 090

South Africa

Autozone Holdings (Pty) Lts t/a Autozone v Moolman 2017 JR649/15 ZALCJHB 201 (LC)

Department of Labour v Abdul Mohammed t/a Abdul Shop 2019 ECPE5799-19 (CCMA)

Department of Labour v Haisam Kashtte t/a Sea Flights Fisheries 2019 ECPE4435-19 (CCMA)

Department of Labour obo Shayibu, Dickson v Cash and Carry 2019 ECPE5432-19 (CCMA)

DETAWU obo Ntshangase, Graphics v PFM 2019 5408-19 (MPEM)

Domingos v IE Lourens Welgelegen (Pty) Ltd 2012 MP724-12 (CCMA)

Free Market Foundation v Minister of Labour; Minister of Justice and Constitutional Development; Bargaining Councils listed in Annexure "A"; National Union of Metalworkers of South Africa (NUMSA); Southern African Clothing and Textile Workers Union (SACTWU) 2016 13762/2013 (HC)

Kureva v Lakeside Transport And Logistics 2017 RFBC44064 (BC)

Mazwi Preysgod Buthelezi v Ebenezer Asset management Holdings 2019 GAEK1014-19 (CCMA)

MIBCO Obo Alicia Chantelle Du Plessis v S A D Paneelkloppers CC t/a Precision Paneelkloppers 2019 MINT66788 (BC)

National Employers' Association of South Africa ('NEASA'); Plastic Convertors Association of South Africa ('PCASA') v Minister of Labour; Metal and Engineering Industries Bargaining Council ('MEIBC'); Parties to the MEIBC 2018 J1475/2015 (LC)

NUHRCCHAW obo Skhosana M v Ahmod Wholesalers 2005 GAPT 4114-05 (CCMA)

Tao Ying Metal Industry (Pty) Ltd v Pooe NO 222/06 2007 (SCA) 54; 2007 3 All SA 329 (SCA); 2007 7 BLLR 583 (SCA)

United Kingdom

Ajayi v Abu 2017 EWHC 3098 (QB)

Guiseppe Caruso T/a Albro House Hotel Ltd vs The Commissioners for HM Revenue and Customs 2018 2206722 (UKET)

HM Revenue & Customs v Rinaldi-Tranter 2007 0486.06.1309 (UKEAT)

Jasleem Beauty Parlour Ltd v Commissioners for Revenue and Customs 2016 2208155 (UKET)

Lyn Cartmell v Steven Moore 2019 2405530 (UKET)

Miss P Powell v Tedroo Ltd 2019 1406075 (UKET)

Mr W Brown and Mrs A M Stubbs v Farringdon City Sports and Social Club 2018 2501227 (UKET)

Razor Sharp v Commissioners for Revenue and Customs 2019 3321921 and *DF99 Ltd v Commissioners for Revenue and Customs* 1601350/2019 (UKET)

The Best Connection Group Ltd v HM Revenue and Customs 2016 2403063 2200121/2017 (UKEAT)

Internet sources

Adams Z "The EU Minimum Wage Directive: A Missed Opportunity?" (12-11-2020) *UK Labour Law Blog* <https://uklabourlawblog.com/2020/11/12/the-eu-minimum-wage-directive-a-missed-opportunity-by-zoe-adams/> (accessed 15-11-2020)

Aguinis H, Gomez-Mejia LR, Martin GP & Joo H "CEO Pay is Indeed Decoupled From CEO Performance: Charting a Path for the Future" (2018) 16 *Manag Res* 117 <http://www.hermanaguinis.com/CEOpaydecoupled.pdf> (accessed 8-1-2019)

Altman M "Formal-Informal Economy Linkages" (2008) *HSRC Repository* <http://repository.hsrc.ac.za/bitstream/handle/20.500.11910/5420/5263_Altman_Formalinformaleconomylinkages.pdf?sequence=1&isAllowed=y> (accessed 23-2-2021)

Australian Council of Professions "What is a Profession?" (2003) *ACP* <https://professions.org.au/what-is-a-professional/> (accessed 28-02-2021)

Australian Council of Trade Unions "Modest Minimum Wage Rise Risks Increasing Inequality" (2014) *ACTU* <https://www.actu.org.au/media/293542/ACTU%20Economic%20Bulletin%20-%20June%202014.pdf> (accessed 13-1-2021)

Australian Government: Attorney-General's Department "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" (2019) *Australian Government: Attorney-General's Department* <https://www.ag.gov.au/sites/default/files/2020-03/strengthening-penalties-for-non-compliance-discussion-paper.pdf> (accessed 2-2-2021)

Australian Human Rights Commission "Chapter 5: The legal and policy framework" (2021) *Australian Human Rights Commission* <https://humanrights.gov.au/our-work/chapter-5-legal-and-policy-framework> (accessed 15-1-2021)

BEIS “National Minimum Wage Law: Enforcement: Policy on HM Revenue & Customs enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law” (2020) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923118/national-minimum-wage-enforcement-policy-1-oct-2020.pdf> (accessed 6-1-2020)

Belman D & Wolfson P “What does the Minimum Wage do in Developing Countries?” (2016) 62 *Conditions of Work and Employment Series* 1 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_463192.pdf> (accessed 8-2-2017)

Benassi C “The Implementation of Minimum Wage: Challenges and Creative Solutions” (2011) *Global Labour University* <https://www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.12.pdf> (accessed 8-2-2017)

Bhorat H, Kanbur R & Mayet N “Minimum Wage Violations in South Africa” (2011) *NMW-RI* <https://nationalminimumwage.co.za/wp-content/uploads/2015/08/0074-boorat-minimum-wage-violation.pdf> (accessed 23-2-2021)

Bhorat H “Compliance with Minimum Wage Laws in Developing Countries” (2014) 80 *IZA World of Labor* 1 <https://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries/long> (accessed 20-9-2017)

Bishop J “The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss” (2018) *Reserve Bank of Australia* <https://www.rba.gov.au/publications/rdp/2018/pdf/rdp2018-06.pdf> (accessed 8-1-2019)

Bolsheva A “Mapping gaps and challenges in building effective wage policies in the Russian Federation” (2014) 7 ILO Working Paper <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-moscow/documents/publication/wcms_357964.pdf> (accessed 23-02-16)

Bowman A & Isaacs G "Demanding the Impossible? Platinum Mining Profits and Wage Demands in Context" (2014) <https://www.researchgate.net/publication/273776729_DEMANDING_THE_IMPOSSIBLE_PLATINUM_MINING_PROFITS_AND_WAGE_DEMANDS_IN_CONTEXT_Full_WP/link/550d5df60cf2ac2905a6701f/download> (accessed 18-12-2017)

Bright S, Fitzpatrick K & Fitzgerald A "Young Workers Snapshot: The Great Wage Rip-Off" (2017) *Young Workers Centre* <https://d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1493954358/Young_Workers_Snapshot_The_Great_Wage_Ripoff_final.pdf?1493954358> (accessed 2-3-2020)

Broecke S, Forti A & Vandeweyer M "The Effect of Minimum Wages on Employment in Emerging Economies: A Literature Review" (2015) *NMW-RI* <http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf> (accessed 23-2-2021)

CCMA "National Minimum Wage" (2020) *CCMA* <https://www.ccma.org.za/Advice/Knowledge-Hub/Downloads/National-Minimun-Wage> (accessed 17-4-2020)

CEIC "Australia Employed Persons" (2020) *CEIC* https://www.ceicdata.com/en/indicator/australia/employed-persons (accessed 17-4-2020)

CEIC "Brazil Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/brazil/employed-persons> (accessed 17-4-2020)

CEIC "Chile Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/chile/employed-persons> (accessed 18-4-2020)

CEIC "Mauritius Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/mauritius/employed-persons> (accessed 18-4-2020)

CEIC "Mexico Employed Persons" (2020) *CEIC* www.ceicdata.com/en/indicator/mexico/employed-persons (accessed 18-4-2020)

CEIC "South Africa Employed Persons" (2020) *CEIC* <https://www.ceicdata.com/en/indicator/South Africa/employed-persons> (accessed 17-4-2020)

CEIC "United Kingdom Employed Persons" (2020) *CEIC* https://www.ceicdata.com/en/indicator/united-kingdom/employed-persons

Cornia GA & Martorano B "Development Policies and Income Inequality in Selected Developing Regions, 1980-2010" (2012) *UNCTAD* <https://unctad.org/system/files/official-document/osgdp20124_en.pdf> (accessed 23-2-2021)

Cousins B "Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope" (2013) *HSF* *<https://hsf.org.za/publications/focus/focus-70-on-focus/focus-70-oct-b-cousins.pdf>* (accessed 2-4-2018)

Cousins B "Land Reform in South Africa is Sinking: Can it be Saved?" (2016) *Nelson Mandela Foundation* *<https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf>* (accessed 2-4-2018)

Deakin S & Green F "A century of minimum wages in Britain" (2009) *CentrePiece* 6 <https://cep.lse.ac.uk/pubs/download/cp291.pdf> (accessed 23-2-2021)

Department for Business Innovation & Skills "Employment status review" (2015) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585383/employment-status-review-2015.pdf> (accessed 21-12-2020)

DPRU "Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations" (2010) *NMW-RI* <http://nationalminimumwage.co.za/wp-content/uploads/2015/08/0005DPRU-2010The-role-of-Sectoral-Determinations.pdf> (accessed 21-12-2020)

DPRU "Monitoring the Performance of the South African Labour Market" (2017) *DPRU* <http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Other/2018-11-29%20Factsheet%2022%20-%20Year%20ended%202017Q3.pdf> (accessed 23-12-2018)

Department for International Development "Growth: Building Jobs and Prosperity in Developing Countries" (2008) *OECD* <http://www.oecd.org/derec/unitedkingdom/40700982.pdf> (accessed 18-6-2020)

Dube A "Impacts of Minimum Wages: Review of the International Evidence" (2019) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844350/impacts_of_minimum_wages_review_of_the_international_evidence_Arindrajit_Dube_web.pdf> (accessed 23-2-2021)

DPRU & CSDA "Investigating the Feasibility of a National Minimum Wage for South Africa" (2016) 201601 *DPRU Working Paper* <http://dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP201601.pdf> (accessed 28-01-2019)

Engler M "The Case for a Maximum Wage" (2013) 462 *New Internationalist* 33 <http://web.a.ebscohost.com.ez.sun.ac.za/ehost/pdfviewer/pdfviewer?vid=1&sid=d532b56b-290f-4596-958b-a9726312af89%40sessionmgr4008> (accessed 23-2-2021)

Ensor L "Budget 2018 in a Nutshell: First VAT Increase in 25 Years" BusinessDay (21-2-2018) <http://businesslive.co.za/bd/economy/2018-02-21-budget-2018-in-a-nutshell-first-vat-increase-in-25-years> (accessed 19-4-2020)

Ensor L "Department Sticking to its Guns on Sectoral Determinations" *BusinessDay* (28-01-2019) <https://www.businesslive.co.za/bd/national/2018-04-03-department-sticking-to-its-guns-on-sectoral-determinations/> (accessed 10-9-2019)

EPSU “A Mapping Report on Labour Inspection Services in 15 European Countries” (2013) *EPSU* <https://www.epsu.org/sites/default/files/article/files/EPSU%20report%20on%20Labour%20Inspection%20services%20update%202013.pdf> (accessed 23-2-2021)

Fair Work Commission “Practice Note: Appeal Proceedings” (2014) *Fair Work Commission* <https://www.fwc.gov.au/resources/practice-notes/appeal-proceedings> (accessed 20-2-2021)

Fair Work Ombudsman “A Guide to FWO Notices” (2020) *Fair Work Ombudsman* <https://www.fairwork.gov.au/ArticleDocuments/725/Guide-to-FWO-Notices.pdf.aspx> (accessed 20-2-2021)

Fair Work Ombudsman “Compliance and Enforcement Policy” (2020) *Fair Work Ombudsman* <https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx> (accessed 20-2-2021)

Fair Work Ombudsman “The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2019-20” (2020) *Fair Work Ombudsman* <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports> (accessed 5-2-2021)

Forestry in South Africa “National Minimum Wage Agreement has now been signed” (13-2-2017) *Forestry in South Africa* <https://www.forestry.co.za/national-minimum-wage-agreement-has-now-been-signed/> (accessed 2-1-2019)

Ghosheh N “Wage Protection Legislation in Africa” (2012) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_203972.pdf> (accessed 2-10-2017)

Government UK “School leaving age” (2020) *Government UK* <https://www.gov.uk/know-when-you-can-leave-school> (accessed 2-5-2020)

Government UK “The National Minimum Wage and Living Wage” (2020) *Government UK* <https://www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage> (accessed 8-5-2020)

Howe J, Hardy T & Cooney S "The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012" (2014) *Melbourne Law School* <http://law.unimelb.edu.au/__data/assets/pdf_file/0008/1556738/FWOReport-FINAL.pdf> (accessed 23-2-2021)

Howe J, Yazbek N & Cooney S "Study on Labour Inspection Sanctions and Remedies: The Case of Australia" (2011) 14 *LAB/ADMIN Working Document* <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154066.pdf> (accessed 23-2-2021)

International Association of Labour Inspection "International Common Principles for Labour Inspection" (2014) *IALI* <http://www.iali-aiit.org/resources/International%20Common%20Principles.pdf> (accessed 28-02-2021)

ILO "Women and Men in the Informal Economy: A Statistical Picture" (2002) ILO <https://www.wiego.org/sites/default/files/publications/files/ILO-Women-Men-Informal-2002.pdf> (accessed 22-12-2018)

ILO "Rules of the Game: A Brief Introduction to International Labour Standards" (2005) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_084165.pdf> (accessed 3-1-2020)

ILO "Strategies and Practice for Labour Inspection" (2006) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_297_esp_3_en.pdf> *ILO* (accessed 26-1-2019)

ILO "Global Wage Report 2008/09 Minimum Wages and Collective Bargaining: Towards Policy Coherence" (2008) *ILO <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_100786.pdf>* (accessed 4-2-2016)

ILO “Figures and Statistics on Labour Inspection Systems” (2010) *ILO* <https://www.ilo.org/labadmin/info/WCMS_141079/lang--en/index.htm> (accessed 04-03-2017)

ILO “Inequality, Income Shares and Poverty The Practical Meaning of Gini Coefficients” (2010) *ILO* <http://ilo.org/travail/whatwedo/publications/WCMS_145695/lang--en/index.htm> (accessed 4-12-2018)

ILO “Global Wage Report 2014/15: Wage and income inequality” (2015) *ILO* <http://ilo.org/global/publications/books/WCMS_324678/lang--en/index.htm> (accessed 22-7-2018)

ILO “Towards a South African National Minimum Wage” (2015) *ILO* <http://lrs.org.za/media/2018/2/f06ac094-fd58-4e9c-9bdb-7440a774d60c-1518619496429.pdf> (accessed 7-7-2017)

ILO “Global Wage Report 2016/17: Wage Inequality in the Workplace” (2016) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_537846.pdf> (accessed 13-7-2018)

ILO “Minimum Wage Policy Guide” (2016) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_508566.pdf> (accessed 21-12-2018)

ILO “ILO Approach to Strategic Compliance Planning for Labour Inspectorates” (2017) *ILO* <http://ilo.org/wcmsp5/groups/public/--ed_dialogue/---lab_admin/documents/publication/wcms_606471.pdf> (accessed 9-7-2019)

ILO “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” (2017) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (accessed 21-12-2018)

ILO “World Employment Social Outlook: Trends 2018” (2018) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_615594.pdf> (accessed 18-3-2019)

ILO "Ratifications by country" (2019) *ILO* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::> (accessed 12-2-2020)

ILO "Rules of the Game: An Introduction to the Standards-related Work of the International Labour Organisation" (2019) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf> (accessed 30-12-2019)

ILO "Brazil" (2020) *ILO* <https://www.ilo.org/labadmin/info/WCMS_114935/lang--en/index.htm> (accessed 17-4-2010)

ILO "ILO Monitor: COVID-19 and the World of Work. Third edition: Updated estimates and analysis" (2020) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_743146.pdf> (accessed 15-10-2020)

ILO "ILOSTAT Explorer" (2020) ILO <https://www.ilo.org/shinyapps/bulkexplorer46/?lang=en&segment=indicator&id=LAI_INSP_SEX_NB_A> (accessed 18-4-2020)

ILO "South Africa" (2020) *ILO* <http://www.ilo.org/labadmin/info/WCMS_150917> (accessed 12-05-2020)

ILO "Working conditions" (2021) *ILO* <http://ilo.org/global/topics/working-conditions/lang--en/index.htm> (accessed 23-02-2021)

ILO, IMF, OECD & World Bank Group "Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes" (2015) *OECD* <https://www.oecd.org/g20/topics/employment-and-social-policy/Income-inequality-labour-income-share.pdf> (accessed 4-12-2019)

Isaacs GA "A National Minimum Wage for South Africa" (2016) *NMW-RI* <http://nationalminimumwage.co.za/wp-content/uploads/2016/07/NMW-RI-Research-Summary-Web-Final.pdf> (accessed 23-2-2021)

Jordaan N "Minimum Wage Act has Led to Huge Rise in Labour Disputes, Says CCMA" (2020) *Timeslive* <https://www.timeslive.co.za/news/SouthAfrica/2020-03-03-

minimum-wage-act-has-led-to-huge-rise-in-labour-disputes-says-ccma/> (accessed 31-3-2020)

Lambrechts J, Erin M & Rule N "Does Free Trade Result in Higher GDP Per Capita: An International Perspective" (2012) 5 *DPIBE* 12 <https://ojs.deakin.edu.au/index.php/dpibe/article/view/53/60> (accessed 7-7-2019)

Landau I, Cooney S, Hardy T & Howe J "Trade Unions and the Enforcement of Minimum Employment Standards in Australia" (2014) *Labour Law Research Network* <http://www.labourlawresearch.net/sites/default/files/papers/Union%20Enforcement%20Report%20%28FINAL%2019%20Feb%202014%29.pdf> (accessed 23-2-2021)

Legalbrief "Labour Department Aims to Phase Out Sectoral Determinations" (2020) *Legalbrief* <http://legalbrief.co.za/diary/legalbrief-workplace/story/sectoral-determination-will-be-phased-out-dol/pdf/> (accessed 19-12-2020)

Litvak D "Felix Adler: The Maximum Wage Prophet" (2010) *SSRN* <https://ssrn.com/abstract=1583248> (accessed 1-3-2019)

Living Wage Foundation "What is the Real Living Wage?" (2020) *Living Wage Foundation* <https://www.livingwage.org.uk/what-real-living-wage> (accessed 10-9-2020)

Low Pay Commission "The National Minimum Wage in 2020: Uprating Report April 2020" (2020) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877174/LPC_2020_uprating_report.pdf> (accessed 8-5-2020)

Manning A "The UK's National Minimum Wage" (2009) *CentrePiece* <https://cep.lse.ac.uk/pubs/download/cp290.pdf> (accessed 23-2-2021)

Margolis DN "Introducing a Statutory Minimum Wage in Middle and Low Income Countries" (2014) 52 *IZA World of Labor* 1 <https://wol.iza.org/articles/introducing-a-statutory-minimum-wage-in-middle-and-low-income-countries/long> (accessed 15-10-2016)

Marinakis A “The Role of ILO in the Development of Minimum Wages” (2009) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_180793.pdf> (accessed 23-2-2021)

Metcalf D “United Kingdom Labour Market Enforcement Strategy 2018/19” (2018) *Government UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf> (accessed 18-4-2020)

Mitchell DJ “South Africa’s Land Seizure is Classic Populism” (2018) *FEE* <*https://fee.org/articles/south-africa-s-land-seizure-is-classic-populism/*> (accessed 2-4-2018)

Mudronova J “The International Experience of the Relationship Between Inequality, Poverty and Minimum Wages” (2016) 3 *NMW-RI Working Paper Series* 1 <http://www.nationalminimumwage.co.za/wp-content/uploads/2016/08/NMW-RI-Inequality-and-Poverty-Final.pdf> (accessed 23-2-2021)

Murahwa B “Monitoring and Enforcement: Strategies to Ensure an Effective National Minimum Wage in South Africa” (2016) 5 *NMW-RI Working Paper Series* <http://nationalminimumwage.co.za/wp-content/uploads/2016/11/NMW-RI-Monitoring-and-Enforcement-Brian-Murahwa.pdf> (accessed 20-1-2019)

National Minimum Wage Panel *A National Minimum Wage for South Africa: Recommendations on Policy and Implementation: National Minimum Wage Panel Report to the Deputy President* (2016) <*http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF*> (accessed 3-8-2017)

National Minimum Wage Research Initiative “National Minimum Wage in South Africa: The Basics: Fact sheet 1” (2015) *NMW-RI* <http://nationalminimumwage.co.za/wp-content/uploads/2015/04/NMW-Fact-Sheet-1.pdf> (accessed 23-2-2021)

National Treasury *Medium Term Budget Policy Statement 2019* (2019) <http://www.treasury.gov.za/documents/mtbps/2019/mtbps/Prelims.pdf> (accessed 10-6-2020)

NEDLAC *Draft South Africa Decent Work Country Programme* (2010) <http://new.nedlac.org.za/wp-content/uploads/2014/10/decent_work_country_programme_sa.pdf> (accessed 1-1-2018)

News24 "The Great R1.2m Divide" *City Press* (25-8-2012) <http://news24.com/Archives/City-Press/The-great-R12m-divide-20150429> (accessed 1-9-2017)

OECD "Globalisation, Jobs and Wages" (2007) *OECD* <http://oecd.org/els/emp/globalisation-jobs-and-wages-2007.pdf> (accessed 27-9-2017)

OECD "Focus on Minimum Wages After the Crisis" (2015) *OECD* <http://www.oecd.org/social/Focus-on-Minimum-Wages-after-the-crisis-2015.pdf> (accessed 8-9-2016)

OECD "OECD Economic Surveys: South Africa 2020" (2020) *OECD* <https://www.oecd-ilibrary.org/sites/530e7ce0-en/index.html?itemId=/content/publication/530e7ce0-en> (accessed 27-9-2020)

OECD "Unemployment Rate" (2020) *OECD* <https://data.oecd.org/unemp/unemployment-rate.htm> (accessed 5-1-2020)

OECD.Stat "Minimum Relative to Average Wages of Full-Time Workers" (2020) <https://stats.oecd.org/Index.aspx?DataSetCode=MIN2AVE> (accessed 24-4-2020)

Pizzigati S "Why Greater Equality Strengthens Society" (2011) 293 *Nation* 11 <http://web.b.ebscohost.com.ez.sun.ac.za/ehost/pdfviewer/pdfviewer?vid=5&sid=b0f338b0-a048-4ad1-8199-7431e945f814%40pdc-v-sessmgr03> (accessed 3-11-2018)

Rethink Africa & South Africa Network on Inequality "Mind the Gap: Assessing the Possibilities of a National Statutory Minimum Wage in South Africa to Address

Inequality" (2014) *Oxfam* <https://www.oxfam.org.za/downloads/research/South-Africa-Mind-the-Gap_-Minimum-Wage.pdf> (accessed 2-8-2017)

RSA Department of Labour *2019/20 Annual Performance Plan: Department of Labour* (2019) <https://static.pmg.org.za/DOL_Annual_Performance_Plan_2019-2020.pdf> (accessed 23-5-2020)

RSA Department of Social Development *South African Integrated Programme of Action Addressing Violence Against Women and Children (2013-2018)* (2014) <https://www.saferspaces.org.za/uploads/files/Violence_Against_Women_and_Children-Low_Resolution.pdf> (accessed 7-8-2017)

RSA *Department of Labour Annual Report 2018/19* (2019) <https://www.gov.za/sites/default/files/gcis_document/201911/labour-annual-report201819.pdf> (accessed 8-6-2020)

RSA *National Strategic Plan on Gender-Based Violence & Femicide: Human Dignity and Healing, Safety, Freedom & Equality in our Lifetime* (2020) <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 17-12-2020)

SBP "National Minimum Wage: A Complicated Issue" (2014) *REBOSA* <http://www.rebosa.co.za/wp-content/uploads/2014/10/National-Minimum-Wage-Background-Paper.pdf> (accessed 1-6-2016)

Stats SA "Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011" (2014) *Stats SA* <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf> (accessed 15-7-2017)

Stats SA "Quarterly Labour Force Survey: Quarter 4: 2016" (2016) *Stats SA* <https://www.statssa.gov.za/publications/P0211/P02114thQuarter2016.pdf> (accessed 21-12-2018)

Stats SA "Quarterly Labour Force Survey: Quarter 3: 2020" (2020) *Stats SA* <*http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2020.pdf*> (Accessed 17-12-2020)

South African Revenue Service "Taxation in South Africa" (2020) *SARS* <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-Gen-G01%20-%20Taxation%20in%20South%20Africa.pdf> (accessed 6-9-2020)

Strauss I & Isaac G "Labour Compensation in the South African Economy: Assessing its Impact Through the Labour Share Using the Global Policy Model" (2016) 4 *NMW-RI Working Paper Series* <http://nationalminimumwage.co.za/wp-content/uploads/2016/08/NMW-RI-GPM-Model-Final.pdf> (accessed 8-5-2018)

Reynaud E "The International Labour Organization and the Living Wage: A Historical Perspective" (2017) 90 *Conditions of Work and Employment Series* 1 <https://ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_557250.pdf> (accessed 23-2-2021)

The World Bank Data "Income share held by the lowest 10%: South Africa" (2019) *The World Bank Data* <https://data.worldbank.org/indicator/SI.DST.FRST.10?locations=ZA&start=2007> (accessed 26-5-2019)

The World Bank Data "World Bank Open Data" (2019) *The World Bank Data* <https://data.worldbank.org/> (accessed 26-5-2019)

Tregenna F & Mfanafuthi T "Inequality, Unemployment and Poverty in South Africa" (2012) *TIPS* <http://tips.org.za/research-archive/inequality-and-economic-inclusion/second-economy-strategy-project/item/2597> (accessed 20-5-2018)

Rodríguez AF "A Study on Labour Inspectors' Careers" (2020) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_739165.pdf> (accessed 23-2-2021)

Schmitt J "Why Does the Minimum Wage Have no Discernible Effect on Employment?" (2013) *CEPR* <https://cepr.net/documents/publications/min-wage-2013-02.pdf> (accessed 23-2-2021)

Strauss I, Isaacs G, Rosenberg J & Passoni P "Rapid Country Assessment: South Africa: The Impacts From a COVID-19 Shock to South Africa's Economy and Labour

Market" (2020) *ILO* <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_754443.pdf> (accessed 23-2-2021)

UNDP "Covid-19 in South Africa: Socioeconomic Impact Assessment: United Nations in South Africa" (2020) *UNDP* <https://www.za.undp.org/content/south_africa/en/home/library/socio-economic-impact-of-covid-19-on-south-africa.html> (accessed 23-2-2021)

World Bank Data "Data From Database: World Development Indicators (2018) Last updated: 01/25/2018" (23-1-2018) *Personal email correspondence*

World Economic Forum "Strategies for the New Economy Skills as the Currency of the Labour Market" (2019) *World Economic Forum* <http://www3.weforum.org/docs/WEF_2019_Strategies_for_the_New_Economy_Skills.pdf> (accessed 11-10-2020)