

# Corporatism and Collective Bargaining in a Democratic South Africa (1995) 16 ILJ 785 \*

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## 1 Introduction

The theme of 'emerging models of worker participation and representation' is uniquely appropriate in relation to South Africa today. In February 1995 a draft labour statute, designed to replace the existing Labour Relations Act <sup>1</sup> and corresponding statutes applicable to the public, education and agricultural sectors, was published <sup>2</sup>. One of its more radical innovations is the proposal for a system of worker participation by means of elected bodies to be known as 'workplace forums'.

The draft law has turned out to be controversial, and at the time of writing it is not clear what its fate will eventually be. Inter alia, the chapter on workplace forums has reportedly encountered opposition from trade unions as well as employers. Debate of this nature, however, is integral to the emergence of new industrial relations models. This article will attempt to evaluate the proposed system of worker participation and to explore some of its implications which may be of interest internationally. In particular, it will focus on the envisaged relationship between workplace forums and trade unions - a question that will be crucial to the success or failure of the project.

## 2 a Brief Background

The proposed law should be viewed in its historical setting. For reasons that are generally known, independent trade unions in South Africa have evolved in a strongly adversarial relationship vis-à-vis employers and the state. The union movement - in particular, that part of it affiliated to the Congress of South African Trade Unions (COSATU) - played a major role in forcing the retreat by the previous regime which led to the election

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of a 'government of national unity', led by the African National Congress (ANC), in April 1994. <sup>3</sup>

Since then the circumstances of these unions have changed dramatically. The ANC, indeed, had fought the election in a formal alliance with COSATU and the South African Communist Party (SACP). A significant number of union leaders have been drawn into government and public administration at national, provincial and local levels.

With hindsight, a more fundamental rapprochement between unions, the state and employers may have been set in motion a decade earlier when, following the legal recognition of African workers as 'employees', <sup>4</sup> independent unions started joining industrial councils <sup>5</sup> during the early 1980's. A controversial tactic at the time, it was criticized as well as defended - by some, as compromising the unions' ability to promote

labour interests unambiguously; by others, as a necessary move in the struggle for better wages and conditions. <sup>6</sup> Though subsequent events provided ammunition for both schools of thought, the tactic itself became established and industrial councils are now accepted as a legitimate, if bureaucratic, mechanism of collective bargaining.

Over the same period, trade unions and union federations were also being drawn into bipartite, tripartite and multipartite structures or ad hoc configurations with employers, government and other parties for a variety of purposes. This trend reached its zenith (to date) with the creation of the National Economic Development and Labour Council (NEDLAC) early in 1995. <sup>7</sup> In the process the term 'corporatism' <sup>8</sup> came to be used as shorthand for describing the involvement of labour with employers and/or

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the state in consultative structures at workplace and/or centralized level. <sup>9</sup> It is used in the same sense here.

In the early stages, much attention was focused on employer driven efforts at creating participatory structures at enterprise level in line with contemporary management theory. <sup>10</sup> During the last year or two, however, the debate has taken a new turn. From being a management initiative with essentially commercial objectives, the participatory project has become redefined as a dimension of public policy. Briefly, the proposition is that South Africa's priorities have shifted from the struggle for democratic rights to the struggle for economic and social upliftment of the black majority. For this to succeed, it will be necessary to cure the chronic malfunctioning that increasingly affected the country's economic performance since the mid-1970's. <sup>11</sup> A corresponding shift from adversarial towards more participative industrial relations is deemed imperative, not only for the reasons that apply in every country competing on the world market but, specifically, as part of achieving the developmental aims of the government's Reconstruction and Development Programme (RDP).

From this perspective it is not only in labour's interests to cooperate with management over production related issues with a view to boosting the prospects of job security and higher wages; it is part of labour's responsibility as a key player in the formulation and execution of national policy <sup>12</sup>

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Against this background came the proposed new labour statute (referred to from now on as the draft bill), intended to give effect to the guarantees of fundamental human rights contained in the new Constitution <sup>13</sup> as well as the vision of improved economic performance based on improved industrial relations. It also concretized much of the debate that has gone before, raising issues which are significant not only in a local context but more broadly. In a world increasingly characterized by social, economic and national tensions, the new South Africa has emerged as a laboratory of conflict resolution. If the new labour dispensation can mould relative stability and enhanced economic performance out of the endemic industrial warfare of the past, it will surely be of interest internationally. Conversely, South Africa has a great deal to learn from the experience of other countries, in particular those countries where systems of worker participation have been operating for decades. A comparative approach is therefore essential.

### 3 the Rationale for Workplace Forums

The draft bill presents workplace forums as part of the industrial restructuring which is necessary for South Africa to compete on international markets as well as a mechanism of economic development. <sup>14</sup> 'Workplace restructuring', it is argued, 'has been most successful in those countries where participatory structures exist' (such as Germany and Sweden); countries (such as Britain) that are characterized by an adversarial system of industrial relations are said to have 'fared badly'. <sup>15</sup> Workplace forums are accordingly expected to 'facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects'. Unless workers and management 'work together more effectively', it is argued, 'they will fail adequately to improve productivity and living standards'.

At the same time the drafters were sensitive to union fears that workplace forums might cut across the struggle to develop enterprise level bargaining, and went to considerable lengths (as

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will be discussed below) to defuse them. The aim, according to the Explanatory Memorandum, is 'not to undermine collective bargaining' but 'to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production'. It is assumed that production related or 'non-wage matters' are capable of being dealt with in a non-adversarial manner at workplace level whereas 'wage matters' are the proper subject of industry level collective bargaining.

### 4 'Cooperation' Versus 'Adversarialism'

Are these assumptions realistic? The Explanatory Memorandum, in effect, treats adversarial industrial relations as a central obstacle to economic progress <sup>16</sup> - an approach uncomfortably suggestive of the view that strikes are the main cause of economic problems. 'Dialogue', in contrast, emerges as an autonomous and seemingly decisive factor in the quest for competitiveness. Such a view is certainly not prevalent among authorities on the systems of worker participation in countries such as Germany which helped to inspire the draft bill. Rather, plant level industrial relations is understood as only one of a range of factors which, in combination, determine economic performance. Investment levels, for example, have historically been far higher in the 'successful' countries mentioned in the memorandum than in 'unsuccessful' Britain.

Nor does it follow that production related topics of consultation are necessarily less controversial or more conducive to agreement than the 'distributive' topics of collective bargaining. And there is little evidence that the institutions of worker participation reflect a willingness to collaborate on the part of management and labour while collective bargaining reflects an attitude of confrontation. As Blanpain comments:

'I would certainly not accept this connotation as being an important one. It seems to me that the attitude of the actors, namely whether they want to work together or to fight, is more important than the structures through which they operate.' <sup>17</sup>

In South Africa, the 'attitude of the actors' has been crucially influenced by the traumatic historical experiences through which present labour relations have been shaped. Decades of deprivation, conflict and mistrust on the part of black workers will not disappear overnight. Organized labour cannot but reflect the accumulated aspirations of a severely deprived working population. The institution of workplace forums will need to be

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experienced as a means towards realizing at least some of these aspirations, or it is unlikely to gain credibility.

A better approach is to start with the actual causes of South Africa's poor economic performance in all their complexity, and the actual causes of industrial conflict, in order to assess the role that a participative form of management could realistically be expected to play. A system of 'cooperation' imposed from above might be perceived as a device for disarming the union movement, not necessarily by creating an organizational alternative in the shape of workplace forums (which the draft bill denies) but, more insidiously, by downplaying the importance of independent ('adversarial') mobilization in the eyes of workers. If the view takes root on the union side that worker participation is really about limiting their power while managerial power remains essentially intact, <sup>18</sup> the participatory project is likely to be still-born.

## 5 Curbing the Right to Strike

The draft bill goes on to give some substance to such fears. The most obvious way in which it *would* limit conflict has little to do with a spirit of cooperation and is hardly mentioned in the Explanatory Memorandum: it would prohibit industrial action over 'rights' issues as opposed to 'interest' issues. <sup>19</sup> Included among the former would be -

- (a) all topics designated as topics for joint decision making in terms of clause 66, and
- (b) attempts by employers unilaterally to implement decisions in respect of topics designated as topics for consultation in terms of clause 63 - in other words, without following the procedure laid down by clause 65.

While this is in line with international trends, it marks a substantial departure from the existing position that disputes may be declared and industrial action taken over any issue, including issues of 'right'. Inevitably, it would have an impact on the bargaining agenda and, more particularly, on union efforts to extend the bargaining agenda. Unless it is backed by the ability to strike, it has been said, collective bargaining becomes collective begging. By seeking to limit the scope for industrial conflict in this way, the draft bill may intensify suspicions among trade unionists that their hard-won ability to defend their members' interests by

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means of collective bargaining is under threat. <sup>20</sup> In practice, the bargaining agenda would be limited by legislative intervention - something which has thus far gone against the grain of our pluralist tradition.

The draft bill furthermore does away with the concept of 'unfair labour practice' which has thus far enabled the Industrial Court to order recalcitrant employers to bargain with

representative unions at plant level. Legally, this is problematical. The interim Constitution guarantees all employees a right to 'adversarial' collective bargaining as well as a right to strike. Even accepting that this does not place a duty on private sector employers to bargain (a point which has yet to be clarified), it does call into question the competence of the legislature to curtail *existing* bargaining rights unless it can be established that such curtailment meets the criteria for limitation of fundamental rights set out in s 33 of the interim Constitution.

Also from an industrial relations point of view there are strong arguments for leaving the present (unlimited) bargaining agenda and the right to strike as they are. Trade union hackles are likely to be raised, especially at grass roots level, by interference with their hard-won rights. If workplace forums come to be perceived as a sweetener for this pill, they will fail. The 'bargained corporatism' envisaged by the draft bill cannot be imposed by closing off the road of collective bargaining and illegalizing the right to strike over what has been termed 'quality of work' issues. Unions will be antagonized, and the causes of conflict will remain. Workplace forums will only succeed if they become a preferred option - ie if workers and unions with a free choice in the matter come to see them as bodies through which such issues can be dealt with more satisfactorily than by means of collective bargaining. <sup>21</sup>

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## **6 the Democratizing Aspect of Worker Participation**

All this suggests that a narrow economic motivation for worker participation aimed primarily at curbing industrial action, though possibly reassuring to management, carries the risk of alienating labour. It goes without saying that the economic rationale for the reorganization of work along more cooperative lines is vitally important. Equally clearly, however, issues of power are involved which may well be decisive from the labour point of view. Since the aim is to arrive at a model that will be considered serviceable by labour as well as management, it is necessary to start from a more balanced understanding of the functions that workplace forums will have to serve.

Internationally it is recognized that, alongside of its economic role, worker participation also has 'moral' (or 'ethical') and 'sociopolitical' objectives. <sup>22</sup> A Dutch textbook, for example, refers to the 'requirement of basic fairness, that they who are affected by particular decisions . . . should be involved in discussing and taking such decisions'. It continues:

'We can call this consideration one of democracy . . . . It applies in various cohabitational contexts such as the state, an association or a family, and equally in a cooperative context such as an enterprise.' <sup>23</sup>

From this standpoint, maximum involvement in decision making at work is a basic human right, not confined to trade union members, for which appropriate institutions need to be created. In South Africa, given its history of political repression and the aim of empowerment reflected in the RDP, such considerations should weigh heavily.

The point also has legal significance. When interpreting statute law, courts must give effect to the intention of the legislature as expressed by the wording of the statute. While the Minister of Labour has described worker participation as 'more than a moral or ethical imperative', situated within 'parameters of equity and social justice', <sup>24</sup> the draft bill itself

does not reflect this. The only imperative identified with the functions of workplace forums is that of 'seeking to enhance efficiency in the workplace'. <sup>25</sup> Such an explicit directive will be binding on a court in a way that a general statement of intent by a minister is not. The implication is that economic efficiency must take precedence over the requirements

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of democracy and that, if 'efficiency' (as understood by the court) demands it, workers' rights to be involved in decision making must be curtailed.

Yet the notion of a mutually exclusive relationship between efficiency and democracy is by no means obvious. An alternative approach, starting from a recognition of the contrasting functions of worker participation, would be to seek a synthesis: a system of workplace governance designed to enhance democracy as well as efficiency, in mutually reinforcing ways, to the greatest possible extent. The relevant provisions of the draft bill will be looked at in this light.

## **7 the Powers of Workplace Forums**

The constitution of a workplace forum may be determined by means of a plant level collective agreement; failing this, the provisions of the draft bill, as set out below, will apply. It is therefore likely that a majority of workplace forums could have customized powers, capacities and modes of operation having little in common with those proposed by the draft bill. In practice, since only unions can trigger the establishment of workplace forums <sup>26</sup> such negotiated powers would presumably be more extensive or more favourable to the union than those contained in the draft bill, or the union would have no incentive to agree to them. Only if the parties are unable to agree would the draft bill come into play. What follows should therefore be read with this proviso in mind.

Clause 63 of the draft bill provides that a workplace forum is 'entitled to be consulted' by an employer about proposals on a range of issues to be determined by NEDLAC. Clause 66 provides for what is termed 'joint decision making', by which is meant that an employer may not implement proposals on a different range of topics, also to be determined by NEDLAC, until it has reached consensus with the workplace forum. International precedent suggests that the topics intended by clause 63 will be production related issues (such as restructuring of work, product development plans, investment decisions, mergers, etc) and those intended by clause 66 will be what might be termed 'social' issues (pension funds, medical aid schemes, etc). <sup>27</sup> Clause 67 further entitles a workplace forum to relevant information for purposes of consultation and joint decision making.

If the employer fails to consult as required by clause 63, the workplace forum may seek mediation and, if this fails, arbitration

through the mechanisms proposed by the draft bill. <sup>28</sup> In such an event, the arbitrator could presumably order the employer to repeat any part of the consultation exercise that may have been flawed before taking a final decision. If there is no agreement on a subject of joint decision making, on the other hand, the dispute may be referred to arbitration from which there is no appeal. As already noted, these remedies displace workers' constitutional right to take industrial action. <sup>29</sup>

## 8 the Content of the Duty to Consult

Contrary to what is sometimes assumed, only the process of joint decision making provided for by clause 66 would promote democratization directly. Democracy implies an open-ended mechanism for articulating conflicting viewpoints and deciding along lines of majoritarianism which one will prevail: 'open-ended' in the sense that the process itself will determine which viewpoint commands a majority. In the consultative scheme of things it is settled in advance whose viewpoint will finally prevail. 'Consultation', as contemplated by clause 63, would not limit managerial prerogative but merely impose certain procedural duties on management in exercising its prerogative.

It is true that consultation - and, in particular, the duty to provide workplace forums with relevant information - could have an important educative function and increase workers' ability to take decisions. It may also influence the decision-making process. Clause 65 gives workplace forums and workers an opportunity of seeking to win the employer over to their point of view. But, if they fail to do so, the employer may implement its proposal unilaterally.<sup>30</sup> Workers must then either submit or take industrial action in terms of clause 47.

The draft bill further confines the role of the workplace forum to one of responding to management proposals. It is not clear why

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it does this. In the Netherlands, for example, works councils have a 'right of initiative' to make proposals on any subject for consideration by the employer.<sup>31</sup>

Finally, the draft bill creates the possibility of amending the agendas contained in clauses 63 and 66 by means of collective agreement (although, in the case of additional matters for consultation, limiting the parties' discretion by confining it to the topics specified by clause 63(3)). The object of doing so, however, is left unclear. This highlights an important omission from the draft bill. Avowedly concerned with improved economic performance, it implicitly recognizes workers' ability to contribute to the governance of the workplace. Yet it gives no sign of regarding worker participation as a dynamic process driven by workers' increasing capacity and preparedness to take part in decision making. Adjustment by means of collective bargaining is a useful mechanism but, in practice, unlikely to focus adequately on production related issues. Indeed, part of the rationale for workplace forums is precisely the supposition that efficient regulation of such issues is something 'that collective bargaining cannot easily achieve'.<sup>32</sup>

Nothing, of course, would prevent parliament from amending clauses 63 and 66 from time to time. But provision for amendment to the agendas for consultation and joint decision making in the light of the increasing experience gained by workplace forums and the requirements of national policy, on the advice of NEDLAC, would have been a more proactive way of dealing with this need.

To sum up: though the draft bill reserves a decision on the specific powers of workplace forums for NEDLAC, it qualifies them in advance. The intention, presumably, is to accommodate management fears of interference with their freedom to manage. The

question that arises is whether, on this basis, the draft bill can satisfy labour's expectation of becoming a serious stakeholder in the drive for economic development.

## 9 Acquiring Expert Skills

A further concern among trade unionists is that workplace forums (like shop stewards in collective bargaining) may be disadvantaged by the preponderance of expert skills, advice and knowledge which employers tend to have at their disposal. The draft bill addresses this problem in two ways.

Firstly, clause 71 allows members of workplace forums to take reasonable time off work for undergoing training at the expense of the employer. Clause 73 moreover requires employers to provide

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workplace forums with facilities that are 'reasonable having regard to the size and capabilities of the employer'.

Secondly, clause 70 provides that workplace forums 'may have recourse to experts' with a right to attend their meetings with employers and have access to information. However, no clear provision is made for enabling workplace forums to exercise this right. They will have no independent resources to pay for the services of experts. <sup>33</sup> In practice, workplace forums (like their counterparts in Europe) may well have to turn to trade unions for advice, training and support. This may help to cement the relationship between unions and workplace forums but could make heavy demands on unions' already limited resources.

More proactive efforts by the state seem necessary to make the policy work. There should at least be a clear commitment to the principle that workplace forums and their members must receive the necessary training and consultative support to play the role that public policy envisages for them. This could include provision for training of workplace forums by bargaining councils and for training boards to be given this function in terms of the Manpower Training Act. <sup>34</sup> In particular, unions should be involved in this, possibly by receiving direct assistance in setting up accredited training schemes for workplace forums. This would tend to give more credibility to such training as well as serving the ends of workers' empowerment. In any event, the principle should be clear: if participation in management is to be considered to be part of the inherent functions of employees, then the existing concept of skills training should be broadened to accommodate this.

## 10 Establishing a Workplace Forum

Clause 57 lays down two requirements which might well serve to confine workplace forums to an insignificant minority of workplaces. Firstly, it excludes workplace forums from all workplaces with fewer than 100 employees - by all accounts, the vast majority of workplaces in the country. <sup>35</sup> Secondly, it provides that only trade unions representing a majority of employees in the workplace shall have the capacity to trigger the establishment of workplace forums. This would further limit the number of

workplace forums to (a) workplaces where a majority union is present <sup>36</sup> and (b) where such majority union wants to see a workplace forum established.

Workplace forums as conceived here will have an identity crisis. While supposedly representing all workers in the workplace as opposed to union members only, <sup>37</sup> workers themselves cannot initiate their establishment. The aim of the exercise thus becomes unclear. Workplace forums, according to the Explanatory Memorandum, are necessary to serve the developmental purposes of national policy. Yet unions are effectively given a power to prevent them from coming into existence in workplaces where they have a majority, while workplaces without a majority union are left out altogether. The aim is obviously to allay union fears of employer dominated workplace forums that could be used to undermine trade unionism and to 'get the unions on board'. But is this the way to do it? If a 'second channel' is necessary for the national economy to grow, can it be left to individual unions to create or not create in the light of their own perceived interests? <sup>38</sup> Indeed, can workplace forums succeed if the draft bill itself treats them as potential rivals against which unions need the protection of the law?

Also in another sense the approach adopted in clause 57 is puzzling. South African workers are no strangers to dealing with attempts to foist unwanted structures on them. Even in the early 1970's, when independent trade unionism was all but extinct, management created liaison committees proved to be only the feeblest obstacle to the growth of the new unions. However, taking union sensitivities into account, an alternative approach might be to provide for the establishment of workplace forums at the instance of majority unions *or* a petition signed by a stipulated

number or percentage of employees. This would be consistent with the approach of clause 58(4), where employees are permitted to nominate candidates for election on this basis.

The point is that, where a majority of workers in a workplace desire the establishment of a workplace forum, a power of veto by the union seeking to represent them seems a questionable device for winning union support. <sup>39</sup> A better approach, it is submitted, would be to offer unions sound practical reasons for accepting workplace forums. Only if this happens could the latter function in the way suggested by the Explanatory Memorandum: as a supplement rather than an alternative to collective bargaining. On this basis unions would be enabled to move from their present defensive position and begin to think constructively about the relationships they could develop with workplace forums.

International precedent suggests ways in which this could be done.

## 11 Trade Unions and Works Councils

It is noteworthy that in European countries with statutory systems of works councils employers are generally under a duty to establish such councils in the sense that any employee, not only unions, can demand their institution. Yet, in practice, unions have little difficulty in holding their own against 'competition' from this source. <sup>40</sup>

A persistent theme in the unions' perception of workplace forums in South Africa has been one of 'us' and 'them'. The assumption is that workplace forums would be non-union or anti-union bodies, actually or potentially under management control. Leaving aside the union trigger mechanism contained in the existing draft bill, as well as the unions' proven ability to make unwanted impositions unworkable, <sup>41</sup> European experience suggests that such a dichotomy is unlikely to occur in practice.

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Whatever management might intend, unions - provided, of course, that they do not adopt an abstentionist position - are likely to command a majority on most works councils. In the Netherlands, some two-thirds of works council members in larger enterprises are trade unionists. The trend is even more marked in Germany, where some 86% of works council members are trade unionists and some 75% are members of unions affiliated to the social-democratic trade union federation, the DGB <sup>42</sup> Union representation on works councils is more than twice their representation in the workforce as a whole. In countries with a higher union density such as Belgium, on the other hand, unions are said to have '*colonized* the works council'. <sup>43</sup>

This comes about not because unions are given a protected role by law (as some South African trade unionists demand in respect of workplace forums) but, more simply, because active unionists tend to be natural candidates for election to bodies of this nature.

The Dutch example, given a relatively low level of unionization compared to other northern European countries, is particularly instructive. Union density in the Netherlands has declined to approximately 26% of the working population in recent years <sup>44</sup> and there is little union presence at workplace level, 'partly through neglect by the trade union movement over a long period of time'. <sup>45</sup> In certain sectors, more effort has been made to organize members into groups at enterprise level (*bedrijfsledengroepen*). In the metal and transport sectors, in particular, such structures have been formed in two-thirds of enterprises with over 100 employees. In the banking and insurance sectors, on the other hand, this is true of only one in ten enterprises.

Against this background, the FNV <sup>46</sup> 'admitted [the] primacy of the councils [at enterprise level] in 1990 and made union participation in the councils a strategic priority'. <sup>47</sup> Its attitude was premised on the coexistence of union structures and works councils in the workplace and the understanding that both these mechanisms can serve to promote employee interests in different

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but complementary ways. On the one hand, works councils can serve as a means of establishing or 'legitimizing' a union presence at plant level, especially in enterprises where it is not yet established.

Collaboration between unions and works councils, however, is not confined to workplaces where unions are weak. More than one interviewee during a recent study visit by the writer to the Netherlands and Germany stressed that the operation of the works council system is optimal in enterprises with a powerful union presence. <sup>48</sup> An organized union structure alongside a works council can, from the union point of view, serve a fourfold function:

- (a) it can play a stimulating role in respect of the works council, which will generally contain union members;

- (b) it can serve as a channel of communication between the union and the works council;
- (c) it can represent workers' individual interests as well as collective interests not provided for by statute; and
- (d) it may have a negotiating role at enterprise level in terms of a national collective bargaining agreement. <sup>49</sup>

Works councils, from their side, tend to see unions as organizations offering expertise and services (for example, counselling and training) which the councils themselves do not dispose over. 'Calling in a trade union organizer', Koene & Slomp observe, 'is one of the most frequently used power mechanisms of work councils' <sup>50</sup> As in Germany, informal arrangements of this nature can be more influential than legal rules in establishing union authority in the works council arena.

This does not take away the possibility of conflict between unions and works councils. In Germany, for example, despite union policy to oppose overtime work in the interests of job creation, union members on works councils may come under pressure from their constituencies to agree to overtime rosters in order to boost earnings. In such cases the latter pressures tends to be decisive. <sup>51</sup> More than one interviewee in the Netherlands and

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Germany, however, stressed to the writer the crucial role of trade unions in combating inward looking tendencies on the part of works councils, sometimes referred to as 'workplace egoism', by injecting a sense of the broader interests of the labour movement, of solidarity with other workers and issues of social importance.

In practice, collaboration between unions and works councils appears to be the rule. Unions are able to represent and defend worker interests in ways not available to works councils - for example, through industrial action. <sup>52</sup> Works councils, in turn, enjoy statutory rights which unions do not have - for example, the right to specified information, which may thus become available to unions for collective bargaining purposes. <sup>53</sup> Koene & Slomp conclude that few problems emerge in practice from the overlap between trade union and works council activities; indeed, '[m]ore than two thirds of trade union organisers and works council chairpersons have no knowledge of such problems'. <sup>54</sup>

To sum up: works councils do not remove the need for shop stewards councils or other plant based union structures. On the contrary, it is widely accepted that works councils function best if there is an active union structure alongside of them. In practice there may be a flexible and informal division of labour between them. In particular, the employer's duty to disclose information relating to corporate plans and the state of the enterprise is of obvious importance to the development of union policy. The works council's right to be consulted over, or to veto, management decisions in respect of certain economic issues can reinforce union activity in respect of such issues. Conversely, the union's ability to muster action on an industry-wide basis can supplement works councils' weakness in these departments.

Even where unions have failed to build plant level structures, and works councils may formally have little connection with the union, there is a tendency for bonds of cooperation to develop. Crucial to this are the training and support that unions can offer works councils. The difficulty that under-resourced unions in South Africa would have in providing such facilities, and possible ways of addressing the problem, have been noted above.

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## 12 Collective Bargaining and Consultation - a Case of 'either/Or'?

Many South African trade unionists argue that the proposed topics of consultation in the draft bill form part of the potential bargaining agenda and call for a general duty to bargain rather than a duty to consult. <sup>55</sup> However, the mere fact that employers are obliged to consult over these topics would not prevent a union from bargaining over them where the employer is willing to do so or where the union is able to compel bargaining, provided the right to strike is not curtailed or excluded in the way that the draft bill proposes.

Rather, as in Europe, the employer's duty to consult could offer an opportunity for a union to gain entry to a workplace and start a de facto relationship with the employer even where it has limited support. <sup>56</sup> This raises another question mark, from a union point of view, against the wisdom of confining workplace forums to enterprises where the union is already strong.

In the Netherlands, indeed, it has become increasingly normal for unions to delegate to works councils, by means of collective (framework) agreements, a de facto capacity to bargain with employers over actual conditions of employment at plant level. The draft bill <sup>57</sup> gives the capacity to employers and representative unions to replace by collective agreement the entire scheme of consultation contained in chapter V with their own preferred conception of what the powers of a workplace forum ought to be. Such an agreement could, for example, stipulate the capacity to bargain over conditions of employment. <sup>58</sup>

This need not mean the thin end of the wedge for industry level collective bargaining. The most obvious safeguard would be a stipulation (as in Germany and the Netherlands) that collective agreements shall prevail over works council agreements. The draft bill, no doubt because of its concern to maintain a separation between bargaining and consultation topics, does not contemplate the possibility of overlap and contains no similar provision.

## 13 the Problem of Smaller Enterprises

In South Africa, as in many other countries, smaller enterprises tend to be largely unorganized and outside the ambit of collective

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bargaining. Given the importance attached to collective bargaining by public policy and the widespread view that the bulk of job creation in the future will be in small and medium enterprises, this should be cause for concern.

Could the extension of rights of consultation and/or joint decision making to employees in smaller enterprises help to address the problem? While consultation and joint decision making are not the same as collective bargaining, there are (as was noted above) some distinct points of connection between the two processes. Both involve discussion between employers and employees on a collective basis over employment related issues. For the

employer accustomed to dealing with employees in an autocratic or paternalistic way, as well as for workers, crossing one threshold may assist in crossing the other.

Yet the draft bill, as already noted, only considers unionized workplaces with 100 or more employees eligible for workplace forums. From the tone of the Explanatory Memorandum <sup>59</sup> it is apparent that the absence of workplace forums is seen as a form of assistance to small and medium enterprises. The perceived interest of those employers in being relieved of any duty to consult, in other words, is treated as paramount. The importance of workplace forums, and the aims of public policy and economic restructuring as expounded in the Explanatory Memorandum - not to mention the interests of employees - do not seem to feature.

The identity crisis of workplace forums grows more serious: are they, economically speaking, a blessing or an affliction? In other countries the duty to establish a works council rests on employers with (in the case of Germany) as few as six employees. It is true that in Germany, as in other countries, works councils are comparatively rare in smaller workplaces. <sup>60</sup> The point is that this has been a result of purely practical causes; it was not brought about through a policy of legal exclusion.

Why does the draft bill set its face against the establishment of works councils in smaller enterprises? If cost is the issue, it would be a simple matter to stipulate the kinds of costs for which employers will be liable and the circumstances under which they would become liable for what. <sup>61</sup> Alternatively (or additionally), provision could be made for forms of representation specially adapted to the situation of the smaller enterprise. In very small workplaces it is arguable that no special structures of employee representation are needed since the parties are in one-to-one

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contact. Even here, however, the objects of worker participation are no less valid than in larger workplaces and, even if no special structures are created, the appropriate rights of consultation and/or joint decision making should be vested in the workforce as a whole.

In the Netherlands, for example, employers with ten to 35 employees - while free to establish works councils - are required by law to hold consultative meetings with their employees at specified intervals and on specified topics. <sup>62</sup>

The provision in clause 13 of the draft bill for the election of union representatives with limited powers, in workplaces with ten or more members of a registered union, will also have little impact on smaller workplaces.

A possibility of opening the door to collective relationships by means of a creative adaptation of the participatory mechanism has thus been passed by. <sup>63</sup> It is submitted that this issue, in particular (a) the limit of 100 employees and (b) the possibility of special structures adapted to the needs of small workplaces, should be revisited. The integration of a large and possibly growing number of the most disadvantaged workers into the organized sector is at stake.

## 14 Conclusion

On balance it is debatable whether chapter V of the draft bill succeeds in meeting the aims it has set for itself, let alone the wider objectives that the institution of worker participation might be expected to serve.

Some of the problems noted above stem from the attempt to accommodate unions' short-term interests. At the same time, limitations are placed on industrial democratization in response to employers' concerns. The need to seek the broadest possible support for an innovation such as this is unquestionable. Unfortunately, little was done in the period leading up to publication of the draft bill to prepare the ground or to educate an employer and trade union public with no experience of a system of this nature. Only seven months elapsed from the appointment of the drafting team to the publication of the draft bill, for all of which time the team's activity was shrouded in confidentiality. The present uncertainty or disarray concerning its future should come as no surprise. <sup>64</sup>

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The negative reaction to chapter V thus far underlines the importance, as argued repeatedly above, of clarity and consistency when seeking to introduce a piece of social engineering as radical as this. Even if not all parties can be convinced, at least those with honest doubts will more readily be persuaded to give the new policy a chance if all its parts can be explained in terms of its overall objectives, rather than in terms of winning tactical support at the expense of overall objectives. If the object of employment democratization is to enhance economic efficiency through the optimal involvement of all those forming part of the productive process, then this should be the criterion in determining the rights and duties of the parties at every stage.

However, a more fundamental question has been raised by the degree of controversy surrounding the draft bill. Worker participation is premised on the ability and willingness of employers and workers to adopt a non-adversarial stance in respect of non-wage matters. The apparent debacle at NEDLAC and the threat of a general strike over the content of a statute intended to herald a new era of greater cooperation between management and labour do make it seem doubtful whether labour relations in the new South Africa have reached the degree of what some term 'maturity' to sustain a viable system of worker participation. Do the parties, in Blanpain's words, want 'to work together' or 'to fight'? Certainly, the distance separating employers and workers in political as well as material terms is far greater in South Africa than in the countries where works councils are well established. Only time will tell how these differences are to be resolved.

In the meantime economic life must continue, and employers and workers will continue to shape and reshape the institutional framework through which their relationship is expressed. It is to be hoped that the criticism attracted by the draft bill will result in careful revision and produce a statute in line with the developmental aims of public policy. If so, employers should indeed be able to reap the benefits of increased productivity and other benefits identified in the Explanatory Memorandum. For unions and for the country as a whole, the gains could be even more profound. A working population comprising a majority of the country's people could be assisted in overcoming the legacy of oppression and becoming more active and creative participants in the longer term project of building a new South Africa. The impact of worker participation must, of course, not be exaggerated. Relations at work are only one part of social life and activity; but a very important part. The new labour law offers an opportunity of ensuring that the possibilities of human resource development in this area are utilized to the full.

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- \* Revised version of communication paper presented at the 10th Annual Congress of the International Industrial Relations Association, Washington DC, 31 May to 4 June 1995.
- <sup>1</sup> Professor of Law, University of the Western Cape and Coordinator, Small Enterprise Project, Labour Law Unit, University of Cape Town.
- <sup>1</sup> Act 28 of 1956.
- <sup>2</sup> Ministry of Labour Draft Negotiating Document in the Form of a Labour Relations Bill *Gazette* 16259 General Notice 97 of 10 February 1995.
- <sup>3</sup> Cf E Patel (ed) *Worker Rights: From Apartheid to Democracy - What Role for Organized Labour?* (Cape Town 1994) at 25-9.
- <sup>4</sup> in terms of the Industrial Conciliation Amendment Act 94 of 1979. The integration of the independent trade unions into the statutory collective bargaining system and their commitment to orderly industrial relations, indeed, had been a central objective of the Wiehahn Commission whose report formed the basis of the amendment Act.
- <sup>5</sup> First instituted in 1924 and inspired by the British Whitley councils, industrial councils are voluntary associations of trade unions and employers and-or employer organizations in the private sector with jurisdiction over defined areas of industry. Their principal function is to negotiate collective agreements which may then be extended by the Minister of Labour to the whole of the industry concerned. The operation of industrial councils is at present regulated by the Labour Relations Act 28 of 1956.
- <sup>6</sup> Extensively documented in S Pandit *Legalism in the South African Trade Union Movement: 1979-1988* (Unpublished PhD Thesis London School of Economics 1994). Cf S Bendix *Industrial Relations in South Africa* (Cape Town 1989) at 305-9 323-46.
- <sup>7</sup> in terms of the National Economic, Development and Labour Council Act 35 of 1994. The council is composed of representatives of 'organized business', 'organized labour', 'organizations of community and development interests' and representatives of 'the State' (s 3(1)). Its functions are inter alia to 'seek to reach consensus and conclude agreements on matters pertaining to social and economic policy' and to 'promote the formulation of co-ordinated policy on social and economic matters' (s 5(1)).
- <sup>8</sup> It should be stressed that any connection of the term with pre-war fascist ideology has been lost and forms no part of the present discussion.
- <sup>9</sup> Cf K von Holdt 'The Dangers of Corporatism' (1993) 17 (1) *South African Labour Bulletin (SALB)* 46; J Baskin 'The Trend towards Bargained Corporatism' (1993) 17 (3) *SALB* 64. Von Holdt defines 'corporatism' as 'an institutional framework which incorporates the labour movement in the economic and social decision making of society' (at 48; emphasis added). Baskin, more precisely, describes it as 'an ongoing, structured relationship between the social partners, and a web of collaborative interchanges' (at 66). The question, in other words, is whether labour is thus '[co-opted] into accepting the economic perspectives of capital' (Von Holdt), rather than those of 'society'.
- <sup>10</sup> as reflected, for example, in a series of articles in the *SALB* since 1990; cf D Lomofsky *Workers' Participation: A Challenge to Managerial Authority or Strengthening of the Status Quo? A Case Study of Workers' Participation at P G Bison* (Unpublished Honours Dissertation Department of Sociology University of Cape Town 1991); G Evans 'Worker Participation at P G Bison' (1992) 16 (3) *SALB* 40. For a broader overview see M Anstey (ed) *Worker Participation* (Cape Town 1990).
- <sup>11</sup> For more detailed analysis of the trends referred to here, see R Schrire (ed) *Wealth or Poverty? Critical Choices for South Africa* (Cape Town 1992), in particular the contributions by B Smit ('Secular Trends in South African Macro-economic Data' at 39-58), J Blumenfeld ('The International Dimension' at 59-76), C McCarthy ('Industrial Development and Distribution' at 446-63), R Bethlehem ('Issues of Economic Restructuring' at 524-47) and G Maasdorp ('Meeting Expectations: The Policy Environment Facing the Post-apartheid Government' at 584-607). See also G Howe & P le Roux (eds) *Transforming the Economy: Policy Options for South Africa* (Durban 1992); B Godsell, L Harris, A Jammine, L Louw & R McGregor *McGregor's Economic Alternatives: Thoughts on Possible Economic Alternatives for a New South Africa* (Cape Town 1990); S Gelb (ed) *South Africa's Economic Crisis* (Cape Town and London 1991), in particular the contributions by S Gelb ('South Africa's Economic Crisis: An Overview' at 1-32), A Black ('Manufacturing Development and the

Economic Crisis: A Reversion to Primary Production?' at 156-74) and D Kaplan ('The South African Capital Goods Sector and the Economic Crisis' at 175-97).

- [12](#) Which has not left collective bargaining unaffected: recent years have seen the emergence of what has been termed 'strategic unionism', described by Von Holdt as 'union initiatives to put forward comprehensive policies for macro-economic policy, industry restructuring and workplace reform' (at 47).
- [13](#) Republic of South Africa Constitution (Act 200 of 1993).
- [14](#) The quotations that follow are from the Explanatory Memorandum prepared by the Ministerial Legal Task Team (referred to below as the Explanatory Memorandum) and appended to the draft bill: see at 135-8.
- [15](#) The argument continues: 'Comprehensive research has shown that the financial performance of companies is enhanced where the following exist: profit-sharing with employees, information sharing and programmes for employees' involvement, flexible work design, training and development and formal grievance procedures. It also found that companies that combined group economic participation, intellectual participation, flexible job design and training and development got an added boost from the combination.'
- [16](#) Cf Explanatory Memorandum at 135-6.
- [17](#) 'Introductory Remarks on a Comparative Overview' (1992) 23 *Bulletin of Comparative Labour Relations* 2.
- [18](#) Whether this is so or not will be looked at more closely below: see The Content of the Duty to Consult para 8 below.
- [19](#) And, in so doing, create an intrusive role for the new Labour Court in interdicting strikes over such issues and awarding damages against strikers: see clause 48(2) read with clause 155. Cf R Etkind 'Rights and Power: Failings of the New Labour Relations Act' (May 1955) *SALB* 30.
- [20](#) One of the flashpoints surrounding the draft bill at the time of writing is the union demand that employers should be prohibited from employing strike breaking labour during industrial disputes. If employers are able to continue business as usual while strikers suffer loss of wages, it is argued, labour law would fail in its mission of leveling the playing field between capital and labour.
- [21](#) The draft bill may also be questionable in the context of South Africa's international obligations. The International Labour Organization (ILO) believes that the range of interests that is protected by a right to strike should include not only 'claims of an occupational nature' but also 'the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers' (cited by Wedderburn 'Labour Law, Corporate Law and the Worker' (1993) 14 *Industrial Law Journal (ILJ)* (SA) 526 - although, as the author goes on to note, this formulation 'is wider than the constitutional or other right to strike in most states' (at 526-7). South Africa's existing Labour Relations Act 28 of 1956 does conceive of an open bargaining agenda in that any matter 'of mutual concern' to employers and employees is susceptible to collective bargaining (s 24(1)).
- [22](#) Lomofsky at 12-16.
- [23](#) M G Rood *Introductie in het Sociaal Recht* (Gouda 1994) at 201. Cf article 22 of the Universal Declaration of Human Rights.
- [24](#) Minister Tito Mboweni 'A New Era for Labour Relations' Speech at the Launch of the Labour Relations Bill Johannesburg 2 February 1995.
- [25](#) draft bill clause 56(d). Giving effect to government policy as reflected in the RDP, it may be noted, was the first item in the brief of the Ministerial Legal Task Team responsible for the draft bill: Explanatory Memorandum at 110. Given the fact that the RDP specifically contemplates the 'empowerment' of workers in the workplace, the reticence reflected in the draft bill is surprising
- [26](#) See Establishing a Workplace Forum para 10 below.
- [27](#) Cf the draft bill at 45 n 9.
- [28](#) See chapter VIII, headed 'Dispute Resolution', in particular clauses 109-132 providing for a 'Commission for Conciliation, Mediation and Arbitration'. In the case of disputes over retrenchment, the case can be taken to the Labour Court or the Labour Appeal Court rather than to arbitration; industrial action is excluded.
- [29](#) clause 48(2)(c). But if the dispute concerns a unilateral change to conditions of employment by the employer, employees or the union concerned may require the employer to desist or to restore the status quo within 48 hours until the conciliation process has run its course: see clause 47(4). This would replace the cumbersome and frequently costly procedure for obtaining interim relief under the present Labour Relations Act.
- [30](#) This is well-established in South African labour law, also in the context of 'fairness' as applied by the Industrial Court. In *FAWU & others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC) the ultimate power of an employer engaged in consultation with workers or their union was summed up as follows: 'He can manage and control his business as he deems fit, in what he perceives to be in its best interest. . . . If his decision has a bona fide commercial rationale, though not necessarily sagacious, it will be unassailable' (at 412-13).

- <sup>31</sup> s 23 of the Works Councils Act of 1979; but there is no recourse if the employer's response is negative.
- <sup>32</sup> Explanatory Memorandum at 135.
- <sup>33</sup> The draft bill does provide that 'agency fees' paid by non-union members in terms of an agency shop agreement *may* be used towards paying for 'the employment of experts by, or the training of members of, a workplace forum' (clause 23(3)(d)(ii)). Agency fees will, however, be administered jointly by the employer and union parties that enter into agency shop agreements (clause 23(3)(c)); the workplace forum will have no direct control over them.
- <sup>34</sup> Act 56 of 1981.
- <sup>35</sup> Cf National Manpower Commission *The Influence of Relevant Labour Legislation on the Small Business Sector* (1991) at 7-8.
- <sup>36</sup> Which may be a bigger obstacle than appears at first sight. Workforces are often fragmented on lines of skill or race, and unions which represent a majority of one category may not represent a majority of the workforce as a whole. A suggested solution to this particular problem is to broaden the relevant provision to include a combination of unions commanding a majority of workers among them.
- <sup>37</sup> Although their accountability to their nominal constituencies is far from clear. Clause 59 provides for the removal of workplace forum members at the instance not only of those who elected them but also of the majority union or the forum itself. Even more incongruously, the employer is given precisely the same right to apply for the removal of an elected worker representative. Furthermore, removal can take place on one ground only: 'gross dereliction of duty' and not for the most obvious reason of all: failure to represent their constituency. In extreme cases such failure might be construed as 'gross dereliction of duty' but in general it seems that even the most unrepresentative individuals will be able to sit out their two years.
- <sup>38</sup> The problem has been recognized by members of the ministerial task team, who reportedly declared at the launch of the draft bill that the union trigger mechanism should be seen in an 'evolutionary' way and could be revised or abolished (along with other restrictions contained in chapter V) once workplace forums have been seen to work in a number of workplaces and union fears have been allayed. The possibility of future amendment, however, is a dubious justification for writing problems into law.
- <sup>39</sup> The legality of a union seeking to override the expressed view of its constituency is also open to question. The Labour Appeal Court has recognized the capacity of union members affected by a decision to extend a binding mandate to their union representatives on a majoritarian basis: *Don Products v Monage* (1992) 13 ILJ 900 (LAC); *D du Toit 'An Ill Contractual Wind Blowing Collective Good?'* (1994) 15 ILJ 39 .
- <sup>40</sup> In contrast to Britain, where 'worker participation' is broadly synonymous with structures under management control and unions have traditionally remained at arm's length. The contrast with continental systems is wide. An account of Dutch trade unionists' encounter with British realities during a visit to their counterparts at a British sister enterprise concludes: 'All in all this trip was a shocking experience for us, a journey back to the twenties and we have not laid it on thick for this report. Let us make sure that this 'English' disease does not blow over to the Netherlands and strive towards obtaining more participation for our British colleagues.' *The Bridge* (Newsletter of the Steering Committee Reed Elsevier July 1994). Cf Trades Union Congress *Representation at Work* (1994) section 2.
- <sup>41</sup> See Establishing a Workplace Forum para 10 above.
- <sup>42</sup> M Weiss *Labour Law and Industrial Relations in the Federal Republic of Germany* (Deventer 1989) at 179.
- <sup>43</sup> B Hancké & H Slomp 'A Small Difference with Large Consequences' (unpublished paper due for publication in 1995) at 17. Cf A M Koene & H Slomp *Medezeggenschap van Werknemers op Ondernemingsniveau* (The Hague 1991) at 54-5.
- <sup>44</sup> H Slomp 'National Variations in Worker Participation' in J van Ruysseveldt (ed) *International Human Resource Management* (due to be published 1995).
- <sup>45</sup> Koene & Slomp at 54. This represented a policy choice by the Dutch trade union leadership after World War II who, unlike their Belgian counterparts, concentrated on obtaining representation on central consultative organs and 'ignored the local level'. Hancké & Slomp at 10.
- <sup>46</sup> *Federatie Nederlandse Vakbeweging*, the country's major trade union federation.
- <sup>47</sup> Hancké & Slomp at 17.
- <sup>48</sup> One interviewee drew an analogy with parliament. If the works council can be compared to a parliament of employees consisting of different union factions, then the unions' membership groups are like political parties with the role of mustering support for their factions and conveying to them the policy they should follow.
- <sup>49</sup> Interview with K Santbergen, Director of the FNV's Centre for Works Councils Amsterdam 28 October 1994. Cf J Windmuller *Labor Relations in the Netherlands* (1969) at 428-33.

- [50](#) Koene & Slomp at 54.
- [51](#) It will be noted, however, that problems of this nature arise not from the institution of the works council itself but rather from contrasting interests manifested at industry and plant levels. Similar tensions can and do arise from time to time between national and local union structures as well.
- [52](#) In South Africa, in contrast to Europe, the draft bill would extend the legal right to strike to 'every employee': clause 47(1).
- [53](#) In contrast to the position in a country such as Britain where no equivalent access to information exists. In relation to the Reed-Elsevier merger, for example, the Steering Committee Reed Elsevier notes that, '[w]hile workers' representatives in Holland were consulted prior to the merger, British workers first learned of it through reports published in the UK press' (*The Bridge*).
- [54](#) Koene & Slomp at 55.
- [55](#) At the time of writing, compulsory centralized bargaining is the main demand of the campaign of mass action called by COSATU against the draft bill in its present form.
- [56](#) Despite the fact that works councils in Germany, the Netherlands and elsewhere may not call strikes.
- [57](#) clause 57(6).
- [58](#) Agreements between workplace forums and employers would, however, not enjoy the same legally binding status as that accorded to agreements between unions and employers by clause 21 of the draft bill in its present form.
- [59](#) See at 117.
- [60](#) Of German enterprises with 300 or more employees, nearly all have works councils. For smaller enterprises the percentages with works councils are as follows: (101-300 employees) 80-85%; (50-100 employees) 60%; (21-49 employees) 50%; (6-20 employees) 10%: Koene & Slomp at 104.
- [61](#) Clause 73 already limits the facilities that workplace forums may claim to those which are 'reasonable' from the employer's point of view.
- [62](#) Section 35b of the Works Councils Act of 1979 requires employers in such enterprises to hold staff meetings at least twice a year, or when requested by 25% or more of the employees, at which information must be provided and any matter may be discussed.
- [63](#) In Italy, for example, unions have negotiated a system for representing small manufacturing enterprises on an area basis rather than on the basis of individual workplaces, which might not be viable. See M Biagi 'Employee Representation in Small and Medium-sized Enterprises: A Comparative Overview' (1992) *Comparative Labour Law Journal* 257.
- [64](#) Cf J Brand & M Brasseley 'Jumping the Gun: Problems in the Drafting of the New LRA' (May 1995) *SALB* 38.