

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

SEMINAR PHASE 2

HELD ON

31 MARCH 2014

PAGES

1 TO 95



© **REALTIME TRANSCRIPTIONS**

64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@pixie.co.za
Web Address: <http://mysite.mweb.co.za/residents/pak06278>



Seminar phase 2

1 [PROCEEDINGS ON 31 MARCH 2014]

2 [Track 1]

3 MR BUDLENDER SC:

Good afternoon and

4 welcome to this first seminar in the series of four which
5 are being hosted by the Marikana Commission. I'm Jeff
6 Budlender, I'm one of the evidence leaders and I had been
7 asked to say a few words to explain why these seminars are
8 being held, what their context is and so on. The
9 Commission has divided its work into two phases. It has
10 been busy up until now with phase 1 which is an examination
11 of the events of the 9th to the 16th of August 2012, which
12 is the week during which a number of people tragically were
13 killed and injured and up until now the focus of the work
14 of the Commission has been on those events on phase 1.
15 Phase 2 of the Commission's inquiry deals with the
16 underlying courses of the events of that week and it deals
17 with matters which are set out in the programmes which I
18 think everyone has seen. Those are of course very broad
19 topics.

20 The Commission is interested in those topics not
21 in an abstract sense but in the sense that they may be
22 causally related to the events of that week in August 2012,
23 and so they are not theoretical or hypothetical or all
24 encompassing inquiries into those topics, they're
25 interested in those topics insofar as they may be causally

Seminar phase 2

1 related to the tragic events which followed. The purpose
2 of organising a series of seminars is that the subject
3 matter of these seminars does not easily lend itself to
4 court style procedures, quasi judicial procedures of the
5 kind which have been dealt with so far in phase 1. A great
6 deal of information can be collected by means other than
7 the traditional method which is hearing witnesses and
8 having them to give evidence under oath and having them
9 cross-examined and so the Commission has in mind that there
10 will be three main methods by which it will collect
11 information for its phase 2 inquiry. There will be this
12 series of seminars, there will be submissions by parties or
13 interested persons who have been invited to make
14 submissions, to put up reports, documents, affidavits or
15 such other evidence as they think may be of assistance to
16 the Commission and finally the Commission will identify
17 matters on which it wishes to hear oral evidence which will
18 be subjected to cross-examining in the typical judicial
19 manner. So this is the first element of the information
20 gathering exercise.

21 The second, the examination of submissions is
22 already underway and in due course the third, the oral
23 evidence will take place. I think I've said enough for the
24 moment. It is important that we get on with the subject
25 matter which of course is a critical and foundational issue

Seminar phase 2

1 in the inquiry, or in the events which took place. We are
2 very grateful to Les KettleDas, the deputy DG of the
3 Department of Labour for being with us, I'm informed he is
4 retired. Well, goodness me, not old enough to have
5 retired. Les has very generously agreed to chair this
6 session and I hand over to him.

7 MR KETTLEDAS: Well, good afternoon to
8 everyone. Thank you very much, Jeff, for that explanation
9 around the seminar series. I would like to welcome all of
10 you present here today, in particular the chairperson of
11 the Marikana Commission of Inquiry, Judge Ian Farlam and I
12 see another member of the Commission in the corner there,
13 welcome to you, the other members of the Commission who are
14 present here today, also the parties to the Commission,
15 distinguished guests, ladies and gentlemen. We are here
16 today as Jeff had explained for the first seminar of the
17 Marikana Commission looking at the underlying causes and of
18 course he explained of the tragic incidents at the Lonmin
19 Mine in Marikana in North West province in August 2012.
20 Today's seminar is important not only as part of the search
21 for the truth and what happened at Marikana, but also
22 because labour unrest in that part of the country continues
23 even today with the platinum sector almost at a standstill
24 since the beginning of the year.

25 Our focus today is on bargaining arrangements in

Seminar phase 2

1 platinum and it is a topic that touches on some of the
2 debates that emerged immediately during the labour unrest
3 that engulfed the mining sector in 2012. As we would
4 recall in the aftermath of the tragic events at Marikana
5 there were many who offered their views on the events and
6 the factors that were there, were to explain what had
7 happened. These included in no particular order of
8 importance the migrant labour system which has remained
9 unchanged in a democratic South Africa, the Collective
10 Bargaining processes and institutions which some said,
11 failed, and I quote, "failed dismally to see the signs of
12 discontent and address the causes." And thirdly, the
13 failure of unions to adequately serve their members and the
14 failure by management to recognise minority unions as
15 bargaining partners and improve the relations with
16 employees at the mine and shaft levels. These were some of
17 the issues that people raised after that incident.

18 Now we have come a long way over the last 20
19 years. Collective Bargaining and regulating the labour
20 market, in particular saw a new labour regulatory framework
21 with its pillars as the Labour Relations Act of 1995, the
22 Basic Condition of Employment Act of 97, the Employment
23 Equity Act also of 97 and the Skills Development Act and
24 Skills Development Levies Act of 1999. The new government
25 inherited the Collective Bargaining framework, including

Seminar phase 2

1 Industrial Councils from the old Labour Relations Act. The
2 government chose to keep the nature of the Industrial
3 Council system, but in a modernised form, in the form of
4 Bargaining Councils as is set out in the Labour Relations
5 Act. It was argued that Collective Bargaining ought to be
6 strengthened to ensure a stable labour relations
7 environment which would lead to increased productivity and
8 skills, increased investment and in turn increased
9 employment.

10 The emphasis of the government then was also
11 voice regulation where worker and employer organisations
12 had an important role to shape the policies and rules that
13 regulate the workplace, as well as regulated flexibility
14 where the effort was made to take into account the
15 differences of the sectors, regions and sizes of
16 enterprises. So this is basically a brief overview of
17 where we are with the system of Collective Bargaining in
18 the country and the underlying regulatory framework that
19 governed Industrial Relations by the time the tragic events
20 at Marikana took place in 2012.

21 Now since Marikana many questions have been
22 raised about Industrial Relations and the Bargaining system
23 in mining and platinum in particular. So we have with us
24 today then people who will shed some light on pertinent
25 issues of importance to the work of the Marikana

Seminar phase 2

1 Commission. Firstly we have Ian Macun here on the right of
2 the Department of Labour who will look at the phenomenon of
3 workers bypassing unions and how to respond to that, and we
4 have here next to me Professor Sakhela Buhlungu, the dean
5 of the Humanities Faculty at the University of Cape Town,
6 who will then look at post apartheid trade union role and
7 weaknesses. We were going to have a third presentation
8 entitled "video presentation", Mr John Brand and the title
9 of the presentation was "violence and the rivalry in
10 Collective Bargaining". This is now going to be replaced
11 with a PowerPoint presentation by Ms Thantaswa
12 Lupuwana that will do that PowerPoint presentation after
13 the tea break that we will have at four o'clock this
14 afternoon.

15 So I will introduce the speakers before their
16 presentations, but just in conclusion it is my sincere wish
17 that our deliberations will help us understand many
18 important issues that have been raised as linked to the
19 tragic events at Marikana. Among the questions I hope we
20 can reflect on will include, are our bargaining system
21 sound and how can we ensure that they are regularly
22 assessed to ensure they remain or become responsive to new
23 labour market and social developments. How to ensure that
24 worker and employer organisations remain strong and
25 defective for the purposes for which they are intended and

Seminar phase 2

1 to give voice to workers and employers alike. Thirdly, how
2 to improve social dialogue and specifically dialogue among
3 the parties at the different levels, including at the
4 workplace level and lastly, how to prevent negative
5 developments such as violent conduct at our workplaces. So
6 it is my hope that today's seminar is a success and
7 contributes to the work of the Commission, thank you.

8 Now we will go immediately onto the first
9 presentation and that is the presentation by Mr Ian Macun,
10 currently he is director Collective Bargaining at the
11 Department of Labour. He holds a Masters in Social Science
12 from the University of Cape Town and has worked at research
13 units at UCT and here at Wits and has been a lecturer in
14 Sociology and Industrial Sociology at both these
15 universities. He joined the Department of Labour in 1998,
16 initially as a senior research to labour market information
17 and statistics and later as director of the Skills
18 Development Planning Unit. So we have Mr Macun, thank you.

19 MR MACUN: Thank you, Chair. I agree
20 with Jeff's comment, definitely premature at time and had
21 this been a year ago it would have been Mr Kettledas giving
22 this talk and not me. I might have contributed some notes
23 to it, but that's it, so it is definitely a premature step.
24 Judge Farlam, other members of the Commission, Colleagues,
25 let me also take this opportunity to thank the Marikana

Seminar phase 2

1 Commission for taking the initiative in opening up issues
2 for public debate that relate to the second phase of the
3 Commission's inquiry. Many of the issues that the
4 Commission will be considering in my view require very
5 broad discussion and consideration by the wider public and
6 in particular by the social partners in the Labour
7 Relations arena namely government organised business and
8 organised labour. So this is a very welcome opportunity
9 and I'm just really going to try and make a few comments in
10 the spirit of a seminar which is about opening up for
11 discussion and debate and make those comments around the
12 question, workers bypassing unions, how to respond, quite a
13 tricky question, an important one.

14 I think the starting point for me is certainly to
15 see the question in context and that is the context in
16 South Africa as the chair alluded to, where the majority of
17 workers in the country remain in the lower income groups,
18 reside in residential areas where conditions and services
19 are sub optimal, that certainly applies to the context for
20 this Commission's work in Marikana and many are still
21 subject to treatment in the workplace that gives rise to
22 dissatisfaction and creates a basis on a daily basis for
23 spontaneous worker action. There certainly have been major
24 improvements and changes post 94 in this period, but I
25 think the critical question posed by the Marikana incident

Seminar phase 2

1 two years ago in 2012 is whether change in the South
2 African workplace has really gone far enough. So I think
3 the context is important but I'm not going to direct
4 further comments, I'll leave that for debate to contextual
5 issues to do with wage systems, the migrant labour system,
6 housing conditions.

7 I would rather want to try and address in a more
8 practical way the question, but let me start by suggesting
9 that the question of workers bypassing unions really begs a
10 prior question in my mind and that is, why would workers do
11 that? Why would workers want to bypass trade unions and I
12 can think of a few situations where this might occur. The
13 first situation is where workers bypass unions, where
14 unions are not able to represent them in the workplace and
15 in workplace processors and in Collective Bargaining, and
16 there are very good practical reasons why that might be the
17 case. A trade union may not have enough members to
18 negotiate access to a workplace and to organisational
19 rights in the workplace and that's in terms of our legal
20 framework of the Labour Relations Act. And in such a
21 situation workers who are members of minority unions may
22 engage in industrial action independently of the union, so
23 to speak, and that has happened. There are cases of that,
24 so the degree of unionisation is obviously an important
25 issue, are we dealing with when we talk to the question

Seminar phase 2

1 workers bypassing unions, are we dealing with in all cases
2 unionised workers, minority groups within the workplace or
3 non unionised workers, and what rights do unions have in
4 certain situations, and indeed is there contestation around
5 their rights, around those rights of access, around
6 organisational rights, and I think that also is an
7 important factor in the events that unfolded in Lonmin in
8 2012.

9 Secondly, workers may choose to embark on strike,
10 on a strike or a stoppage spontaneously over some incidents
11 that happens in the workplace where there is no time for
12 union organisers to consult members, to channel grievances
13 or disputes in a proper way, and it seems to me that such
14 action, spontaneous action in many cases by union members
15 was more common in the pre 94 period where non-racial
16 independent unions were still in the process of becoming
17 established and where conflict over day to day conditions
18 was far more frequent than it is today. An example that
19 comes to mind, when I was in the Western Cape is that of
20 workers who confronted management over hostel conditions in
21 a building products plant in 1984. The workers in that
22 particular plant were housed in a hostel on the premises,
23 they had longstanding grievances and dissatisfaction over
24 conditions in the hostels and those related to frequent
25 raids by administration board officials who were in search

Seminar phase 2

1 of unauthorised visitors, particularly wives and children
2 of hostel residents, the hostel manager was autocratic and
3 dictatorial in the way that he controlled the hostel, and
4 the facilities and the quality of the food in particular
5 was completely unacceptable. And this dissatisfaction that
6 the workers had in this plant had been communicated to the
7 management on a number of occasions, including by the union
8 which was then still in the process of negotiating a
9 recognition agreement and nothing was done over a period of
10 a few years until the workers decided to take the matter
11 into their own hands, embarked on a stoppage and demanded
12 the dismissal of the hostel manager and it got quite tricky
13 and it ended up with the hostel manager fleeing over the
14 walls of the hostel, leaving his shoes behind, but he got
15 away in one piece, intact.

16 Now I mean that's a good example for me in the
17 pre 94 situation which, I think is less frequent today, but
18 where workers who are union members, their issues over
19 access by that union, but they decide to take action on
20 particular issues. I think the final area or potential
21 area where workers might bypass unions is when they become
22 disaffected with their union and with union organisers, and
23 there was clearly an element of this in the strike at
24 Lonmin that led to the shooting in August. Now I'm sure my
25 colleague, Sakhela is more of an expert than I am in this

Seminar phase 2

1 area but dissatisfaction with the trade union and its
2 services can have a number of causes and while the reasons
3 may vary, I think a common threat we increasingly see is
4 the problems that face trade unionism in South Africa today
5 in many of our larger trade unions and these are problems
6 that are very real problems to do with social distance
7 between union organisers and members, weaknesses in union
8 organisation and indeed rivalry between trade unions. And
9 sometimes these problems take on a particular character in
10 certain sectors such as mining and I think one should be
11 careful not to over generalise about these problems and
12 their commonality, particularly in how they manifest in
13 different sectors, because difference is important,
14 organisational specifics and dynamics are important.

15 In the mining situation the sheer size and this
16 has been mentioned in other analyses of the Marikana with
17 the Lonmin events. The sheer size of the workplace in
18 mining complicates communication between union
19 representatives and members and often feeds in, in some
20 ways to dissatisfaction with the union. So I think there
21 are different reasons why workers may choose to bypass
22 their trade unions, but to do so and to demand to negotiate
23 with management directly on substantive issues like wages,
24 I think is less common than workers bypassing unions to
25 address specific grievances or try to pressure management

Seminar phase 2

1 to respond to certain situations, for example the health
2 hazard in the workplace. There are quite a few examples
3 one can think of where workers have downed tools because of
4 perceived health hazards and again that applies in a mining
5 situation. I think we probably need more research in this
6 area.

7 One of the sub questions that the Commission
8 posed is how prevalent is this of workers bypassing trade
9 unions. Well, I would say that it was a lot more prevalent
10 pre 94. I would like to think it is a lot less prevalent
11 today, but to be more specific than that is quite
12 difficult. Certainly what one can say is that there has
13 been an increase over the last two to three years in
14 unprocedural strike action but that's not necessarily the
15 same as workers bypassing their trade unions. In some
16 cases it is because workers will have grievances, they're
17 not dealt with through proper channels and unprocedural
18 strikers embarked on, but one cannot, I think easily
19 generalise about the increase in unprocedural action and
20 say therefore this has become more prevalent. So I'm going
21 to, I'm afraid duck the question of prevalence. But I
22 think it does seem to me that where Collective Bargaining
23 is concerned, in a general sense workers are in a weaker
24 position if they do try and negotiate directly with
25 management rather than through trade unions, through

Seminar phase 2

1 representative processes and there is certainly cases
2 historically where workers who were not well organised or
3 not well represented in Collective Bargaining, try and
4 engage management directly end up becoming divided and end
5 up in a weaker position in the Bargaining process and
6 therefore do not achieve very much.

7 So it does seem to me in a general sense that
8 workers bypassing unions and trying to negotiate directly
9 with management as they did at Lonmin, is actually not a
10 common or a frequent occurrence and there are all sorts of
11 reasons why that's the case. So how should one then
12 respond? The second part of the question to workers
13 bypassing unions, well, let me start by suggesting how not
14 to respond. That's the easy part. It certainly does not
15 help in my view to respond by calling for legal
16 intervention or State intervention and there has been a
17 very worrying trend post 2012 to do exactly that, for the
18 State to step in and solve problems in the workplace.

19 I sense and I hope I'm right, that there is a
20 greater consensus but we'll hear from you on this. There
21 is a greater consensus today that the law does not offer
22 solutions to the issues that cause workers to bypass
23 unions, thinking of some of the scenarios that are sketched
24 in very few cases, in very few are there legal solutions to
25 those sorts of situations.

Seminar phase 2

1 Equally the State can do very little about what
2 are essentially complex workplace and/or trade union
3 organisational issues, community issues, issues relating to
4 migrant labour, for example are also complex issues and the
5 State can certainly facilitate change but it takes time.
6 It is not a quick fix to workplace problems or conflict in
7 the workplace when workers may bypass their organisations.
8 Government certainly has been involved and the chair could
9 share his experiences in this, in the post 2012 events at
10 Marikana and how we did get involved and continues to be
11 involved in disputing the mining sector. There is actually
12 little that we can do beyond facilitating talks, framework
13 agreements, etcetera, but let me say that, and I'm saying
14 this in the expectation that we might still have a bus of
15 AMCU members, a bus load joining us. I was informed there
16 was that opportunity but let me say that we maintain a
17 neutral position in relation to inter union rivalry and
18 union disputes. That's been contested by a number of
19 parties but let me very clear, that our job in the
20 Department of Labour is not to deregister trade unions,
21 except where there are very good grounds for doing so
22 relating to noncompliance with aspects of the Labour
23 Relations Act.

24 There have been rumblings around this issue or
25 relating to the question, how should we respond about the

Seminar phase 2

1 process of registering trade unions and there has been
2 talk, particularly recently about our processes in the
3 department and indeed in the law being faulty. We're aware
4 of these views that the process of registration, so the
5 argument goes, it is too easy, the department registers
6 trade unions without proper scrutiny over the genuineness
7 of the organisation or over its membership. And while this
8 might be a separate debate we would certainly want to
9 defend the current framework for registration and how we
10 apply it, and I think it is important to remember also the
11 context in which the LRA was negotiated in the early 90s.
12 The previous dispensation was one in which there were
13 excessive powers for the Registrar of Labour Relations and
14 the executive to interfere directly in the internal
15 regulation of trade unions, legal regulation of union
16 finances, restriction on political activities of unions and
17 in part that's where we're coming from and why we have the
18 dispensation that we have today.

19 It is also important to bear in mind that South
20 Africa is a signatory to the International Labour
21 Organisations Convention on Freedom of Association and
22 protection of the right to organise and that convention
23 very explicitly requires that public authorities do not
24 interfere in trade union affairs. So there is a strong
25 rationale for the current legal framework for a limited

Seminar phase 2

1 role for the State in the affairs of trade unions and
2 indeed a limited role in workplace relations between
3 management and trade unions. What responses could be
4 appropriate? Well, to kick off the discussion I want to
5 suggest three areas and to some extent these go to
6 management, labour and government.

7 The first is in relation to process of
8 communication in the workplace. This is an old story, but
9 I think it is one that's worth revisiting in the wake of
10 the Marikana incidents. Processes of communication between
11 workers and their representatives, between union
12 representatives and management, between workers and
13 management need to be in place and should function well at
14 all times. It is absolutely critical, irrespective of
15 whether it is an unorganised group of workers that's
16 approaching management with certain demands, channels of
17 communication need to be put in place and it is certainly
18 not impossible to do so. I think in the events at Lonmin
19 there were committee structures, there were leadership
20 elements, there were union members, there were non union
21 members and there certainly was procedures and channels of
22 communication that perhaps could have been used a bit
23 better than they were at the time, but communication needs
24 to function well at all times.

25 Now does that mean that we should be revisiting

Seminar phase 2

1 workplace committee structures? That's another area that
2 might require its own debate, but it will probably come
3 down to, in my view, the particular circumstances in a
4 workplace. In the Labour Relations Act we have an option,
5 it is called the workplace forums. It has clearly not
6 worked well, this is a provision that the act makes for
7 elected forums in the workplace with a substantial role in
8 consultation and joint decision making. It was to some
9 extent an import from West Germany and it has not worked.
10 The history of workplace committees and here I'm thinking
11 of liaison committees, work's committees, have a very
12 controversial history and often that's because they were
13 used as an alternative to union structures making this, I
14 think very contested areas. But there were and there
15 probably still are committees in operation in the mining
16 sector and some other sectors that can play an important
17 role in my view in establishing lines of communication
18 where the workplace itself, its size and its complexity
19 might or union weaknesses might make established channels
20 difficult.

21 So in the sense of supplementing, not bypassing
22 or being an alternate but supplementing, I think there may
23 be a role for considering committee systems, but clearly
24 where workers do bypass unions to try and engage management
25 the first response should be to establish communication

Seminar phase 2

1 with legitimate spokespersons of workers and the
2 appropriate representatives of management and that includes
3 obviously engaging with recognised trade unions.

4 The second area, I'm going to just touch on it
5 and that relates to trade union renewal which is a more
6 tricky area. The Marikana incident certainly highlighted
7 how genuine capable trade union organisation is in the
8 public interest and having said that, I think it is, in my
9 view it is up to the trade union movement to take the lead
10 in this regard and to take forward initiatives that do
11 exist to strengthen trade union organisation, to accelerate
12 the process of regeneration. An example that comes to mind
13 is the COSATU September Commission of a number of years
14 ago, a very wide ranging investigation initiated by COSATU
15 into its own functioning in many different elements. It
16 never really received the attention that it deserved, so
17 perhaps it is time, Chair, for an October Commission,
18 preferably one that can jointly be initiated by all the
19 country's major trade union federations. I think we have a
20 public interest in that sort of process. Government can
21 certainly do more to facilitate the capacity in trade
22 unions for improved compliance. We're trying, we have our
23 own limitations but perhaps acknowledge it is an important
24 area.

25 Thirdly and lastly is the issue of

Seminar phase 2

1 majoritarianism which is the model in the Labour Relations
2 Act for want of a better term and time to explain it, the
3 winner takes all model where unions may negotiate certain
4 thresholds of access by other trade unions and that has
5 been a particularly contentious and debated issue, and it
6 is a debate that's required in the work of Marikana, but I
7 think this does need to be reconsidered and reviewed. Not
8 necessarily in the view of the department to change the
9 model in the legal framework, but rather to examine
10 unintended consequences that may occur in the workplace.
11 So we are engaging from our side in a process at Nedlac,
12 through Nedlac in discussing, sharing views on how the
13 majoritarian principle operates, how it operates in
14 particular to, in accessing organisational rights, whether
15 it might have unintended consequences, *etcetera*. So those
16 are three areas that I would suggest, Chair, where
17 responses could be appropriate.

18 Finally just in conclusion, I think we need
19 another forum like this at some time in the future to
20 debate the report of the Farlam Commission once it becomes
21 publically available and that will be, I think a critically
22 important response as well, thank you.

23 MR KETTLEDAS: Thank you very much, Ian.
24 I think we're running a little bit but the professor here
25 will make some adjustment in his presentation. Are there

Seminar phase 2

1 any burning issue of clarification, not debate, not
2 comments, not discussion at this point in time? I think
3 Ian was quite clear in what he was trying to convey,
4 everybody agrees. Alright, can we just then, - let's go on
5 to the next presentation by Professor Sakhela Buhlungu. As
6 we stated earlier he is currently the dean of the Faculty
7 of Humanities at the University of Cape Town. Before that
8 he was teaching Sociology at the University of Pretoria.
9 He is accustomed to the slogan of Pretoria University which
10 says "Tuks of niks".

11 Secondly he was, before that he was also teaching
12 Sociology at the University of Johannesburg and similarly
13 also at the University of Wits. While at Wits he was also
14 a member of SWOP and at some stage he acted as deputy
15 director and also as director for brief periods. In the
16 1980s and 90s, like some of us, he was in the union
17 movement in the Paper, wood and Allied Workers Union and
18 lastly he has also done extensive research on trade unions
19 and that is why this topic today is an appropriate one for
20 him to say something about. Let's welcome, Professor
21 Sakhela Buhlungu.

22 PROF BUHLUNGU: Thank you very much for
23 the invitation to address such an important topic. While
24 they're trying to fix the connection I have a short
25 presentation I want to make, which will help me condense my

Seminar phase 2

1 thoughts for here. I just want to start off by saying that
2 the subject of trade unions, to an extent trade union
3 strengths and weaknesses is a topic that I've done research
4 on sometimes by myself, at other times with some
5 colleagues, some of whom I can see in the room here, but
6 I'm responsible for what I'm going to say. It has been a
7 research on unions in general but to some extent unions in
8 the mining sector, so I'll kind of move back and forth and
9 draw experiences from all. The one respect in which I will
10 disappoint you is, I will not discuss a specific union,
11 very deliberately so. I will not discuss, because I think
12 the lessons are generic, they can be taken across sectors,
13 so they can be generalised and I'll be able to tell you
14 where they cannot be.

15 Let me start then by talking about, the unions
16 that we see today have been or rather the core of the union
17 movement today, the black unions, over the last years have
18 been extremely successful. That's very, very successful in
19 mobilising support, in mobilising worker, the organisation,
20 but there is a paradox in that strength and success because
21 it is success that led to some of the problems that we see.
22 So one could safely say that unions have, some of these
23 unions became victims of their own successes in many
24 respects and I'll elaborate as I go. So what is this
25 paradox then? It is a paradox where these unions and I'll

Seminar phase 2

1 tell you where exactly, I'll give you a kind of a brief
2 sketch of the landscape of the unions, but the unions I'm
3 talking about they're extremely an influentially society,
4 still to this day if you like and their presence was felt
5 way beyond the workplace in industry or at sector level,
6 industry level nationally, in parliament, at Nedlac and
7 everywhere, but also these unions have actually promoted
8 empowerment to an extent that is almost unparalleled in
9 this country. If you go to any small municipality the
10 likelihood is that the bulk of the councillors, sometimes
11 the mayor are actually people who have come through the
12 ranks of the trade union movement. Especially in the
13 mining areas, we will talk about that just now, but also in
14 terms of building solidarity in giving a sense of direction
15 to the struggle for democracy for justice and in terms of
16 crystallising the demands and the desires of the movement.

17 So this is the movement that we have that
18 inserted itself very successfully in the early 1990s,
19 during the transitional moment. So that's one is talking
20 about. The sending of the 20 leaders to parliament was
21 symbolic as well as real, J Naidoo and all of them, the
22 first 20 that were sent to parliament. It was actually an
23 acknowledgement of that strength and that, but the unions
24 also became a victim of their own because of the size, the
25 massive expansion of some of the unions. I can recall back

Seminar phase 2

1 in 1991 at the COSATU Congress a union such as NEHAWU was
2 not more, they had a membership of not more than 20,000,
3 not more than 20,000 at the time. Today NEHAWU is in the
4 region of 220,000, just one, I'm just giving one
5 illustration here. So this massive expansion over this
6 period brought about its own challenges and difficulties
7 for unions and I talk about all of them, the mining, the
8 manufacturing and all of them.

9 So that's that and as those processes of
10 expansion kind of materialised, over time it became just
11 objectively difficult to service every workplace, to have a
12 general meeting with every member or in every workplace and
13 to keep them abreast of developments and so the thing that
14 so many people fashionably today talk about as social
15 distance, it is something that's been there, that's been
16 coming all the way, it something that's coming over the
17 last 20 or so years. The second thing is
18 institutionalisation, unions getting inserted and rightly
19 so, institutions of Collective Bargaining, institutions of
20 negotiations, Nedlac and so on and so forth and Centralised
21 Bargaining for example, such that the decision making was
22 removed from the base and happened at a national level.
23 And of course at another level, and I'll talk about this
24 later, the individualism that was engendered. You know all
25 of a sudden if you're getting a promotion you no longer had

Seminar phase 2

1 to go to the union and say, Comrades, I'm getting
2 promotion, you just took the promotion because if you
3 didn't the next guy was going to take the promotion.

4 So people started thinking very much in
5 individual terms and foregrounding that and I'm going to
6 come back to those issues, because that's part of the kind
7 of the landscape one is talking about, but let's look at
8 the landscape in terms of unions. Very often we talk about
9 unions whereas we're talking about one current in the trade
10 union movement and I'm just going to paint a very kind of
11 rough sketch for the benefit of this discussion and present
12 a table such as that one. I hope this thing can point,
13 yes, alright. Okay, I'll take you down this way and that
14 way. What I have done here is to categorise unions into
15 three and category 1 being the largest, I'll talk about
16 that. Category 2 being the kind of medium, intermediate
17 kind of, - both in size and in terms of influence and
18 impact and category 3 being the very small unions, some of
19 whom the Department of Labour from time to time raids and
20 kind of shut down or deregisters because they're too small,
21 they don't meet the requirements, they don't submit their
22 books, very fragile, very weak.

23 Now category 1 basically are unions that are
24 large, that have very kind of large, very good resource
25 basis, huge influence in society and at industry level,

Seminar phase 2

1 often affiliated industrial in terms of coverage,
2 geographically and nationally, covering nationally and in
3 terms of collective action very militant. Now, and
4 virtually all these unions are in COSATU. Let me put it
5 crudely like that. So category 2 are unions that are
6 medium size and most of these are to be found either in
7 FEDUSA or in NAPTU, - a some few independent and then of
8 course these ones are formed by basically entrepreneurs all
9 over the place, you know people, a guy gets dismissed by a
10 union, they decide to set up, a guy sees the money, the
11 opportunity to make money and they set up the thing.

12 What we're talking about and all the stuff that
13 we're talking about leading up to the events in mining, is
14 not about this and we're not talking about this. The issue
15 is here, the focus is here and some people will say, but
16 what about AMCU? AMCU comes from here, so the trouble is
17 actually among the successful unions, the most successful
18 of the lot, not from the kind of least successful, the
19 unsuccessful, but from the most successful. All the
20 ructions that we've seen, all the kind of the struggles and
21 the tensions are within this kind of broad, the house and
22 in many ways it is the house of COSATU that is in trouble
23 here. If you want to kind of, in shorthand, it is the
24 house of COSATU that is in trouble. Okay, let me then go
25 and show what one is talking about, but before we do this,

Seminar phase 2

1 let's just, just to say very briefly how these unions, the
2 impact and role that they've played up till now so that we
3 can see how that role has in part disintegrated over time.

4 Unions have been very good at resisting economic
5 exploitation of their members and in particular in the area
6 of wages and conditions and they've done a descent job over
7 time. They've done a very good job in terms of raising
8 wages and of course improving conditions, avoiding and
9 fighting dismissals, arbitrary dismissals of workers,
10 taking up grievances, taking up health and safety issues
11 and so on and so forth. So that's one dimension of union
12 struggle and I'm going to come back to this because in my
13 view this is where the trouble has occurred. This is where
14 the trouble has occurred and this is where some of the
15 problems have arisen. The second dimension is political
16 representation and again in the last 20 years or so we've
17 seen kind of very, very effective, if you like, effective
18 political representation of worker issues by COSATU in
19 particular and they've done a good job, either by
20 themselves or through the alliance that they have with the
21 ruling party, the ANC and they've done something. There
22 are problems there too but I won't go into them today. The
23 third of course is promoting economic and development and
24 reconstruction, just as a general one.

25 Okay, let me move and I'm going to come back,

Seminar phase 2

1 just to say I'm going to come back to that as I go down the
2 points now. Let's look at the successes. The one success
3 and again here I want to take you to the mining industry in
4 particular, the mining industry for years and years, for
5 decades the mining worker has been regarded with the
6 greatest contempt of the working class, even by fellow
7 workers in other industries. It is the kind of work that
8 very few people wanted to do, anyone who was seen, where I
9 come from which was a feeder kind of region for migrant
10 labour, they were called AMA-JOIN join. Now AMA-JOIN are
11 people who join, in this case joining means taking up the
12 contract. If you were AMA-JOIN and growing up as kids we
13 had two choices in those days, either you go and join when
14 you get to 16, 17, or you keep your head down and do
15 school. So those were the options and of course if you
16 joined then that became your kind of, your career path and
17 society never had huge respect for mineworkers in
18 particular and unions did a great deal to restore that
19 dignity, to restore that dignity.

20 I don't want to bore you with cases and so on of
21 people who have risen from the ranks and become respected
22 leaders of society today, from the ranks of the despised
23 mineworkers and other sectors for that matter. Vast
24 improvement to wages and conditions and across sectors here
25 we've seen improvements that much we know. Thousands of

Seminar phase 2

1 leaders again, that's one of the areas I've kind of
2 focussed on in my research, kind of tracking and talking to
3 people who were former leaders and so on, they're
4 everywhere. Every election you rest assured, there are
5 going to be kind of another bunch of them going, there is a
6 bunch of them on the election list time around too, but it
7 gave workers a political voice. At this time it is not
8 seen as something odd for someone to say, you want pro poor
9 policies, you want pro working class policies, it is
10 because that has been inserted into the national agenda and
11 the national discourse that it is not a shame for a party
12 to say they are pro poor.

13 In fact most parties want to be seen to be giving
14 voice to some of the issues that workers have, but very
15 importantly also, they have become a platform for raising
16 issues on economic development and reconstruction,
17 including the RDP. I will not get to that now, but let me
18 just say then, how did this become fragile and start
19 breaking down? Let's look before Marikana and I'm going
20 to, now in this case talk about mining in particular. In
21 mining such was the situation that the bulk of the
22 workforce, including the bottom and the middle was
23 represented by one single large union, the National Union
24 of Mineworkers and a very powerful union that had risen
25 again, you know from very kind of difficult conditions of

Seminar phase 2

1 mobilisation, but by the time, just before Marikana the NUM
2 had a virtual monopoly of that segment of the workforce and
3 had a virtual monopoly and which ordinarily is not a
4 problem but once the union does not function optimally then
5 it becomes a problem for workers because they have nowhere
6 to go. And this might tie in with some of the issues that
7 Ian was raising here, that when workers feel that they have
8 no other option then it becomes a problem, some of them
9 want to bypass the union.

10 Just to illustrate by one small but very
11 significant thing we discovered when we did research on the
12 mines, during the 90s we did several studies, we found a
13 large number of workers joining legal insurance, Legal Wise
14 and Scorpion in particular on the mines and we asked
15 workers, why, you got a very powerful union here, a very
16 strong and well resourced, they said, look, just in case
17 the NUM does not deliver, just in case, so think about it.
18 There is always that "just in case" thing for workers and
19 that for many workers was a problem. That was a problem
20 and in some of the interviews that we did, workers often
21 mistook our position as researchers, as if we were advice
22 workers or something, so they would come to us and with a
23 whole list, a shopping list of complaints. People would
24 undress for us to see the wounds that they carry in their
25 bodies and that the union is not doing anything about it,

Seminar phase 2

1 those kinds of things, but the other thing that we also
2 over time, again these are developments over time, is that
3 ideally, ideally you want relations between management and
4 unions to be cordial, to be cordial and good, but I think
5 there are times, especially in the environment of South
6 Africa where there has always historically been a distrust
7 or mistrust between management and workers.

8 Once a union is perceived to be too close
9 management that becomes a source of problems, that becomes
10 a huge problem and I can say from my experience and the
11 research that I've participated in, there have been
12 problems like that where shop stewards developed
13 relationships which were rather too cosy for comfort with
14 management, while workers' issues were not receiving the
15 attention that workers expected. The question of upward
16 mobility is a huge issue here we should take into account.
17 If this was a South Africa some other time maybe things
18 would have panned out differently, but in 1994 we opened
19 the flood gates for mobility, for people to improve
20 themselves, to take on new jobs and so on and so forth and
21 in the unions across the board, this is a phenomenon that's
22 happening every day. The guy who is a good shop steward
23 the following receives a letter from management, we can
24 offer you a job in personnel, we can offer you a job in HR,
25 we can make you a supervisor and so on.

Seminar phase 2

1 That becomes, that's a big change because
2 materially it means a huge improvement, but just to say
3 something very contentious in the mining industry which
4 maybe in the work of the commission on the deliberations
5 may have come up, and that it is tied up with the question
6 of mobility and that is the question of fulltime shop
7 stewards. Now a fulltime shop steward basically would be,
8 shop stewards and shop stewards are normally guys on the
9 line or underground who kind of run back and forth between
10 the line, doing the job and solving workers' problems, but
11 over the years unions, many unions have moved over to the
12 fulltime shop steward model, which means that guy is taken
13 completely from the line, from underground and then put in
14 an office and they do office work, they become office
15 workers. And one case which sticks to mind, which comes to
16 mind every time I talk about this is, one shop steward we
17 met in 2005 and that's a long time ago, almost ten years
18 ago, and he has just been elected as a fulltime in Lonmin
19 incidentally, at Lonmin, and the guy had been earning
20 R3,000 per month and then he was, he then elevated to
21 fulltime shop steward and his salary wage was bumped up to
22 12.5, R12,500, one shot like that.

23 And in the agreement, the agreement that had been
24 signed was such that if the guy is not re-elected he shall
25 not become worse off, so that guy is gone. He is gone, he

Seminar phase 2

1 is never going to be the same again. He is never going to
2 want to go and sit underground or work underground again
3 and that is a source of problem in mining, it is a huge
4 issue, it is a big issue. I'm sure people will talk about
5 it again and again, but combine that with the frustrated
6 rank and file, including the drillers, but generally across
7 the board frustrated rank and file who felt that their
8 issues are not getting attention, who saw their fellow
9 workers kind of moving up the ladder and this became the
10 very thing, and of course workers facing a squeeze. I
11 think this has come up as a big issue in the work of the
12 commission, I won't get into that, and of course, and this
13 is another thing which I know in these kind of settings
14 one, we have got to be polite and so on and so, but I think
15 one of the real problems in the kind of lead up to this is
16 this three-way kind of thing, again, rather too cosy,
17 sometimes at the expense of the ordinary workers. I will
18 not pre-empt my - and comment about my observation and my
19 tracking of what happened and who commented after Marikana,
20 but that was, this is an issue, this is a problem that you
21 find collusion sometimes across these three, union
22 officials, the employer and the State or State officials at
23 various levels, again we could come and discuss that.

24 Then you have splinters and the splinters emerge
25 from that, from the big house, not from outside, they come

Seminar phase 2

1 from inside. AMCU is a splinter from NUM. In transport
2 there was a splinter from SATAWU. In fact in mining AMCU
3 is not the first splinter, there have been so many
4 splinters before, Mouthpiece, the Five Madoda and so on and
5 so forth, all of it. It is kind of, it is because these
6 workers is feeling this pressure.

7 Okay, let me move now and talk about what are
8 these issues? I think in many cases, especially in mining
9 this question of a tier bargaining strategy that addresses
10 these issues, that anticipates some of the difficulties, I
11 think what's lacking in many respects, the restless
12 workforce I've spoken about, the poor service, just to say
13 the colleagues and I did studies of mining and so on and so
14 forth. I was involved in one of those and always the
15 Rustenburg region came worst in terms of service to
16 members. Members were most dissatisfied in the Rustenburg
17 region, including Lonmin and so on, and of course I want to
18 put this thing here and I think one of the flaws of our
19 system is this, that there is an assumption, there are two
20 assumptions. The one assumption is the so called voice
21 regulation. I think Ian has made reference to it, that
22 there will always be this voice, these unions that
23 necessarily represent the workers. Okay, the other
24 assumption is that you know workers will go on strike and
25 they will go on strike and they'll manage. The fact of the

Seminar phase 2

1 matter is that from day one workers do not manage. They
2 find it very hard to cope. We have this strange thing in
3 the union movement that nobody ever talks about, how do
4 these people buy bread on a daily basis? How do they get
5 taxi fair for the kid to go to school? How do they pay for
6 electricity? Now the effect of this and the reason I'm
7 putting it here is this, if you're going to make this
8 people out, take them out for a week, the levels of
9 desperation don't kind of develop like this, they shoot up
10 like that.

11 The levels of desperation kick in immediately
12 they go on strike, especially when they see someone kind of
13 going around the corner, trying to go to work. So this is
14 a serious issue and I think if South Africa does not move
15 in the direction of making it mandatory for all unions to
16 have a strike fund, we're going to see a repeat upon repeat
17 upon repeat of these instances, but I'm putting that as a
18 very firm provocation and a proposition here.

19 The question of these guys being out of touch
20 with shop stewards and organisers is something that is very
21 commonly, it is common knowledge if you kind of know the
22 union scene and if you've done research there. General
23 meetings, hardly ever held. In mining something that is
24 very important that I need to just put on the table here,
25 when the National Union of Mineworkers started they had so

Seminar phase 2

1 to speak a captive audience in a compound and the venue was
2 the stadium and the mode of convening everyone was the
3 intercom system. You just stand in front of one and you
4 call, everyone goes out and to the stadium, but the
5 compounds have been emptied, most of them are sitting half
6 occupied at the moment, workers have moved in informal
7 settlements, RDP housing, other forms of housing, so the
8 union no longer has that captive audience. In the meantime
9 these processes of keeping meetings going have fallen apart
10 completely.

11 So that's a very big issue and of course the Five
12 Madoda phenomenon and I suppose that's what Ian was talking
13 about, there is these committees and how they formed, they
14 become Five Madoda is still a mystery. We asked some of
15 the people there, why is it Five Madoda? They say, well,
16 it is because there are five men. Is it always five men?
17 They say, it doesn't matter, there may be seven but it is
18 Five Madoda, it is a Five Madoda thing, but the Five
19 Madoda, the significance of the Five Madoda here is that
20 the Five Madoda are people who are trusted, people who are
21 trusted better than the shop stewards, better than the
22 organisers because they live with the workers. They are
23 seen to have sold out. We should not underestimate the
24 notion of selling out in South Africa, it is still a big
25 thing. So those are some of the things. Of course at the

Seminar phase 2

1 unrest, in the period leading up to Marikana we saw
2 actually unrest in other companies in the area and of
3 course Marikana happened.

4 So what happened then is workers started
5 abandoning the union. When we visited on our research trip
6 in May 2012, before Marikana, workers at Impala had started
7 abandoning the NUM, workers had constituted themselves in
8 this semi underground, semi clandestine committees, the
9 Five Madoda, you know and they were kind of, they were
10 talking on the side. The interesting thing is that at that
11 point they were not AMCU, they were very adamant, we are
12 not AMCU, we are Five Madoda. We are mandated by the
13 workers. Yes, we're talking to AMCU, but we don't trust
14 AMCU. NUM, we do not want. ANC, we do not want. The
15 Communist Party, we do not like, so it is very interesting
16 that that starts to happen then when that trust begins to
17 happen. So the workers' committees demand directly to the
18 employer and of course the intervention by the State.

19 I need to make two points but firstly let me go
20 to this one. Very interesting because the focus of this
21 phenomenon of workers bypassing in mining has been on the
22 Rustenburg area, but just about the same time in 2012
23 workers in the Northern Cape at an iron, a huge iron ore
24 mine did exactly the same. They were in the midst of
25 discussing issues, a whole set of demands with management

Seminar phase 2

1 and suddenly when the Marikana settlement happened they
2 dropped that dispute. They just dropped it, they wrote a
3 three liner of a demand and in the middle of that sentence
4 was 12,500. They bypassed the union, they went straight to
5 the employer. So there is that again, when there is a
6 strong perception that the union has sold out. For me the
7 issue is not so much the massacre, many people call it the
8 massacre, the tragedy, it doesn't matter, okay, we're
9 dealing with it now and it will be with us for a long time,
10 but for me the one thing I find absolutely astounding about
11 Marikana is the intervention of the police in an Industrial
12 Relations matter.

13 The Labour Relations Act is very clear, there are
14 procedures and so on and so forth, including the recourse
15 for the employer to dismiss. The criminal system in the
16 country, again I don't want to, - but if anyone knew any
17 better in the 1970s when these unions took off, when they
18 were emerging, this was the most contentious issue
19 involving the police to put down strikes and it is
20 suddenly, you know we've gone full circle and we use the
21 police again to put down strikes. For me I still don't
22 understand it and of course it seems to me that, and this
23 is something that we've been in discussions with managers
24 that we meet, the expertise of, in Collective Bargaining of
25 negotiation and so on and so forth seems to have diminished

Seminar phase 2

1 not only among unions and workers, it seems to have
2 diminished among management too, just the way some of these
3 issues are handled is for me a sign and then of course the
4 AMCU takeover.

5 So what we're talking about here, I'm finishing
6 now, Les, one slide. What we're talking about here, we're
7 talking about paradoxically as I said, a union movement
8 that is out there, that is big, that is forming alliances,
9 that is campaigning massive resources. Just to give the
10 sense by the way for many people don't know, many of the
11 large unions count their monthly revenue in millions, the
12 largest of the unions, 200 plus thousand members, they
13 count their revenue in 20 plus million per month. So
14 you're talking huge organisations here, you're talking
15 huge. So when I say weak it doesn't mean they're going to
16 disappear tomorrow. It just means that they're weak in
17 terms of servicing their original mandate of educating
18 workers, of having workshops, of training their shop
19 stewards as soon as they are elected and of having general
20 meetings and talking to people. That's what I mean by
21 weakness here.

22 I think the question about poor management should
23 be put on the table firmly, very, very firmly. It is part
24 of the mix for me. All of these things are about choices,
25 choices by the union leadership but also choices by

Seminar phase 2

1 management and I'm not going to dwell on that now. The one
2 thing which is a worry for me is the question of un-
3 governability. We seem to have kind of gone back, the
4 wheel seems to have turned back to the 1980s, un-
5 governability, we shall render this country un-
6 governability, we shall render industry ungovernable, it
7 has come back to haunt us now, because the union movement,
8 as soon as parliament came along and politics changed,
9 nobody went back to workers and had a thorough discussion
10 about what, how do we conduct ourselves now, that the way
11 we conduct ourselves in the democracy is persuasion, not
12 intimidating people, but un-governability is here with us
13 and that's the problem and on all sides. I've seen people
14 trying to parcel kind of the blame around, the un-
15 governability is everywhere, everywhere. Of course the
16 question about upward mobility I've mentioned and the
17 police and Labour Relations I've mentioned.

18 I think the long and short of it, if we had more
19 time I would develop this point more to say that actually
20 what we have is a situation where the Vehan model is
21 actually in crisis here. The assumptions of the Vehan
22 model that you have strong employers, strong unions talking
23 to produce a bargain, that will be good and acceptable to
24 the workers, it does not work anymore, there is a need to
25 go back to the drawing board and maybe I should leave it

Seminar phase 2

1 there, Les, and then we can have the discussion. Thank you
2 very much.

3 MR KETTLEDAS: Okay, thank you very much,
4 Sakhela. I think we need to take a break now otherwise you
5 will have so much in your heads already. There is tea or
6 coffee, I don't know, tea or coffee at the back here. I
7 think we should take a, what is it now, ten past four, no
8 more than 15 minutes and then we reconvene here and then we
9 take the process forward. So you're welcome to join at the
10 back here.

11 [MEETING ADJOURNS MEETING RESUMES]

12 **[Track 2]**

13 MR KETTLEDAS: I hope you kept your
14 questions, clarifications, comments, for the discussion
15 that we're going to have after this presentation. The
16 third presentation is a PowerPoint presentation that has
17 been prepared by Mr John Brand from Bowman Gilfillan and
18 the title is "Resolving Labour Tension in African Mining."

19 Now just a little bit about John Brand, for those
20 that don't know him. John is a consultant and an
21 alternative dispute resolution specialist at Bowman
22 Gilfillan. He specialises in dispute resolution and the
23 training of negotiators, mediators, and arbitrators, and is
24 an International Mediation Institute certified mediator and
25 the Centre for Effective Dispute Resolution, which is in

Seminar phase 2

1 the UK, accredited mediator.

2 Over the past 20 years he has arbitrated and
3 mediated many large employment disputes and he regularly
4 facilitates negotiation, strategic planning, and
5 transformation processes. He co-designed the Conciliation
6 and Arbitration Induction Training for the South African
7 Commission for Conciliation, Mediation, and Arbitration,
8 the CCMA as we know them, and has trained many of South
9 Africa's employment and commercial mediators and
10 arbitrators for the past 15 years.

11 The ILO, International Labour Organisation, has
12 also commissioned John Brand to design training material
13 and to train parties and trainers from countries across the
14 world in mutual gain negotiation. Lastly, he's also
15 participated in two facilitations in the Northern Ireland
16 peace process for the communities of Belfast and Portadown,
17 and has trained and consulted to parties in the Basque
18 peace process, Basque, the Spanish region. So that is John
19 Brand.

20 Now he's not personally here today to make the
21 presentation and in his stead we have Ms Thantaswa Lupuwana
22 who will just make the presentation. Any questions you
23 should hold for John when he's back. But you're allowed to
24 make comments on the presentation when we do the discussion
25 and then we can get your views on the presentation as well.

Seminar phase 2

1 So we'll give over to Thantaswa.

2 MS LUPUWANA: Thank you, Chair. Just to
3 emphasise again, I will be reading but I will not be taking
4 questions. Chair, the presentation is entitled "Resolving
5 Labour Tensions in African Mining - The effective
6 regulation of industrial democracy." The contents of the
7 presentation include the introduction and topics such as
8 the essential features of industrial democracy,
9 organisational rights under the Labour Relations Act,
10 collective bargaining rights under the LRA, problems with
11 the LRA.

12 The first topic that he deals with is the
13 manifestations of the Labour Relations Act problems and
14 what needs to be done. In his introduction he argues that
15 violent inter-union rivalry is a major feature of South
16 African industrial relations. It has produced calls to
17 limit inter-union rivalry and even unionisation, but
18 freedom of association and organisational and collective
19 bargaining rights are enshrined in the Constitution. These
20 rights are therefore legally inviolable and are essential
21 for a free market economy. The problem therefore is not
22 the existence of the rights, but how they are exercised and
23 regulated.

24 On the topic "Essential features of industrial
25 democracy" he argues that it replicates the political

Seminar phase 2

1 democracy. It upholds freedom of association. It allows,
2 subject to limited conditions, access by all unions to
3 employer operations for the purposes of -

4 1, recruitment;

5 2, communication with members;

6 3, serving members' interests;

7 4, holding meetings with members;

8 5, holding member ballots.

9 Subject to limited conditions it makes deduction
10 of trade union subscriptions permissible. It makes
11 recognition of shop stewards permissible. It permits union
12 representation in grievance, discipline, and meetings with
13 employers. It allows reasonable time off for trade union
14 activities. It ensures reasonable disclosure of
15 information to all unions. It provides for the holding of
16 proper ballots to test representativeness. It grants
17 collective bargaining rights in appropriate bargaining
18 units to only one union, or an alliance of unions who
19 represent the majority of workers in an appropriate
20 bargaining unit. It recognises the right to strike
21 peacefully. It requires negotiation in good faith.

22 Next topic would be "Organisational rights in
23 terms of Labour Relations Act." A representative trade
24 union is entitled to certain organisational rights and a
25 majority union is entitled to additional organisational

Seminar phase 2

1 rights. A representative trade union means a registered
2 trade union or two or more registered trade unions acting
3 jointly, that are sufficiently representative of the
4 employees employed by an employer in a workplace. The CCMA
5 has set 30% as approximate threshold of sufficient
6 representativeness.

7 What is the definition of workplace? Workplace
8 means the place or places where employees of an employer
9 work. If an employer carries on or conducts two or more
10 operations that are independent of one another by reason of
11 their size, function, or organisation, the place or places
12 where employees work in connection with each independent
13 operation constitutes the workplace for that operation.

14 Any office bearer or official of a sufficiently
15 representative trade union is entitled to access to,
16 recruit, communicate, serve members' interests, hold
17 meetings outside of working hours and to conduct a ballot.
18 Sufficiently representative trade unions are entitled to
19 deduction of union subscriptions and levies.

20 Majority representative union means a registered
21 trade union or two or more registered trade unions acting
22 jointly that have as members the majority of the employees
23 employed by an employer in a workplace. Majority
24 representative unions are entitled in any workplace with
25 more than 10 members to elect union representatives to -

Seminar phase 2

1 1, assist and represent members in grievance and
2 discipline;

3 2, monitor employer's compliance with relevant
4 legislation and agreements;

5 3, report contraventions;

6 4, perform any other agreed function.

7 Subject to reasonable conditions, majority trade
8 union representatives and office bearers are entitled to
9 take reasonable time off with pay during working hours to
10 perform his or her functions and to be trained.

11 Section 18 of the LRA allows a majority union and
12 an employer to define thresholds of what is sufficiently
13 representative in a collective agreement. The thresholds
14 as set in such a collective agreement must apply equally to
15 any registered trade union seeking such organisational
16 rights.

17 Collective bargaining rights in terms of the LRA;
18 there is no duty to bargain collectively in good faith or
19 at all in terms of the LRA. The duty can only arise by
20 agreement.

21 What are then the other problems with the LRA?
22 Section 18 permits a majority union and an employer to
23 agree that in future any other trade union wanting basic
24 rights must be representative of the majority of all the
25 employees in the workplace. Industrial democracy is

Seminar phase 2

1 therefore undermined. This does not mirror the broader
2 political democracy. The LRA prescribes the total
3 workplace as the constituents in which to measure
4 representativeness. Industrial democracy is thereby
5 undermined. This does not mirror the broader political
6 democracy. The LRA does not properly regulate the process
7 to measure representativeness.

8 What are the manifestations therefore of the
9 LRA's problems? He gives as one example the Platinum mines
10 entered into restrictive section 18 organisational rights
11 agreements with NUM. Representativeness was measured by
12 signed stop order forms. The result was that newcomer AMCU
13 had to recruit thousands of members from outside a mine to
14 get basic organisational rights. NUM became complacent and
15 failed to properly service members' interests. Workers
16 chose to join AMCU. Although AMCU became highly
17 representative of for example rock drill operators, it
18 couldn't service their interests or represent them in
19 collective bargaining because it was refused basic trade
20 union and collective bargaining rights. NUM, which did not
21 represent rock drill operators, agreed to wages for rock
22 drill operators that were unacceptable to them. An all-or-
23 nothing war for majority status then broke out for AMCU to
24 get official recognition and for NUM to retain it. The war
25 had high stakes. The winner would have the benefits of -

Seminar phase 2

1 1, the full suit of organisational and collective
2 bargaining rights;

3 2, full-time shop stewards;

4 3, comfortable offices;

5 4, telephone, and computers.

6 The loser would have nothing. This led to the
7 production of fraudulent membership forms, intimidation,
8 serious violence, including murder, and eventually to the
9 Marikana tragedy.

10 What then needs to be done? Basic trade union
11 rights must be granted easily with low thresholds of
12 representativeness to encourage a habit of co-existence
13 between unions in the workplace. Independently monitored
14 ballots must be conducted to test representativeness. A
15 statutory duty to negotiate in good faith must be
16 established. Appropriate bargaining units must be
17 designated within workplaces. Unions must compete
18 democratically for the status of collective bargaining
19 agent. Independently monitored strike ballots must be
20 conducted. The courts must have the power to declare
21 strikes that are accompanied by violence as unprotected.

22 This is now the conclusion. Much can be done to
23 regulate industrial democracy effectively by the parties
24 themselves. It would greatly assist if the LRA was amended
25 to deepen industrial democracy. Thank you.

Seminar phase 2

1 MR KETTLEDAS: If this was a church then
2 this was the sermon because you don't question the priest
3 about what he said. Alright, we now have come to that part
4 of the programme where we will have discussion. I should
5 just indicate that the room that you had coffee in also
6 have members present there and we would suggest that if any
7 of those in the adjoining room want to participate in the
8 discussion here, then they will have to come this side.
9 There is interpretation also on that side and there will be
10 an interpreter here as well so as to also allow them if
11 they want to ask a question or issues for clarification,
12 that they are granted that opportunity.

13 So we'll move immediately, the presenters, the
14 two of them will have to come in front and come and justify
15 the issues that they've raised here, and then on the
16 presentation of John Brand we will just take comments of
17 that, that we can then have a record of. So I'll open the
18 floor now for anyone that wants to make a comment or ask
19 for clarification, if you couldn't do it earlier, or
20 generally participate in the discussion. So you can raise
21 your hand and please state your name and the organisation
22 that you are from. I see, I think I'm going to take three.
23 Now you should also clarify to which of the two presenters
24 you are posing your question so that they can also follow
25 and then be able to respond to the question concerned. So

Seminar phase 2

1 I have a - sorry, Matthew.

2 MR CHASKALSON SC: Chair, I just want to
3 [Microphone off, inaudible] that you ask [inaudible].

4 MR KETTLEDAS: Yes, okay. In addition to
5 making your comments, if you have questions then let's
6 record them and we will then make sure that he gets them
7 and he can respond and then it will be part of the package
8 that will be produced afterwards.

9 MR CHASKALSON SC: And put on the
10 website.

11 MR KETTLEDAS: And put on the website.
12 So I have a - we'll take three, four at a time. Paul, I
13 saw your hand was the fourth, so that encouraged me to take
14 four. Okay.

15 MR BIRCH: My question/comment is a
16 comment about management. Management's purpose is to
17 manage the ore body [inaudible]. They are trained as
18 mining [inaudible, microphone off] rises up into the ranks
19 of management - that that is their primary - not found that
20 in the - on the mine that even the simplest decision about
21 mining is subject to negotiations and there is no right for
22 them to say no. The moment you say no it leads to
23 conflict, negotiations, elevating the comment, the no to
24 higher levels, but at no point does it ever get resolved.

25 I was involved in mine management where even the

Seminar phase 2

1 simplest move of a panel, of a crew becomes subject to
2 negotiation because it's got influence in the payment of
3 bonuses, etcetera, that even the role of the geologist
4 trying to optimise his ore body becomes a labour issue.
5 That was my first comment.

6 The second one is the intervention of the State.
7 Surely if there's a breakdown in basic law and order and
8 there's property damage, violence and deaths, then the mine
9 has a right to call the police to intervene in that
10 situation.

11 MR KETTLEDAS: You didn't say -

12 MR BIRCH: Sorry, sorry, it's Clinton
13 Birch from the School of Mining Engineering here at Wits.

14 MR BEZUIDENHOUT: Andries Bezuidenhout
15 from the Sociology Department at Pretoria University. It
16 seems to me if we look at bargaining arrangements in the
17 Platinum sector there are two issues that also need to be
18 mentioned and Les Kettledas sketched out the bigger picture
19 on the architecture based on the Labour Relations Act, the
20 Employment Equity Act, the Basic Conditions of Employment
21 Act, etcetera, but the mining industry has a peculiar
22 bargaining arrangement through the Chamber of Mines and in
23 gold and coal you have centralised bargaining for those
24 mining companies that are members of the Chamber of Mines.
25 But in platinum these negotiations are decentralised, and I

Seminar phase 2

1 do think there's a need when we want to understand the
2 bigger social context, or the labour relations context of
3 what happened in this case is this kind of anomaly and the
4 decentralisation in the collective bargaining system, and
5 also then the competition that started to exist between
6 mining companies for rock drill operators and then bonuses
7 afforded to them outside the collective bargaining system.
8 To me that's a key issue that we need to recognise.

9 Another issue that I think we should mention is
10 the high levels of sub-contracting, or the use of sub-
11 contracted labour in the platinum sector. Now the
12 statistics from the Department of Mineral Resources shows
13 that about a third of workers in the platinum sector work
14 through sub-contractors and these are workers who are
15 generally not organised by the trade unions, and I do think
16 there is this labour market component to the collective
17 bargaining context that we also need to take into
18 consideration. So it's more a comment to both the speakers
19 about these kind of peculiarities in the platinum sector
20 that I think are really, really key in understanding the
21 high levels of conflict in this case.

22 MR KETTLEDAS: Thank you. The third
23 person, was it you? You're not new now. State the name
24 and the organisation, and then a fourth person would be
25 Paul Benjamin.

Seminar phase 2

1 MR CAMAY: I'm Phiroshaw Camay and I work
2 in CORE, the Co-operative for Research and Education. I
3 think we need to make two salient points. The one is to
4 respect the Constitution, and the Constitution says we
5 recognise freedom of association, which means that workers
6 have the right to join the unions of their choice and
7 management has the obligation to recognise unions that are
8 representative in the workplace.

9 The issue of threshold limits is something that
10 both management and unions can work out, or the State can
11 predict what sort of level of unionisation can take place,
12 as the CCMA has done in terms of the threshold limit.

13 The second point I want to make is that when
14 labour and management get together and establish charters,
15 that they implement those charters and that the State that
16 is co-signatory to those charters also respect the values
17 that are enshrined in those charters and the obligations
18 that are enshrined. The mining charter that was signed has
19 just gathered dust on the shelves of union offices, on the
20 shelves of management, and the shelves of government. So
21 there's a three-way culpability in terms of the mining
22 charter and Marikana is the wind that we have reaped.
23 Thank you.

24 MR KETTLEDAS: Thank you. Paul Benjamin.

25 MR BENJAMIN: [Microphone off, inaudible]

Seminar phase 2

1 MR KETTLEDAS: There is a mike coming.

2 MR BENJAMIN: I'm an attorney at Cheadle
3 Thompson Haysom. I've been involved in the process of
4 amending labour legislation over the last while, and just
5 to indicate, I make these comments in my personal capacity
6 and not on behalf of any client or any player at the
7 Commission.

8 I just wanted to make a couple of comments on
9 John Brand's presentation. There are unfortunately some
10 errors in it and some omissions. The first, he makes the
11 point that the CCMA has set a threshold of approximately
12 30% as the threshold for sufficient representivity. It is
13 correct that an initial guideline by the CCMA did indicate
14 that, but the CCMA practice has deviated from that quite
15 extensively and cases are decided on the basis of a set of
16 criteria in the LRA and in many cases, and there are
17 published arbitration awards where some of those rights are
18 granted at as low as 6%. So 30% isn't a sort of holdall.
19 It's unfortunate that someone as well informed as John
20 should be perpetuating that view when in fact the CCMA has
21 deliberately placed itself on record to say that it's not
22 just a numbers matter.

23 The first criticism he makes of the LRA is the
24 so-called second 18 threshold. In fact that provision has
25 now been repealed, or been amended by the latest LRA

Seminar phase 2

1 amendment that has been passed by parliament and is waiting
2 assent by the President and it is anticipated will come
3 into effect in the course of 2014. What the amendment to
4 section 18 says is that a threshold contained in a
5 threshold agreement can be set aside by an arbitrator if
6 it's considered that the union challenging it represents a
7 particular interest within the workplace, or there are
8 other reasons why it should gain basic organisational
9 rights. That amendment of course has been public for about
10 two and a half years.

11 Significantly in the NEDLAC process it was an
12 amendment initially proposed by the FEDUSA group of unions,
13 supported by all trade unions present in NEDLAC, supported
14 by the Department of Labour, but opposed by organised
15 business both in NEDLAC and in its public representations
16 to the parliamentary process. But anyway, that amendment,
17 it's come into effect and so there is now one change in the
18 LRA impacting on the one clause that I think is implicated
19 in events at Marikana.

20 With regard to the issue of the statutory duty to
21 bargain in good faith, one has to be careful when one - it
22 may seem a very logical thing where people are not
23 bargaining as well as they should to say well, the law must
24 force them to bargain in good faith. Of course the origins
25 of the duty to bargain in good faith are American Labour

Seminar phase 2

1 Law. The impact has generally been negative. It's very,
2 very difficult to regulate bargaining behaviour. The one
3 consequence of duties to bargain is that bargaining often
4 takes place at the lowest level; small groupings of workers
5 win that right, and the other particular difficulty is that
6 a single bargaining process can be held up for several
7 years in the court while the issue of good faith is sorted
8 out.

9 With regard to the freedom of association issue,
10 of course the one other impact of free of association is
11 that our law has been interpreted as preventing employers
12 from being required to bargain in a collectivity. That's
13 why bargaining councils are voluntary and one of the
14 reasons obviously if one is going to say things about
15 sectoral bargaining it's one of the issues that needs to be
16 addressed.

17 Just to indicate a further comment, in the wake
18 of Marikana when John Brand for instance wrote a number of
19 pieces which looked at the issues, he used Marikana as a
20 basis to argue against the bargaining council system, and I
21 think that is something that perhaps a question can be put
22 to him. Obviously Marikana didn't have a - there was no
23 bargaining council in the platinum sector and it wasn't in
24 any sense a trigger to those events.

25 With regard to the issues of strikes and ballots,

Seminar phase 2

1 of course those were issues that were raised in NEDLAC.
2 Proposals to amend the law in regard to both violent
3 strikes and ballots were contained in the bill sent from
4 NEDLAC to parliament, but in fact were rejected by
5 parliament. Just to clarify that.

6 MR KETTLEDAS: Thank you. We'll come
7 back to another round of questions, comments; give the
8 panellists an opportunity to comment or respond to some of
9 the issues raised. Ian?

10 MR MACUN: Ja okay, well just a very
11 brief comment. I think most of the points that have been
12 raised have been useful comments. On the point about
13 bargaining arrangements in the platinum sector I just
14 wanted to support the point that it would be problematic to
15 argue against bargaining councils as a form of, or support
16 the point made by Paul Benjamin to use the Marikana events
17 to argue against bargaining council, or indeed central
18 bargaining arrangements. I think one of the earlier that
19 didn't lead but certainly contributed to the tensions in
20 the platinum mines was precisely differential increases
21 being given by certain mines and the expectations that then
22 raised on others.

23 So indeed it was complicated, and just to remind
24 you that one of the logics of centralised sectoral level
25 bargaining that we have in our legal dispensation is

Seminar phase 2

1 precisely to try and lift wages as far as possible out of
2 competition and conflict within certain sectors.

3 On the point of sub-contractors, just to say that
4 there is again an amendment to the Labour Relations Act in
5 the offing which extends rights to trade unions of
6 representation and of workers who could be employed by
7 temporary employment services. So I think the amendments
8 to allow for to some extent - or let me say to set the
9 framework for including temporary employment workers in
10 bargaining arrangements, the challenge is obviously going
11 to be whether the trade unions rise to that challenge and
12 recruit and represent the workers who may be employed by
13 temporary employment services, or temporary employment
14 agencies.

15 PROF BUHLUNGU: Right, thank you. Let me
16 start with the question about the weak management, poor
17 management question. Look, it's a complex question. Maybe
18 I framed it rather too openly. Let me begin by saying that
19 the fact that you have the framework, the legislative
20 framework, the Labour Relations Act and all other forms of
21 legislation by implication means that that prerogative to
22 manage is going to have to be limited. That's the one
23 thing. So I don't think you are arguing, if I get you
24 correctly; I don't think you are arguing that management
25 must do whatever they want, that the prerogative to manage

Seminar phase 2

1 should be unlimited. The point is they should operate
2 within the law.

3 Now the point is this; if you remember, or
4 anybody in the room remembers, in the 1980s in particular,
5 and into the 1990s there were programmes in universities
6 and other kind of institutions where people, management,
7 entry level, medium level, and even top management people
8 would go to can get courses in management. Many of those
9 don't happen anymore. Industrial relations certificate
10 here, a diploma there, and so on. The question is, and
11 that I would put to you, who does those in the country now?
12 Which institution does them? My guess is very, very few,
13 if any institution runs that. It seems to me that's an
14 area that requires that everybody puts their kind of issues
15 on the side and say here's an area of need, we need to
16 build a new cohort of people who can manage effectively and
17 who have had the requisite training to do so.

18 Now for me it's a question both for the union
19 side as well as the management side. I mean take, I'll use
20 a rather frivolous issue but which was very important when
21 it happened, the thing about union offices at, with NUM and
22 AMCU, that issue. Come on; I mean one union loses majority
23 and therefore they lose certain rights and then suddenly
24 the sticking point becomes does the NUM stay in the offices
25 or should AMCU move in. That kind of thing. It was

Seminar phase 2

1 unnecessary. It could have been resolved just by sitting
2 people down and dealing with the issues.

3 Or a bigger issue; after the tragic events of the
4 16th of August it was the thing about people go back to work
5 or you're going to be fired. I mean what are you doing?
6 Who does that in this day and age with such a powerful
7 well-mobilised workforce? You don't do those things.
8 Those are basic things about management. It doesn't say,
9 and it doesn't downplay the importance of people's skills
10 when it comes to drilling the rock and so on. So for me I
11 think there are issues there.

12 Regarding the intervention of the State, I beg to
13 differ with you there. Just on the basis of past
14 experience, whenever the State is called upon to intervene
15 the results are tragic. I lived - just to tell a little
16 story; when, my baptism getting into the unions was a stage
17 where the old unions, the old TAXA unions were kind of
18 fragmenting and falling apart, but some of them managed to
19 hold on to monopoly status through using the closed shop.
20 The companies used the State and it was tragic and we went
21 through a case in the union where I worked where, at AFCOR,
22 a furniture company, and people were killed. Many people
23 were killed. It became a - five people were sentenced to
24 death for it, precisely because of these things where
25 there's tension, you just do not call a police force in.

Seminar phase 2

1 That's my basic view. Yes, you can call them there to
2 stand there. You don't call them to do what, you know,
3 we've seen happen. So I disagree with you just from that
4 view, and I think just ethically a police force that's so
5 unprepared to deal with industrial relations issues is a
6 recipe for disaster in highly charged environments such as
7 those.

8 I think Andries, you raised a very important
9 point about sub-contracting. It's another part of the mix
10 in this whole story, especially in platinum. The fact that
11 you have such a large number of people who are employed by
12 sub-contractors, who enjoy sub-standard conditions but work
13 side by side with permanently employed workers, that's a
14 big thing.

15 But there are other things as well, and I think
16 if unions were here - I don't know if they are - that's a
17 question that needs discussion. How do you do that? How
18 do you deal with the fact that you're organising and you're
19 improving conditions for one section of the workforce, but
20 you have in your midst a lot of these other people with no
21 basic worker rights on the shop floor.

22 I think the question that Phiroshaw raises about
23 the freedom of association to be respected, I think we all
24 agree there's a Constitution in the country, there are laws
25 in the country, and so on and so forth. I think where

Seminar phase 2

1 you're perhaps opening up a big debate, and I would agree
2 with you with opening it up as a debate, is the question of
3 the majoritarian principle. I think at the time when it
4 was kind of instituted and put into law, maybe it made
5 sense. What happens now is that what happens is that it
6 creates a monopoly. You create a monopoly where the guy
7 inside uses everything to shut everyone out and monopolise
8 power, and sometimes there's always even room for that
9 power to be abused. So for me, I agree with you; that's
10 why I put the point about the monopoly there. Any monopoly
11 in organisation in this environment I think is bound to
12 give rise to serious problems. Thank you.

13 MR KETTLEDAS: Okay, let's take another
14 round. The lady here, number 1. Number 2 I think is
15 Archie. Next, number 3 in the corner here. Number 4. So
16 we're on the right now. I'll come to the left. The
17 leftists.

18 MS SHAW: My name is Andrea Shaw. I'm
19 from Australia, as you can hear. I did a big project in
20 the mining industry here in South Africa a few years ago,
21 including quite extensive interviews across the platinum
22 belt, and I don't know whether this is going to be a topic
23 of a future seminar, but I'm a bit frustrated, I have to
24 say, because to me the most significant issue in terms of
25 bargaining was about wages systems and payment systems, and

Seminar phase 2

1 a few people had touched on how payment systems have led to
2 the kinds of conflict that we've seen, where managers are
3 unable to make decisions about operations because of this
4 serious consequences it has for people's take-home pay, and
5 the issue of sub-contractors who receive much less pay. So
6 I'm interested in a comment from either of the speakers
7 today about the significance of the performance-based pay
8 systems in the mining industry for this. I see it clearly
9 that's one of the differences between reasons why it
10 happened in platinum rather than gold was because of the
11 link of bonuses to the price of platinum and to the demand
12 for platinum. So I'm interested in your comments.

13 MR KETTLEDAS: Thank you. Archie at the
14 back.

15 MR PALANE: Thanks, Chair. My name is
16 Archie Palane. I'm sure many of you, you would want to
17 associate with the name. I must say, and I think the final
18 nail was hit harder when one of the speakers said are there
19 any trade unionists in here, which I then began to ask
20 myself if you've done the research, you have done the
21 deeper analysis of the situation, you would have noticed
22 many trade unionists inside here.

23 But I must say one of the crucial things that all
24 the speakers are missing, and I think even in the public
25 domain, is the mere fact that the environment that has

Seminar phase 2

1 been, or that was triggered in Marikana - put aside the
2 violence and the killings by the police - that is a bread
3 and butter issue for trade unions. If you don't have that
4 kind of labour market environment there's no need for trade
5 unionists to exist. Organisational rights, some of those
6 are issues that challenges the unions to work harder. The
7 loss of membership challenges the unions to work harder,
8 and I don't see any reason why we should be concerned as if
9 it's a disaster when that kind of an environment tests the
10 ability of the unions to organise themselves better, to
11 mobilise and advance beyond just bread and better issues,
12 due to the fact that in 1994 we had a new political
13 dispensation in the country.

14 But secondly, I looked at John Brand, I think
15 some of the comments that Paul has made I concur. It
16 assumes that what the Labour Relations Act intended
17 continues to be without the evolution of the revolutionists
18 in the workplace. I think many of us - today I know some
19 of my former colleagues are here from the NUM - once you
20 move to management they say you crossed the floor, but once
21 you go to government then you're seeing greener pastures.
22 So you get accused all the time that you've crossed the
23 floor, therefore it's a problem.

24 One of the issues that I think one of the
25 speakers touched, it's lack of proper communication back to

Seminar phase 2

1 the workforce and they are kept in the dark, and in so
2 doing you have youngsters who have come into the trade
3 union movement who have never been schooled, same as
4 ourselves and the Les Kettledas and many more here, that
5 one of the fundamental principles of trade unionism is to
6 communicate the bad news to members, so is to communicate
7 the good news to members. New organisers, new leadership,
8 whenever they've got the bad news they run away from
9 communicating that to members and all what members want,
10 it's the truth and the openness and the honesty, and you
11 cannot do so if you sit in your offices and scared to go to
12 members.

13 When you look today in terms of the employer's
14 side, which I'm in today and I'm experiencing it daily, you
15 have newcomers, graduates who read the Labour Relations Act
16 like the mechanic. When you have a problem with a car the
17 mechanic goes to a book and says this is how it's going to
18 be sorted out, and that's a problem in terms of young
19 upcoming managers.

20 I've had the issue of line function managers who
21 are unable today to deal with the human touch when dealing
22 with labour relations issues, and that's a problem. What
23 happens? Management compromises, believing that the union
24 is going to agree.

25 I can tell you today I got a call, workers want

Seminar phase 2

1 to go back to work, and here was the situation, full-time
2 shop stewards are in the offices and they are bringing a
3 new dimension in terms of Labour Relations Act. They are
4 saying because we are full-time in the office we are not on
5 strike and therefore management must pay us. So management
6 says no, no, no, you're part and parcel of the workforce,
7 you're part and parcel of the strike, we're not going to
8 pay you. Now they say can you please write a letter to the
9 union leadership and say can we please ask workers to go
10 back to work, because now it's hurting the pocket of the
11 very same leaders that are there. Now that is nowhere
12 written in any labour relations book. It has just come up
13 yesterday, and that's a demand that is on the table now.

14 But I want to conclude by saying I think what has
15 been presented today, if it will help going forward in the
16 country in terms of measuring labour market issues, I think
17 we need to do a deeper analysis of what we have just
18 presented. It's just scratching the surface. You have not
19 really gone deeper. For example the issue of the strike
20 fund was raised in COSATU in 2003, linked to the question
21 if there is a strike action do the leadership of the union
22 that is full-time in the office, union officials continue
23 to receive salaries when workers are on strike. That is
24 the debate and the unions are shy to commit towards
25 adopting that. And I would say in terms of the threshold,

Seminar phase 2

1 in terms of the Labour Relations Act, that's the
2 contestation and that's the beauty of the trade union
3 movement. In 1998, if many of you were still around, NUM
4 at Anglo Platinum was 13% representative. Because of the
5 Five Madoda, because of the killings, in December 1998 we
6 pulled what my friends called a Christmas strike and John
7 Brand, Charles Nupen, I called them from holiday to come
8 and mediate. When I left the NUM in 2006 we rose from 13%
9 to 87%. Today we are at 0% again. So that's the
10 contestation, but we need to put it into perspective to say
11 how does the union take those challenges and move forward.
12 The groaning, the violence and so on is not going to help.
13 You need to go there and devise strategies and means and
14 collective bargaining we used in 1998 as a stepping stone
15 to build the organisation within Amplats, where we lost it
16 to 13%.

17 But I'm just saying as part of my sharing, we
18 need to understand that the trade union movement that
19 operates in a cordial environment will lose its identity as
20 a trade union movement. Thank you.

21 MR KETTLEDAS: Thank you. Behind you,
22 Hassan. Yes, and then after you the one next to you.

23 MR CAPPS: Gavin Capps from SWOP. Mine
24 is actually a comment on Sakhela's presentation, but just
25 before that a point about the absurdity -

Seminar phase 2

1 MR KETTLEDAS: Just introduce yourself
2 that everybody -

3 MR CAPPS: I just did; Gavin Capps from
4 SWOP.

5 MR KETTLEDAS: Okay.

6 MR CAPPS: But just before that, a
7 comment on the question of the State coming in to
8 industrial relations. The potential danger and absurdity I
9 think of that is very much illustrated by what happened at
10 Marikana where you end up with a situation where 270 of the
11 mineworkers who were arrested were charged under the common
12 purpose doctrine with murder, and that defies any kind of
13 logical sense, any kind of sense of justice or fairness.
14 Those workers up until September of last year because of a
15 huge outcry had murder charges hanging over their heads,
16 and still we must remember that even now the National
17 Prosecuting Authority is saying that when this comes to an
18 end they're still going to have a warning against their
19 name that somehow they have been implicated in the murder
20 of their colleagues, who were largely shot by the police on
21 that particular day. So I think that's a good example of
22 why the State and the law should keep out of industrial
23 relations.

24 But the point I wanted to make in relation to
25 Sakhela's presentation was around his thesis of the paradox

Seminar phase 2

1 of victory which I think broadly is right, but as Archie
2 was saying, it needs to be developed in particular ways,
3 and one of the ways perhaps it needs to be developed, and
4 this is the qualification, which Sakhela makes in his own
5 book, probably didn't have time to make now, is that one
6 gets the sense that there was almost an inevitability that
7 we would end up with the industrial relations framework
8 that we have, and within that industrial relations
9 framework the problems which Sakhela have identified, the
10 problems of organisational power, the problems of
11 institutionalisation, and the problems of
12 individualisation, all of these would almost come about as
13 an inevitable process from the growth of the trade unions
14 and where we've got to now, the price of their success.

15 But I think what that leaves out of the picture
16 is the politics of it. What it leaves out are two things
17 in particular. First of all, that it can also be argued
18 that we've ended up with the situation as a result of the
19 success of employer strategy. Employers have had a very,
20 very clear and strategic understanding of what they want to
21 do in relation to workers post apartheid, and have learnt
22 lessons from other parts of the world, for example from
23 Britain in the 1970s with the development of social
24 contracts arrangements to get rid of the militant shop
25 steward movement, of actually identifying individuals and

Seminar phase 2

1 moving them up the career ladder, actually making part-time
2 positions into full-time positions so you start to pull
3 shop stewards away from accountability of being on the shop
4 floor. This isn't something which just happened by mistake
5 or by accident, or as an inevitable outcome of a process of
6 growth, but it's something which is vigorously pursued, and
7 is vigorously pursued by employers. So let's keep that
8 part of the picture.

9 And the other part of the picture here, I'm sure
10 there are more but the other part of the picture I'd like
11 to emphasise is also that as a result of strategic
12 decisions which were taken within the labour movement
13 itself. Aficionados of the Labour Bulletin for example
14 might remember in 1992, 1992-1993 there was a very fierce
15 debate within the labour movement put out on the pages of
16 the Labour Bulletin, which was provoked by Enoch
17 Godongwama, a very good example of moving from a union up
18 into the higher echelons of government, basically arguing
19 for social contract style arrangements and corporative
20 style arrangements after democracy was going to be
21 achieved, and it opened up a big debate actually arguing
22 whether this was the best way forward for the labour
23 movement, or whether it should be supporting a labour
24 relations framework which was going to lead to it
25 increasing professionalization and bureaucratisation of the

Seminar phase 2

1 unions, particularly at the levels of shop stewards.

2 So again it's just to remind ourselves that these
3 are actually outcomes not of inevitable processes, but are
4 outcomes of strategies and decisions which have been made,
5 and actually now as we confront these questions, for those
6 in this room who are involved in the labour movement and
7 the debates which are going on in the labour movement,
8 perhaps it's time to revisit those decisions in the light
9 of what's happened. I'm afraid that doesn't fit in
10 particularly well with the sort of labour relations
11 framework which is being sketched here, but it does raise
12 questions about the direction which is being taken and the
13 kind of results that this has led to.

14 MR KETTLEDAS: Thank you. Next to you.
15 No, no, Hassan, you'll be the first of the next round.

16 MR SINWELL: Thank you very much, and
17 thank you for the useful presentations. I'm Luke Sinwell
18 from the University of Johannesburg and over the last year
19 and a half I've been doing research specifically on the
20 origins and historical development of the workers
21 committees at Amplats and Lonmin and how those relate to
22 the NUM and AMCU, focussing also specifically on the period
23 between early 2012 and now.

24 One of the things that keeps being suggested is
25 that these strikes were started by a minority union, but in

Seminar phase 2

1 fact the research that I've done on the ground shows that
2 the people who initiated these strikes, some of them were
3 members of the NUM, some were AMCU, and others were non-
4 unionised.

5 Then the second point is that - that was made I
6 think by Ian Macun around unprotected strikes, he was
7 suggesting that they divide and that they're unsuccessful
8 generally, but if we look again at the specific case of
9 Lonmin, and I could give you a detailed - I could tell you
10 in detail what happened at Amplats as well, but in Lonmin
11 it actually united, the unprotected strike and the
12 independent organisation of the workers committee actually
13 ended up uniting the entire workforce, first starting with
14 the RDOs, and this is outside of union structures,
15 therefore bringing in all the RDOs both from AMCU and NUM
16 and uniting them in a common demand for 12 500 until on the
17 9th of August, as a lot of you will know, all the RDOs from
18 Eastern, Western, and Karee, the three mines around Lonmin,
19 where 3 000 of the RDOs met in a stadium. Thereafter they
20 marched to management, as a lot of you know, the following
21 day, and then they next day they went to the NUM and they
22 were attacked. Then they went to the mountain, formed a
23 new committee, and at this point in time workers from the
24 other categories, like winch drivers starting coming. It
25 was a united strike, everyone demanding 12 500.

Seminar phase 2

1 The next thing that Ian suggests is that these
2 are not successful, it's not successful to engage in an
3 unprotected strike. It can be problematic, but in the case
4 of Amplats and Lonmin there have been major victories in
5 terms of wage demands and the unprotected strike helped put
6 the demand for 12 500 into the protected strike that's
7 happening now in 2014. So it's a major victory in terms
8 for mineworkers and for the broader working class. Thanks.

9 MR KETTLEDAS: Thank you. Back to the
10 panel.

11 MR MACUN: Okay, I guess I'll have to
12 respond to that last point. I mean I think my point was
13 really about unprocedural strikes and I'm sorry if I was
14 misinterpreted. I wasn't trying to cast a judgment on
15 whether they're successful or not in terms of the demands
16 that are put forward. I have to say I suppose that
17 unprocedural strikes are unprocedural; they're not in
18 conformity with proper procedures, the law, etcetera, and
19 to that extent as a government official they are
20 problematic. But I wouldn't want to comment on the
21 outcomes.

22 I think the point I was trying to make is that
23 are there evidence of workers bypassing unions, and I think
24 that was really for me the point. It was more in relation
25 to the questions posed by the Commission, you know, do we

Seminar phase 2

1 know whether, what the prevalence is of workers bypassing
2 unions, and it was in that context that I tried to
3 problematise unprocedural strikes.

4 I just wanted to make one other quick comment.
5 Unfortunately I don't know enough about the pay systems in
6 platinum to comment about bonuses, except to say that I
7 think bonuses *per se* are not necessarily a problem. I mean
8 if, and that's a matter of debate, and they're not
9 inconsistent with central bargaining arrangements. We have
10 other central bargaining arrangements where a certain
11 limits are set and then certain percentages may be
12 allocated to production bonuses through workplace
13 arrangements that are then subsidiary to a central
14 arrangement, but I don't know enough about the specifics
15 about the systems in platinum to comment. Perhaps Sakhela
16 can, or our Chair can.

17 I wanted to just make a quick response to Mr
18 Palane's comments really, and I would take them as very
19 useful comments. I think the key issue for me is
20 organisational rights challenge trade unions to work
21 harder. Yes, in theory, and indeed I guess that's one of
22 the logics in the Labour Relations Act, but what I'm
23 hearing from Sakhela's analysis, and certainly from some of
24 our observations that's not necessarily always what
25 happens, and the question then is are there other forms of

Seminar phase 2

1 incentivising, to put it that way - I don't think it's a
2 legal issue, but are there other forms of incentivising
3 trade unions to work harder within our current legal
4 framework, and I think that for me is certainly a question
5 in the debate about trade union renewal and responding to
6 some of the problems that have been made clear. So let me
7 just leave it with that comment.

8 PROF BUHLUNGU: Thank you. I think these
9 are all very useful comments. I want to turn the whole
10 thing round and say my concern here is about trade unions
11 as organisations that have the task of representing workers
12 and objectively there are factors that can limit their
13 ability to do so, to represent workers. I mean like the
14 growth and other things and so on, and so forth, and
15 employer strategy sometimes, you know it can also hamper or
16 limit, you know, what unions can do.

17 But for me the nub of it all, and we can go into
18 all sorts of things - pay systems and so on and so forth;
19 for me that is where I think Archie, you're getting close
20 to it. It's about choices. I think Gavin, you're making
21 the point too. It's about the choices that were made over
22 the last 20 years and these choices were made by people,
23 some of whom have left the unions, some of whom are still
24 in the unions, and some of these cautionary notes and
25 warnings have been sounded all the way for the last 20

Seminar phase 2

1 years. People have said, be careful, you're neglecting
2 this. Studies, some of us and some of the colleagues in
3 the room have actually done commissioned studies by unions
4 on precisely some of these issues and we've sounded those
5 warnings. We've said, careful, things are not working out.
6 Members are not feeling happy, and so on, and so forth.

7 When it comes to issues for example about how
8 unions use the good legislative framework that we have in
9 the country from the LRA all the way to the Skills
10 Development Act and the Employment Equity Act, again we've
11 done some commissioned studies for unions and we've said
12 the framework is there. It's about the choices that you as
13 unions make. For me that's what concerns me the most in
14 all of this; what choices are made by unions at times when
15 these choices have to be made.

16 Where I find Archie's point very important then
17 is this; that at times when these choices have got to be
18 made, when people have got to go to workers and discuss
19 with them, people are often scared to do so. I agree with
20 you; people are often scared to deliver the bad news to
21 workers for a whole range of reasons. But also, some of
22 these choices is because also the top echelon of union
23 leadership today - again this relates to the choices - the
24 top echelon are also interested parties themselves.
25 They're interested in what choices get made. They're

Seminar phase 2

1 interest for example in whether you have - interestingly,
2 somebody said the full-time shop stewards sit in the
3 office. They do sit in the office. One time we found them
4 sitting in the office on a Saturday and basically they
5 wanted to deny us access to the compound, and they were
6 sitting and watching the omnibus kind of thing of
7 Generations on a Saturday morning. Yes, the one - you
8 know, the kind of, the long stitched-together program of
9 Generations for the week. That's what they do. Then it's
10 nice.

11 So the point for me is this; we can go around all
12 of these issues about bargaining and we can suggest things
13 that should be done around wages and wage systems, or pay
14 systems. It's not for us. The people who've got to make
15 the choices are people in the unions.

16 I take the point that sometimes employer
17 strategies can also help to bring unions down, but unions
18 have risen - I've seen them in the past, we've seen them
19 all of us rise from worse kind of situations. We've seen
20 them rise and become even stronger. So I think the idea
21 that unions are becoming weak just because the employers
22 are kind of - I don't think employers have got it worked
23 out that neatly, frankly. I think actually, I want to
24 emphasise very much the choices that have to be made. So
25 for me that's the answer to some of these questions, that

Seminar phase 2

1 the choices that you make determine the shape that the
2 union movement is going to be in, and from now on post
3 Marikana the same is going to happen.

4 MR KETTLEDAS: Thank you. Hassan, and
5 only one hand? Two, three, the back, and four here, we're
6 done with four.

7 HASSAN: Sorry Les, I hope you don't mind
8 me sitting because I thought it's a seminar but I'm in the
9 movies now. There's a long queue here sitting from the
10 back. You know, I think sometimes we tend to confuse the
11 architecture that we have for the real thing. You know, I
12 know as a former union organiser, I now work with the
13 Benchmarks Foundations that I'll talk about, I worked in
14 various unions, that I've had to represent other people who
15 belong to unions because the leadership didn't want to
16 represent them because of other skirmishes. So the
17 incumbents had become quite great managers of control,
18 controlling dissent, making sure that other tendencies are
19 not recognised, etcetera. So really the union movement
20 itself has to change and every time when we talk, we seem
21 to talk like the problem is outside only. The union
22 movement itself have amassed so much wealth, right, and
23 that's why I think the need for discussion around the
24 strike fund is quite important. I don't know if the NUM
25 has got six billion in their reserves or NUMSA has got also

Seminar phase 2

1 money. All these guys have got a hell of a lot of money,
2 right, and this limits the stuff. It's not just the
3 employer. We've tasted some honey.

4 You know when I started to work part-time with
5 the Benchmarks Foundation about five years ago and I, as a
6 unionist I said hey, let's talk to the union guys in the
7 area, community people said don't talk to the union because
8 the minute you talk to the union management will know, or
9 others will know, the powers that be will know. So this
10 idea of this cosy relationship has consequences, right. It
11 means that the union is not as vigilant. It means that
12 political parties are not vigilant. The regulatory bodies
13 don't talk about the DMR. I mean it's both the referee and
14 player, mining and resources. It really doesn't do much of
15 its work.

16 The report which Benchmark produced, "Coping with
17 unsustainability," a year or so ago, did an in-depth study
18 on Lonmin. I think Kelly has got it for the Commission,
19 but it shows that Lonmin has made promises around building
20 houses, which it did not do in practice. So they make
21 these promises. They lie to shareholders and yeah, yeah,
22 there's no activism there, and this is what happens. I
23 mean in 2011 for example they made a promise that - in 2006
24 a commitment was made to build 6 000 houses by 2011. By
25 the following year it has become 5 500 by 2011. So they

Seminar phase 2

1 just reduce the number, and you can find it everywhere, the
2 regulatory bodies. On air, the air pollution is too much;
3 they just reduce it. So we've bent over backwards as a
4 country to the power of corporations.

5 The gentleman here from Tukkies I think,
6 Sociology Department, raised the issue of contract labour.
7 I think in the platinum sector this report points out 30%
8 of the workers are contract workers, less in gold and
9 others. So really, I really think that we've become
10 collectively very weak at keeping those in power to
11 account.

12 I just want to end with a final point. Really,
13 if we want to have this to be seminar, let us sit
14 differently and let us try and have a conversation then.

15 MR KETTLEDAS: Thank you. The next one
16 was the gentleman here with the pink shirt.

17 GENERAL MPEMBE: Firstly the question -
18 Major-General Mpembe from SAPS.

19 MR KETTLEDAS: Mpembe?

20 GENERAL MPEMBE: Major-General Mpembe
21 from SAPS. The first question is why strikers possess
22 dangerous weapons when they have the unions to represent
23 them. And the second question is why they have to kill
24 their own colleagues when they report on duty and destroy
25 everything, why they have to do that when they have their

Seminar phase 2

1 own unions to represent them to take up their grievances.

2 The third question is in the case where people
3 are dying and properties are being destroyed, I just want
4 to know from Prof Sakhela how would you see the, or how
5 would you recommend the intervention should look like from
6 the police.

7 Then the fourth one is, is the South African LRA,
8 is it based on which country's model? If it's not South
9 African, can't we check maybe the parachuting is the one
10 that causes the problem.

11 MR KETTLEDAS: Okay, the second one
12 behind Andries there. Oh, you withdraw. The fourth one
13 was the lady here in front here.

14 MS MUNSHI: Thank you. My name is
15 Naadira Munshi. I work for an organisation named SERI and
16 I'm also a student at WITS. Today I think I'm wearing my
17 student hat, not the Commission hat. My question is around
18 the bargaining agreements and the ways in which the mining
19 companies approach bargaining agreements, so particularly
20 when they break these wage negotiations that they form.

21 At Lonmin, well referring particularly to the
22 work of both Paul Stewart, he goes into sort of a history
23 of rock drill operators and shows how rock drill operators
24 since I think the late 1980s have engaged directly with
25 management in bargaining negotiations at times when they

Seminar phase 2

1 were unhappy with union representation, and I think he
2 shows this again in the 1990s when RDOs engaged with
3 management. At Lonmin in 2012, and obviously in the
4 January strike beforehand by Implats, RDOs again negotiated
5 directly with management.

6 But I want to talk a bit about these
7 negotiations. I mean Lonmin in particular negotiated with
8 RDOs, sort of acknowledged some of the failings and then
9 unilaterally decided to then implement the R750 allowance
10 to rock drill operators without any further negotiations.
11 But this obviously then complicates and undermines the
12 process of unionism and the very collective agreements that
13 Lonmin was engaged in. They had signed a two-year wage
14 negotiation with the NUM. So I think my question is really
15 what does it mean for employers who then break
16 negotiations, further undermining unions, but also the
17 politics around the power that employers do have over
18 employees in sort of these negotiations. Thank you.

19 MR KETTLEDAS: Thank you. Now that was
20 three. One had withdrawn. Archie, we can't give another
21 chance now. Behind Karen Tip here, third row, fourth row.
22 Yes.

23 MR MOFOMME: My name is Mpho Mofomme. I
24 come from one of the firms that represent some of the
25 victims of the Marikana Commission. I'm a lawyer by

Seminar phase 2

1 profession. If you check the LRA it was an overhaul of the
2 previous labour dispensation. Am I correct? Prof will
3 confirm that. Now when we have the new situation, don't we
4 need to have a paradigm shift?

5 As I'm listening now it looks we have a bottom-
6 down approach and everybody's concentrating on the
7 amendment of the LRA. We are not talking about overhauling
8 the labour relations, having a paradigm shift.

9 When we talk about unionism we are talking about
10 voluntarism. You become a union member because you
11 volunteer. Take that and compare that with the party-
12 political situation. We have organised chaos there. You
13 join a party of your choice. The only requirement is that
14 it must register with the registering authority, the
15 Electoral Commission. Any person can vote for it. So the
16 LRA as it is now, the main purpose is to make
17 administrative work easier for the management. I hope I'm
18 right on that. It just makes it - they want to deal with
19 one union.

20 Now the question is, is the management such weak
21 that it cannot deal with 10 unions at a time? Why can't we
22 allow workers to join a union of their own choice and it is
23 the duty of the management to make sure that the workers of
24 those various unions are given the benefits and those
25 workers have got the right to pursue their interests. Then

Seminar phase 2

1 in that instance we have the worker as the core, not the
2 union. You look at the worker, the interest, the
3 obligations.

4 Whilst we talk about the current situation we are
5 looking at the unions, but unionism is about human sector.
6 It's how we regulate the human sector. Now the human
7 sector is very difficult to regulate because if I'm in
8 management and I just happen to like shop stewards from
9 union A, those are the people who'll get the luxurious
10 offices. Those are the people who can visit me at home and
11 we can talk what to do. Those are the people who will spy
12 for me, my ears and eyes on the ground. Those are the
13 people who will get promotion and they get the privileges,
14 and then their officials become managers. Their union
15 becomes an interested party in the investment. Now we have
16 unions who are rich. These unions are now forced to
17 protect their wealth. Now we have to look at those various
18 factors where the union substitutes a worker, where the
19 union should be stopped from being investors in the same
20 companies. How do you expect a union which is a
21 shareholder to support the workers against its own company?
22 Because the more the shares go up, the more the union
23 benefits.

24 We have to be honest with ourselves and say
25 unionists, I'm addressing you. Unions are not fully

Seminar phase 2

1 accountable to their members. It's a fact. They looked at
2 their investments, how their investment arms are doing at
3 the expense of the workers. Unionists, you know some of
4 you want to go to parliament, so the union is a pathway to
5 political elitism. We have to be honest; we have a
6 situation where union executives are senior members of
7 political parties. That's the South African scenario.

8 Now when this executive is in a political party
9 situation is he not going to push the policies of the
10 parties through the members of the union, through this
11 union? This official is also a director of an investment
12 company of the union, which has also invested in the same
13 company that he has to represent the members.

14 Now how do we control this human factor? We have
15 to have a paradigm shift, not talk about the LRA. Remove
16 the LRA from the picture, start afresh, just like we had a
17 paradigm shift with the LRA, and then we can then look at
18 the member. We have a bottom-up approach. We protect the
19 interest of the worker. We have the companies becoming
20 transparent about the financials, when the worker doesn't
21 have to read in the newspapers that the CEO got 48 million,
22 but he cannot get 5%. The company does not have money to
23 pay a 5% increase, but it has money to pay a bonus of
24 millions to the CEO. Unless we do that, we look at the
25 worker as the core and we have a paradigm shift, we will

Seminar phase 2

1 keep on amending and amending and amending, like we have
2 amended the LRA until we do not know what it means. It has
3 lost meaning, now we say the unions are weakened. But how
4 many times have we amended the LRA? We should have a
5 paradigm shift.

6 MR KETTLEDAS: Thank you. Thank you.
7 Now we're going to have the panel again responding. We're
8 running towards closing now. I understand, Kelly, 6
9 o'clock is cut-off. Okay. Ian or Sakhela?

10 MR MACUN: Just a very quick comment,
11 Chair, to Major-General Mpembe. I think the first question
12 you posed would, why do workers kill each other when they
13 have trade unions, really deserves another seminar on its
14 own. I'm not going to try to address it, except to perhaps
15 link it to the last set of comments, and that is that even
16 though we are concerned as government to try and propose
17 legal measures that could curtail violence particularly
18 associated with strikes. I think at bottom it's not a
19 legal issue, or there's no legal solution to your question,
20 but to really answer the question I think we need a
21 separate seminar on that.

22 The LRA was not based on a model from other
23 countries, except as I alluded to, one specific part of the
24 LRA which was to do with the workplace forums and the
25 Minister of Labour at the time, Mr Tito Mboweni as I

Seminar phase 2

1 understand it had a particular interest not in finding an
2 alternative to trade unions, but trying to deepen
3 industrial democracy and it so happened that one of the
4 drafters, or one of the members of the drafting team was a
5 Professor Manfred Weiss, who is from Germany, and who then
6 brought in an amended form of what the German Law has into
7 our law. But it's fallen flat, as I said, in the
8 presentation, so indeed we have our South African, a truly
9 South African product in practice.

10 Just a quick comment on the issue of management
11 bypassing agreements, which I think again is a question
12 that perhaps could be problematised in the same way that we
13 try to problematise workers bypassing unions. There's no
14 question that it's unprocedural, it's problematic that when
15 agreements are struck, as far as we're concerned that's
16 what's struck and that's what follows and there should not
17 be unilateral amendments outside of a collected bargaining
18 arrangement. So let me just acknowledge that the question
19 that you've posed is a very important one and indeed
20 touches on a very problematic issue.

21 PROF BUHLUNGU: Thank you. I think,
22 Hassan, I agree with you; you know, the bottom-line is
23 people who run trade unions have to be accountable. It's
24 not just, it's in the law, it's in union constitutions,
25 society expects it to be so, members expect it to be so.

Seminar phase 2

1 It's just that it's got to be done. People have got to be
2 more accountable for all sorts of things that they do.

3 I think the question from the gentleman, Major-
4 General Mpmembe, look, you're raising interesting questions
5 here; why do strikers carry weapons when they have trade
6 unions? I think it's a legitimate question, but it doesn't
7 begin with Marikana. It does not begin with Marikana.
8 Just in case we forget, in fact there were times when
9 people justified it and called those weapons traditional
10 weapons. It is so. Let's, I think we need to kind of go
11 back a little bit in time and just look at how different
12 people at different times tried to justify the carrying of
13 these things, and I don't think it necessarily results in
14 people being killed.

15 So I just want to clarify that one as a general
16 point from what I know and from what I've seen. But what
17 does happen is that situations do get out of hand and
18 sometimes with people carrying no firearms. Sometimes
19 people - remember the old days when people were thrown off
20 moving trains in strikes, during strikes. So all sorts of
21 these things happen. So we've got to think carefully about
22 it. Why do they have to kill when they have grievances?

23 The point is this; when there are bottlenecks,
24 and what we're talking about here essentially is a
25 bottleneck in the system where people have a trade union,

Seminar phase 2

1 they pay their union dues every month, they elect people to
2 represent them and suddenly there's a bottleneck, things
3 don't go there and come back. Like Archie Palane was
4 saying, people don't deliver the bad news to members, so
5 members wait, and members wait, and members wait. So
6 there's a blockage.

7 Just to take - maybe this is too big. For me an
8 instructive case is the recent Constitutional Court
9 judgment in the kind of FAWU case where basically two
10 members took the union - no, the members were supposed to
11 be represented. There was a bottleneck. The union did not
12 take the matter to the Labour Court for reasons which I
13 don't understand and then the members discovered a year
14 later, they took the union to court and of course the Court
15 found in their favour. The union appealed it all the way
16 up to the Constitutional Court. How do you explain that
17 blockage? How do you explain to these workers, who are
18 members of a union, in good standing, who are paying
19 subscriptions, but there's a blockage? So in this case
20 they resorted to the law. So it's not as simple as that.

21 I think your question about using the police, for
22 me it still stands. The police can do all sorts of other
23 things but shoot. I just think as a society, as a society
24 we've got to draw the line. Yes, if we draw the line and
25 say everybody, no carrying of firearms, fine, let's do

Seminar phase 2

1 that, or arrest people. Or arrest people, as the police
2 should, but not - it's a sad reminder. The problem is that
3 it just kind of throws us back. It throws us back. So
4 let's -

5 About the Labour Law, I'll leave that. It's a
6 bigger question that the Commission is dealing with, so I'm
7 not going to dwell. On the law I think was the LRA
8 parachuted into the country? I don't think you're right,
9 frankly. I think at worst the LRA is patchwork. There's
10 elements of it from 1924 actually, the Industrial
11 Conciliation Act, there's elements of that, if you look at
12 the bargaining councils for example, industrial councils.
13 So there's elements drawn from that era. Then there's
14 elements from Wiehahn, and then there's elements from all
15 these people that were involved, Halton Cheadle, and other
16 people, and where's Paul? And Paul and all of them, and
17 then there's the German kind of side, influence on it, but
18 it's not parachuted. It's part of the history of the
19 country, of the evolution as people are talking about here,
20 so I think just in case we forget those details.

21 Now the question about management, look, let's
22 face it, management in any country will do anything they
23 can to bypass legislation if they can get away with it, to
24 bypass, or ignore regulations and agreements if they can do
25 it. That's why you have unions to then be the watchdogs

Seminar phase 2

1 and account, and so on, and so forth. So if they do it,
2 look, why blame them? And after all, in this country
3 people try to get away with bigger things. So I think
4 you're on two things there.

5 I think the gentleman, Sir, the lawyer, I think
6 you, I want to throw that question back to you, seeing that
7 you're the lawyer, but you're raising very fundamental
8 points here about the need for a paradigm shift, about a
9 need - this is my point too, that there's a need to revisit
10 this patchwork, this mosaic of kind of legislative
11 framework and see whether it still holds together.

12 My view is that it does not hold precisely
13 because the assumption is that unions, once they are in
14 place they will forever be functional. Fact is most unions
15 today are there, they have nice offices, they have, you
16 know, people, they employ people, but many of them are
17 semi-functional to dysfunctional. So I will leave it to
18 that. I think this is a debate; it's not for me to answer
19 all the questions. We're here together in a debate. Thank
20 you very much.

21 MR KETTLEDAS: Thank you. If they are
22 dysfunctional they get deregistered. Archie, we've come to
23 the close. You need a microphone.

24 MR PALANE: No, no, I just wanted to
25 clarify otherwise everyone in the house will leave here

Seminar phase 2

1 thinking that it was parachuted, it is Wiehahn and so on.
2 I was part and parcel of the research committee that was
3 appointed by the then Minister Tito Mboweni. We went in
4 each and every country to identify what was the best
5 practice, but then it was put within the South African
6 context. So let's not shy away from the fact that some of
7 the issues in the LRA in 1995 come from other experiences
8 in other countries. So I just wanted to correct that.

9 MR KETTLEDAS: Well, in addition to that
10 the LRA is fully compliant with the fundamental core labour
11 standards of the International Labour Organisation, the
12 conventions 87, 98, 100, 111, 105, 29, and so on.

13 The team that drafted the LRA at the time was a
14 balance team that had representatives that one would say
15 would represent the interests of business, on the other
16 hand the interests of labour, and with experts as well. So
17 one of those people that were involved then is today a
18 judge of the Constitutional Court.

19 Alright, so I don't think this discussion is
20 over. It can't be over. There's so much still to discuss
21 in the various aspects that have been raised. We've heard
22 the three presentations and we've had some responses to
23 those presentations and I think even beyond those
24 presentations, and I think it's been a help. It's been a
25 useful discussion for the Commission to understand some of

Seminar phase 2

1 the dynamics in this labour market, because the labour
2 market is not stagnant, it is dynamic. It keeps on
3 changing and everybody has to be aware and keep pace with
4 those developments and make the necessary adjustments.

5 On the trade union side, on worker organisation
6 side there obviously have to be some adjustments made in a
7 way that people have done things, and similarly on the
8 employer's side you have the same. There is an allegation
9 that some managements are weak, some managements are not
10 keeping pace with developments and thereby we get into a
11 situation where we have these disruptions within the labour
12 market.

13 I mean the core for bargaining arrangements is
14 that both parties must come to the party and they've got to
15 continue talking about the issues that confront them in the
16 workplace. There's no point in people going into trenches,
17 you know, and not talk, and that is why a lot of the
18 legislation that is there today is underpinned by this
19 issue of social dialogue. You've got to keep talking.
20 You've got to keep addressing the issues. You've got to
21 keep making the adjustments necessary as circumstances
22 change.

23 So I think that, I don't know what the way
24 forward is going to be, if we're still going to continue
25 with the discussion of this nature at another level, but

Seminar phase 2

1 we'll hear from Advocate Matthew Chaskalson, who is also
2 involved in the Commission on the evidence leadership part.

3 Thank you very much for all those that have come
4 and your participation and I think you've made a
5 contribution to the work of the Commission today. Thank
6 you.

7 MR CHASKALSON SC: We're running quite
8 late at this point, so before we get evicted I would just
9 like to thank our Chair and our speakers for what for me
10 certainly has been a very helpful discussion and seminar.

11 I do want to thank some other people as well, in
12 particular Thantaswa Lupuwana who didn't just stand in for
13 John Brand, but also was central to organising this event,
14 and Kelly Forrest who didn't stand in for John Brand but
15 was core to organising this event, and our backup support
16 from the Department of Justice who made sure that
17 everything worked and happened.

18 I'd like to alert everyone to the fact that our
19 next seminar is going to be at this venue on Wednesday, the
20 9th of April. It will be focussing on migrancy, with the
21 specific focus on Marikana, and the seminar thereafter will
22 be on the 16th of April at this venue. Major-General
23 Mpmembe, you'll be happy to know it will be focussing on
24 strike violence.

25 I have a sense from people's responses that there

Seminar phase 2

1 are a great deal of people who have a lot more to say than
2 was possible to be said today. Now parties at the
3 Commission will obviously have their opportunity to make
4 those submissions in the formal processes of the
5 Commission, but if there are people out there who would
6 like their views on the topics that we have discussed today
7 to be fed into the Commission process we would encourage
8 you to make submissions to us as the evidence leaders and
9 we will feed them into the Commission process. The parties
10 will then be able to respond to them. But I do get a sense
11 that there are a great deal of people who are not going to
12 be at the Commission day in and day out, who have some very
13 important views to express on these topics.

14 At this point then I'd like to thank you all for
15 coming and participating and invite you to come to our
16 future seminars. Thank you very much.

17 [MEETING ADJOURNED]