

# Collective Bargaining and Worker Participation (2000) 21 ILJ 1544

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## 1 Introduction

The relationship between collective bargaining and worker participation has two main aspects -

- the interaction between collective bargaining as a process (at workplace; sectoral and subsectoral level) and the process of worker participation through workplace forums and similar structures; and
- the demarcation of topics for collective bargaining from topics dealt with by workplace participatory structures.

This article is concerned with the first aspect - the organizational and institutional sides of the process.

Collective bargaining is widely accepted as the primary means of determining terms and conditions of employment. In South Africa its importance has been underlined by the legacy of deep adversarialism between organized labour and employers, the recent struggles of the trade union movement to achieve recognition and continued wariness on the part of unions against real or perceived attempts by employers to undermine their hard-won status. The right to bargain collectively has been written into the Constitution<sup>1</sup> and is guarded jealously in the workplace. In this polarized climate it is inevitable that trade unions will tend to view participatory structures as a potential threat, an instrument that may be used by employers to marginalize unions and avoid collective bargaining. Many employers, from their side, were and are concerned about perceived encroachments on their decision-making powers threatened by employee participation and feel more comfortable with the familiar process of collective bargaining in which, at least, the independent roles of management and labour are clearly demarcated.

A shop steward graphically sums up the mutual reservations of management and labour:

'But on some issues there were differing opinions; management fears that we, as workers, want to take control of the running of the factory. From our side we were suspicious of management because no matter what they may say, they are still white, they are the oppressors, and there will always be a hidden agenda

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behind their promises. So instead of starting this change process with a good spirit, mistrust developed.'<sup>2</sup>

The government, when launching the bold idea of workplace forums, was well aware of the fears on both sides. The new law, the drafters of the LRA insisted, envisaged 'a clear and strict institutional separation between workplace forums and collective bargaining'. Workplace forums would be 'a secondary channel, supplementary to collective bargaining. It is vital to ensure that they do not replace collective bargaining or undermine trade unionism in any way'.<sup>3</sup>

But deep-rooted suspicions, feeding on a legacy of conflict, are not easily appeased. It is legitimate to consider to what extent such fears may be justified. Where industrial relations

are poor, suspicions may easily become self-fulfilling prophecies. Conflict may tend to permeate all forms of interaction, including would-be participatory processes. In the process workplace forums may conceivably be played off against shop stewards' committees, and vice versa.

In practice, the establishment of participatory structures tends to take place very largely as a result of management initiatives or under management control, with trade unions accepting the process rather than being actively involved in shaping the outcome. Against this background, this chapter will examine the manner in which the LRA seeks to establish a stable division of labour between workplace forums and trade unions while maintaining the primacy of the latter. It will then look at the actual relationship between collective bargaining and worker participation, in respect of non-statutory structures as well as workplace forums, compared in both cases with the experience of works councils and trade unions in Germany, the Netherlands and Belgium.

## 2 the Statutory Model

### (a) South Africa

The LRA contains a battery of provisions aimed at giving effect to its vision of workplace forums harmoniously coexisting with trade unions within an environment determined by collective bargaining:

- (a) Only a trade union or trade unions with majority membership in a workplace may apply to the CCMA for the establishment of a workplace forum (s 80(2)).<sup>4</sup>
- (b) Upon receiving such application a CCMA commissioner must seek to facilitate a collective agreement between the parties that will govern the operation of the workplace forum in its entirety

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and replace the provisions of chapter V (s 80(7)-(8)). The primary option, in other words, is a workplace forum created by collective agreement.

(c) If the parties cannot arrive at a collective agreement, the commissioner must seek to facilitate agreement on the constitution of the workplace forum (s 80(9)).

(d) If the applicant union or unions are recognized in terms of a collective agreement as collective bargaining agent(s) in respect of all employees in a workplace, such trade unions may choose the members of the workplace forum from among their elected representatives in the workplace in terms of their own constitutions (s 81).

(e) If the applicant union or unions cease to be representative and another union or unions achieve majority status, the latter will be entitled to demand a new election of the workplace forum (s 82(1)(f)).

(f) Any registered trade union with members at the workplace may nominate candidates for election to the workplace forum (s 82(1)(h)). The likely effect is that the applicant union or unions, given their majority membership among the workforce, will determine the composition of the workplace forum by putting forward their own nominees for election.

(g) An applicant union or unions that nominated a member for election to a workplace forum may remove that member at any time (s 82(1)(i)).

(h) Office-bearers or officials of the applicant trade union or unions may attend any meeting of the workplace forum, including meetings with the employer or with employees (s 82(1)(u)).

(i) The applicant union or unions and the employer may, by agreement, change any of the provisions of the constitution of workplace forum set out in paras (e) to (h) above (s 82(1)(v)).

(j) If any of the statutory topics of consultation or joint decision-making are regulated <sup>5</sup> by a collective agreement, they are automatically excluded from the agenda of the workplace forum and will continue to be regulated by collective agreement (ss 84(1), 86(1)). <sup>6</sup>

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(k) The applicant union or unions and the employer may by collective agreement add topics to the statutory agendas of consultation and joint decision-making (ss 84(3), 86(3)(a)) and may also remove all or any of the topics from the agenda of joint decision-making (s 86(3)(b)). <sup>7</sup> Similarly, a bargaining council may add topics to the consultative agenda of workplace forums falling within its jurisdiction (s 84(2)). <sup>8</sup>

(l) The applicant union or unions may request a ballot to dissolve a workplace forum. If more than 50% of employees taking part in the ballot vote for dissolution, the workplace forum will be dissolved (s 93).

As matters stand, therefore, trade union control over workplace forums would seem to be all but complete. Workplace forums can only exist if majority trade unions wish them to exist, and can be dissolved at the behest of the same unions. Their members are likely to be union nominees. While they exist, their powers are by definition confined to areas not covered by collective agreements, trade unions have the right to be involved in all their activities and every aspect of their existence can be regulated by collective bargaining to the exclusion of the LRA. They are, in essence, creatures of trade unions and collective bargaining rather than creatures of statute.

The Minister of Labour has, however, recently given notice of a potentially far-reaching change to chapter V of the Act. Pointing out that '[f]ewer than 20 workplace forums have been set up in terms of the LRA', the minister went on to make a statement that could herald a transformation of the manner in which workplace forums are established:

'Nevertheless, the Department would like to review the requirement that trade unions must trigger the establishment of such forums. We are seeking the increased utilization of these forums, as we believe they can constitute meaningful avenues of engagement between employers and employees on issues such as restructuring and affirmative action.'<sup>9</sup>

It is unclear at present what the nature of the contemplated amendment will be. At least two possibilities present themselves: allowing employers also to apply for the establishment of workplace forums, or placing employers under a duty to establish workplace forums (as in Europe). Draft legislation is expected in the latter part of 2000 and may be enacted in 2001.

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(b) *Germany*

The Works Constitution Act (WCA) does not provide German trade unions with the same sweeping powers over works councils that are found in the LRA. As in South Africa, provision is made for the involvement of trade unions in various aspects of the operation of works councils. But, unlike in South Africa, the statutory provisions are directed at safeguarding the integrity of works council proceedings as much as protecting trade unions against encroachment by works councils upon their territory. <sup>10</sup>

Works councils appoint their own electoral boards to organize elections. Trade unions with members in the workplace are entitled to be represented on such boards. If none of their members have been appointed to the board, s 16(1) provides that 'each trade union represented in the establishment may . . . delegate a representative belonging to the establishment to the electoral board as a non-voting member'. If a works council fails to appoint an electoral board, a trade union represented in the workplace may apply to the Labour Court for its appointment (s 16(2)).

Trade unions are also entitled to challenge the outcome of works council elections in the Labour Court on procedural grounds (s 19), apply for the removal of any member of a works council on grounds of grave dereliction of statutory duties (s 23(1)) or interdict an employer from gross violation of its duties under the Act (s 23(3)).

Delegates from the trade unions represented in the establishment are entitled to attend all 'works and department meetings' in an advisory capacity (s 46(1)). Trade unions are not entitled to attend meetings of the works council as of right but only upon invitation by 'one-fourth of the members or the majority of a group represented on the works council' (s 31). In this event the trade union delegate is entitled to receive the agenda of the meeting and a copy of 'the section of the minutes which concerns him' (s 34(2)). A trade union may, however, require a works council to call a works meeting if no such meeting has been held during the preceding 'calendar half year' (s 43(4)).

The primacy of collective bargaining is safeguarded in two ways. Firstly, the WCA stipulates that '[t]he employer and the works council shall work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment' (s 2(1)). It is further provided that the WCA '[s]hall not affect the functions of trade unions and employers associations and more particularly the

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protection of their members' interests' (s 2(3)). This provides a Sframework for the interpretation of the parties' statutory rights and duties which is absent from the LRA. <sup>11</sup>

Secondly, s 77(3) provides that 'works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement'. <sup>12</sup> The words 'or are normally fixed by collective agreement' are important because they address a lacuna which has been noted in the LRA: they exclude the jurisdiction of works councils not only over matters actually dealt with in a collective agreement but also in the event that (i) agreement is not reached or (ii) bargaining has not taken place but the topic in question is 'normally' bargained over. Mere refusal to bargain by the employer or deadlock thus cannot suffice, as in South Africa, to give the works council jurisdiction over an issue that had previously formed part of the bargaining agenda.

Windbichler notes some of the competing considerations which enter into the rationale:

'The basic rule in German law is that the collective agreement between union and employers always prevails. This was introduced to avoid competition between the union and the works council. The topics of bargaining are rather strictly regulated for the works council, and the protection of the individual is much more elaborate. This has to be so because its a mandatory structure. [On the other hand t]he works council has a much broader basis of legitimation because everybody is entitled to vote in the works council election.' <sup>13</sup>

Section 77(3) goes on to state, however, that a collective agreement may expressly authorize 'the making of supplementary works agreements'.

*(c) The Netherlands*

The starting-point of the Works Councils Act (WCA) is a delineation of the powers of the works council. It is required to focus on the interests of the workplace as a whole and the persons employed in the workplace. It is the task of the trade unions to engage in collective bargaining negotiations about primary terms and conditions of employment and to protect individual interests. In practice, however,

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there is scope for overlaps which may be a source of tension between trade unions and works councils.

As in Germany, a trade union with members in the workplace may submit a list of candidates for election to the works council (s 9(2)). Trade unions may also request the employer to set up a joint works council in enterprises with more than one workplace (s 3(2)), request that a separate works council be set up for part of an enterprise if it is considered that this will advance the proper application of the WCA (s 4(2)) and express their views about applications by employers to be exempted from establishing a works council for a specified period (s 5(2)).

Similarly, trade unions do not have an automatic right to attend works council meetings but may do so by invitation (s 16(1)). <sup>14</sup>

The primacy of collective bargaining is safeguarded by providing that the rights to consultation and joint decision making given to the works council will lapse as soon as a matter is regulated in a collective bargaining agreement. <sup>15</sup> Powers in addition to the statutory powers may be given to works councils by collective agreement (s 32(1)) but such additional powers will not apply 'insofar as the substance of the matter has already been regulated for the enterprise by a collective labour agreement or in a ruling laid down by a public body' (s 32(3)).

*(d) Belgium*

Works councils in Belgium exist alongside of two other bodies for the representation of employee interests: the trade union delegation and the Committee for Prevention (of accidents) and Protection at Work (CPPW).

Works councils are bipartite statutory bodies including representatives of employees and management. <sup>16</sup> Works council elections take place every four years. <sup>17</sup> To be elected, employees must feature on the list of candidates presented by the most representative unions except in the case of 'cadres' (leading personnel), whose candidates may also be nominated by -

- the representative union of 'cadres', or
- 10% of the 'cadres' in the enterprise, thus allowing for independent candidates.

Works councils and CPPWs are incapable of making company level collective agreements. Union delegations are the bodies most involved

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with collective bargaining at enterprise level, provided they have been given delegated authority by one of the three representative unions to do so. <sup>18</sup> A union delegation can only be established at the request of one or more representative trade unions <sup>19</sup> and, if so requested, the employer is obliged to comply. If there are elections the unions will draw up the list of candidates. There is no room for independent candidates. <sup>20</sup>

In addition, union delegations enjoy certain rights within the company which in other jurisdictions are typically extended to works councils. These include -

- the supervision of the application of labour standards, labour laws, collective agreements and work rules;
- right to advance information on matters which could affect working conditions or remuneration methods;
- joint decision-making rights concerning measures to deal with an increased workload, such as overtime and the use of temporary workers from an agency;
- in the absence of a CPPW, carrying out the duties normally assigned to such committee. <sup>21</sup>

If there is no works council in the company, the union delegation also has the right to receive the annual social balance sheet. <sup>22</sup>

### 3 the Debate

The relationship between trade unions and collective bargaining on the one hand and workplace forums and the participatory process on the other has, predictably, been one of the more controversial aspects of the LRA. Critics of the statutory model have broadly formed themselves into two schools of thought: those who believe that the LRA does not go far enough in differentiating workplace forums from trade unions, and those who believe that it goes too far. Representatives of the first school tend to come from the ranks of scholarly researchers and consultants while the second point of view has its strongest resonance among trade unionists.

#### (a) *The LRA does not go far enough*

The essential point is that the array of legal powers given to trade

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unions over workplace forums and their agendas constrain workplace forums to act as extensions of trade unions and their agendas rather than as genuine participatory structures. The LRA, in other words, accommodates trade union concerns at the expense of promoting genuine worker participation. It 'does not take sufficient cognisance of the essential precondition of worker participation: creating institutions unequivocally dedicated to facilitating co-operative decision-making by employers and employees'. <sup>23</sup>

When the debate about the introduction of workplace forums was at its height Baskin commented as follows:

'Many unionists (and most companies) see the forums as a threat. But this argument is, at least superficially, hard to sustain. A range of union safeguards have been built into the chapter on workplace forums. Employers cannot set up a forum, only a majority union can trigger one; and disestablishment is also provided for. Union officials are entitled to attend forum meetings and provide advice. Unions have preferential rights in nominating candidates for election. The agenda for forum-management interaction excludes items which are collectively bargained by the union. And so on. . . . If anything, the LRA can be accused of being contradictory in design. It wants to encourage workplace co-operation whilst retaining extensive mechanisms that may simply perpetuate shopfloor adversarialism.' <sup>24</sup>

A similar prediction was made by Brassey and Brand in somewhat blunter terms:

'Though it has some of the trappings of corporatism, the workplace forum will in practice be no more than a sophisticated and more powerful version of the shopstewards' committee. As the majority union uses it to fight battles that they have lost elsewhere, it will become yet another bargaining forum whose proceedings are characterized by aggressive distributive bargaining across an adversarial divide in the plant itself.' <sup>25</sup>

There is support internationally for the view that too close an overlap between trade unions and participatory structures undermines the effectiveness of the latter as vehicles of joint problem solving. The European model of statutory worker participation was premised, by and large, on the notion of a clear separation between collective bargaining at sectoral level and works councils operating at plant level. Although the LRA set out to promote centralized bargaining in order to create a similar separation, collective bargaining continues in many instances to take place at plant level. This structural problem may be compounded by the LRA's encouragement of trade union control over works councils and result in blurring the distinction between the two processes:

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'The same people who negotiate the collective agreement must then deal with the problems of plant safety, changes in production processes, product quality and productivity. Adversarial attitudes of the bargaining table carry over to daily plant relations. Problems are not solved but fought over.' <sup>26</sup>

*(b) The LRA goes too far*

The argument that the LRA gives workplace forums too much independence from trade unions has been put most forcefully by Von Holdt. Because of the adversarial nature of industrial relations in South Africa, it is assumed, there is no prospect of two institutions charged with the representation of employee interests operating at workplace level in the manner contemplated by the LRA; conflict between them is inevitable. The only viable type of workplace forum, in Von Holdt's opinion, is that referred to in the LRA as a 'trade union based workplace forum' <sup>27</sup> - in effect, shop stewards' committees invested with the rights of participation set out in chapter V and doubling as workplace forums.

This would, of course, represent the most extreme form of overlap between adversarial and non-adversarial process from the point of view described in section (a) above and would rule out any possibility of workplace forums serving as organs of 'shopfloor co-operation'.

Specifically, Von Holdt saw the following problems arising if workplace forums were formally independent of union structures:

- 1 Workplace forums could weaken unions because workers may no longer see the need to join unions as they already are represented in the workplace forum.

- 2 'Demarcation conflicts' may arise which will result in issues being shifted back and forth between forums, promoting factionalism and divisions within unions between shop stewards in workplace forums and collective bargaining;
- 3 Trade unions 'negotiating strength may be diluted in the forum by the presence of representatives of lower management and other non-members'. [28](#)
- 4 It is 'generally true that stronger forums tend to drive out weaker forums. The workplace forums should be stronger because they have more resources, and so marginalize the weaker collective bargaining forums'. [29](#)

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Baskin, having noted that the LRA seeks to avert these very problems by giving trade unions unprecedented legal powers over workplace forums, went on to argue that the real difficulty might be something rather different. Having triggered workplace forums, he suggested, unions could find themselves faced with a Frankenstein monster:

'[W]orkplace forums may indeed be a threat to unions - not through the forums themselves but because unions may lack the capacity to give meaningful support to union members sitting there. Forums will not deal with familiar issues, like wages, but with productivity, technology, investment and so on. Without the capacity to provide expert advice to forum members, unions may alienate themselves and prove irrelevant.' [31](#)

Put simply, an ineffectual trade union presence at plant level may create a vacuum that workplace forums could fill, either by force of circumstances or with a little help from employers. The fear is that workers may transfer their loyalties from an inadequate trade union to a workplace forum that is better able to represent their interests and thus turn curable union weakness into terminal decline.

*(c) Germany and the Netherlands*

Both arguments outlined above proceed from extreme and generalized assumptions - on the one hand, that workplace forums will be completely dominated by a powerful trade union presence; on the other hand, that trade unions are too weak to exert influence over workplace forums. The real situation is considerably more complex and, while both stereotypes are no doubt to be found in particular workplaces, it is clear - as reflected by the fieldwork discussed below - that there are numerous situations where the assumptions on which chapter V of the LRA are based may be borne out to a greater or lesser extent.

European precedents of relations between trade unions and works councils help to place the question in perspective. While there are manifest socioeconomic contrasts between South Africa and Europe, the experiences of Germany, the Netherlands and Belgium encapsulate responses to practical problems developed over many decades and offer insight into modes of coexistence between trade unions and participatory structures.

At least two trends can be distinguished - first, the potential for a division of labour between trade unions and works councils and, second, the scope for conflict or a blurring of roles within that division.

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*(i) A division of labour . . .*

A central feature of the German industrial relations system is the separation between collective bargaining by trade unions and participation (consultation and joint decision making) by works councils. Weiss explains:



'In Germany, economic terms are bargained at the industrial or sectoral level. Bargaining may be bitter and end in strikes, but neither plant managers nor plant representatives - the works council - are involved in the confrontational bargaining. The adversarial bargaining of the collective agreement leaves little or no residue of hostility to undermine cooperation <sup>32</sup> at the plant level. The same is true in Sweden. Collective agreements establishing economic terms are centrally negotiated. Workplace problems are resolved by local management and local union officers. The antagonisms generated by bargaining do not carry over to the day-to-day discussion of workplace issues.' <sup>33</sup>

These outcomes may appear to suggest that 'cooperation' is primarily issue driven - 'antagonism' in the workplace can be avoided by a relatively simple exercise of separating 'adversarial' issues from 'non-adversarial' ones and placing the latter on the agenda of participatory structures. <sup>34</sup> This instrumentalist assumption was manifest in the Explanatory Memorandum to the Draft Labour Relations Act <sup>35</sup> and clearly informed the definition of the powers and role of workplace forums contained in chapter V.

Arguably, this view confuses cause and effect. The division between 'distributive' and 'productivity' issues, in Germany as elsewhere, has been the outcome of a complex, ongoing process of interaction between employers and employees rather than something predetermined by the nature of the issues themselves. Historically, the identification of 'productivity' issues developed as an extension of the collective

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bargaining process and, more specifically, in response to the proliferation of local operational issues which a centralized collective bargaining system is ill-suited to address. A classic example was the collective agreement signed in the German metal industry in 1984 which provided for average weekly working time of 38,5 hours. In determining actual working hours at plant level the circumstances of the individual establishments had to be taken into account. To achieve this the unions, given their lack of plant level structures, were left with no choice but to integrate the works councils in the bargaining system. As a result, working hours ranging from 37 to 40 hours were agreed between works councils and employers in different enterprises. <sup>36</sup>

Trade union attitudes toward works councils have tended to be ambiguous. Codetermination in the enterprise has been regarded as valuable, implying that employees' opinions will be taken seriously. It can contribute towards socially acceptable behaviour by companies. <sup>37</sup> At the same time trade unions have viewed works councils as (potential) competitors. Trade unions generally insist that they possess primacy in negotiations about conditions of employment and that the works council plays a supplementary role. The trade unions argue that the works councils have insufficient countervailing power because they do not possess the strike weapon and because they are dependent on the employer. <sup>38</sup>

The tendency towards decentralization in the realization of conditions of employment however, has made it necessary for trade unions to review their suspicious attitude. Rood describes the process:

'Our collective contract system is for a large part industry based. Gradually we have come to the conclusion that the working hours in enterprise X in the metal industry do not necessarily have to be the same as those in enterprise Y also in the metal industry. On top of that we live in an age of decentralisation - ie bringing such decision-taking as close as possible to the shopfloor. It is now possible to conclude a collective agreement per enterprise. So it is feasible via this route. But our system is in the first place more industry-orientated. While the works council orientates itself more towards the enterprise itself. The Works Council Act sees the enterprise as an organisational unit of labour. In other words in a given place people work on the basis of a collective agreement, an organisational structure, as well as a manager are present. In such an enterprise we install a works council.' <sup>39</sup>

As in Germany, the regulation of working hours illustrates the manner in which a division of labour between trade unions and works councils has been established:

'If for example you lay down by collective agreement that in a certain sector work starts at eight and ends at five o'clock, then the works council has no say in the matter, because it has already been worked out in a substantive way in the

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collective agreement. But you can also say in the collective agreement: working hours shall be 36 hours per week. Then it will be necessary to determine with the consent of the works council when work will start and when it will end.' [40](#)

During the parliamentary debate about the most recent change of the Works Councils Act in 1997 the views of the trade unions towards works councils was discussed at length. The representatives of the FNV and the CNV [41](#) were of the opinion that the works council is not 'a type of union' which can make binding decisions for its employees. The works council is not a union of employees that looks after their interests. However, a collective agreement can delegate authority to the works council. The trade unions state that not the works councils but the trade union federations play a directive role in the negotiation about conditions of employment. Although the trade unions are of the opinion that decentralization must be encouraged, they feel that it cannot and should not be the case that employers can 'freely shop around'. The works council should continue to play a supplementary role. [42](#)

Coexistence and a division of labour between trade unions and works councils are the practical result. Slomp explains:

'I really only see room for worker participation if the trade union movement is also quite strong at industry or regional level, and negotiated there: if there can be separation between topics of participation, which can remain in the workplace, and the major conditions of employment - such as wages, working hours - which are negotiated by the union outside the workplace. . . .'[43](#)

The Director of the Dutch Centre for Works Councils confirms:

'I see a tendency towards increasing mutual dependency. Also within the unions. The Dutch trade unions for a long time saw the works council as an organ of the enterprise which you should not waste too much energy on - which you might even have to oppose because they are used to keep the unions out. The last few years the unions have seen that their active members are elected in massive numbers, and that is often after all a very good way to manage the interests of the employees.'[44](#)

(ii) . . . or a blurring of roles?

At the same time, the emerging division of labour signifies 'a gradual weakening of the former, relatively strict separation of plant and enterprise level on the one hand and collective bargaining on the other. It also implies that works council and unions are increasingly becoming competitors. The power relationship between the two will have to be reformulated'. [45](#)

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In the Netherlands it was proposed in the early 1990's that terms and conditions of employment should be placed on the works council agenda in workplaces not covered by collective agreement. [46](#) The FNV called for a duty of joint decision making in respect of an employer's proposals to determine, amend or cancel terms of employment not subject to a collective agreement. The alternative, it believed, was to allow the employer to do so unilaterally. [47](#)

The notion of involving works councils (or workplace forums) in wage bargaining, even under controlled conditions, signifies a radical departure from the traditional model and presents trade unions with a complex new agenda of opportunities as well as threats:

'The starting point is still that terms of employment are primarily the concern of the union and that works councils should be excluded as far as possible. But I think there is more awareness now that the expertise to negotiate terms of employment is very specific and that works councils, even with authorisation to do so, will in any event have to approach the unions for assistance. And if the works' councils get such authorisation in sectors where the unions have no presence, it will open up possibilities for unions to become involved in collective bargaining. <sup>48</sup> But if you give more powers to works councils, all sorts of problems arise which are not yet provided for in the law. The works council is deemed to act in the interests of the enterprise as a whole, not representing employees' interests only but taking everything into account. And if the works councils get greater powers to negotiate . . . there is the problem of industry-level agreements. . . . If negotiations take place with works councils at plant level, the promotion of union policy in respect of job creation and so on becomes more difficult to handle.' <sup>49</sup>

Yet conflict between works councils and trade unions is by no means unavoidable. The collective bargaining system, supplemented by workplace level fine-tuning between employers and works councils, functions well and there is no great pressure to change it. Nor does alienation between trade union members in the workplace and their unions appear to be a major factor. While there is undoubtedly scope for conflict over the dividing line between the responsibilities of trade unions and works councils, in practice the problem may well be self-limiting:

'I sometimes think that trade union fractions in works councils . . . don't attach a great deal of importance to expanding the powers of works councils. And that the demand [for expanded powers] is especially strong on works councils without

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trade union fractions or where the unions are very weak. I think the idea is also popular among academics. . . . To get it in perspective, terms of employment are determined by collective agreement, directly or indirectly, for about 80 per cent of employees in the Netherlands. Twenty per cent have terms of employment where collective bargaining played no role. So the amendment of the law [to permit works councils to negotiate over wages in workplaces not covered by collective agreement] would affect that 20 per cent in particular. And those are often small enterprises, plus enterprises which very deliberately want to keep the union out.' <sup>50</sup>

*(d) Belgium*

The crucial difference between Belgium on the one hand and the Netherlands and Germany on the other is that Belgian trade unions are well represented at company level both in legal and practical terms. Union delegations are active in most enterprises and the most representative unions have an exclusive right to nominate candidates for works council elections (with the exception of the special rules that apply to leading personnel or 'cadres'). In this manner unions have extended their reach to individual companies, effectively monitoring the observance of labour laws and collective agreements through the union delegation and staying well informed about current developments in production, technology and organization through the works council. Company based union delegates function as an interface between the trade union leadership and the rank and file. As such works councils can be seen as a workplace based mechanism favouring trade unions. The practical division of labour closely follows the legal position and the debate about a division of roles between works councils and trade unions does not present itself in the same way as in the Netherlands, Germany or South Africa. <sup>51</sup>

*(e) A possible synthesis*

Participatory structures are increasingly a given. The question for trade unions in South Africa, as elsewhere, is no longer whether or not to support their creation but how to relate to them. Adu-Amankwah and Kester argue that '[t]he need for the trade unions to consider

this [worker participation] policy option derives from the understanding that collective bargaining covers only the contractual aspects of employment. . . . Collective bargaining negotiations are often based on the effects of [operational] decisions and not on the decisions themselves'. <sup>52</sup> Participation is about operational decisions. If trade unions are not prepared to take the initiative in establishing structures for this purpose, management will do so. <sup>53</sup> The authors conclude:

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'[T]he imperative for the trade union to meet this challenge is that together with collective bargaining, it increases worker influence to many areas of importance to them. It expresses a recognition of the need for supplementary strategy and not just a call for choice between collective bargaining and worker participation.'  
<sup>54</sup>

This is not to deny the difficulties that may be experienced in a country such as South Africa in making the transition from a purely adversarial relationship to a more complex relationship of collective bargaining combined with joint problem solving and decision making. As Deale observes:

'Clearly, the range of [participatory] issues intrudes deeply into the traditional realms of management prerogative. Union officials and workers may feel equally daunted by the prospect of having to switch from confrontational mode to creative engagement on sometimes unfamiliar issues. This will naturally cause some discomfort to both managers and workers and a period of orientation may be necessary to assist with the adjustment.'  
<sup>55</sup>

In practice, nevertheless, the fortunes of collective bargaining and employee participation, of trade unions and participatory structures, are inextricably linked. <sup>56</sup> While conditions vary considerably from workplace to workplace, industry to industry and country to country, there are certain issues, at any given point in time, which employers and employees find appropriate to regulate by means of the collective bargaining machinery at their disposal and others which they find more appropriate to regulate by means of participatory structures. The distinction drawn between bargaining matters and participatory matters is explained ex post facto with reference to the nature of the issues, <sup>57</sup> the forums at which they are tabled <sup>58</sup> or the

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manner in which they are dealt with. <sup>59</sup> In reality, it is submitted, it cannot finally be reduced to any one of these determinants. The borderlines between collective bargaining and worker participation are demarcated through practical interaction - the limits to which one process is taken determine where the other one begins.

Also in South Africa 'mutual dependency' between collective bargaining and worker participation may become increasingly manifest. Ironically, the catalyst in the process may be the adversarial nature of collective bargaining itself. Worker participation appears to function most effectively where both parties respect each others strength. The relationship often starts by being adversarial, with each party flexing its muscles. Through trial and error the parties learn that participation in structures that are based on cooperation offers a less costly and more satisfactory means of dealing with many problems. <sup>60</sup>

The power dimension may also be influential in determining the level at which participation takes place. Bendix's observation in respect of collective bargaining is helpful also in understanding the process by which participatory structures may be shaped:

'The level of collective bargaining - at enterprise, industry or region - evolves, therefore, from the trade union's structure and cannot be determined by any other factor but the dynamics contained in the process of free association of workers for the pursuit of their interests. Collective bargaining will thus take place at the level at which a trade union has built its power base.' <sup>61</sup>

#### 4 the Practical Position

##### (a) South Africa

##### (i) The composition of participatory structures

As in Europe, workplace forums and participatory structures consist predominantly of trade union members or representatives. There is, however, a significant departure from the Dutch or German norm. In these countries works council members are freely elected but trade union nominees capture a majority of seats. In most of the South African workplaces covered by the fieldwork, a greater or lesser number of seats were formally reserved for trade union representatives. This may reflect the legacy of adversarialism between trade unions and employers, with neither side prepared to resign itself to

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the outcome of elections but preferring the certainty of an outcome determined in advance. <sup>62</sup>

A breakdown of the membership of workplace forums and non-statutory structures at unionized workplaces reveals the following:

#### WORKPLACE FORUMS

COMPANY	TOTAL NUMBER OF UNION REPRESENTATIVES	TOTAL NUMBER OF REPRESENTATIVES	CONSTITUTION or ELECTION
	NAME	NUMBER	
A	NEHAWU Unorganized labour	2 1	3 but constitution makes provision for 5 None of the seats are reserved for union members
B	Staff Association Mineworkers Union CWIU HTP Works Council Non-organized labour	6 2 2 2 2	14 (at present there are only 12 seats) 12 seats reserved for union members
C	NUTESA NEHAWU	1 1	1 16 other stakeholders 18 2 seats reserved for trade union members
D	CAWU SAWU	4 1	10 5 management
E	NUTESA NEHAWU	8 8	24 12 management representatives

#### NON-STATUTORY STRUCTURES

COMPANY	UNIONS	TOTAL NUMBER OF REPRESENTATIVES	CONSTITUTION or ELECTION
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	NAME	NUMBER		
F			28	Only 1 seat is reserved for organized labour
G	NUMSA MOCLAWU	1 2	9 1 packer 1 mixer 2 operators 2 representatives	NUMSA shop steward appointed; other 2 union members elected
H			10	None of the seats are reserved for union members
I	NUMSA	3	6 3 management	
J	NUMSA NETU SEAWUSA	3 2 1	11: 3 management 2 office staff	6 seats reserved for union members
K	FAWU	6	12 6 management	All 6 worker representatives are senior shop stewards
L	SATU	5		All 5 seats are reserved for union members
M	SATU Non-unionized	2 1	6 3 management	
N	SACCAWU	6	12 6 management representatives	
O	CWIU SACWU Employers Association	4 4 4	+/- 24 4 senior managers 4 supervisors 1 staff 1 technology 1 middle management 1 engineering	

*(ii) The problem of policy*

The response by the trade union federations to worker participation, in general, has been to avoid the issue and allow affiliates to make their own decisions as to whether to participate or not. FEDUSA indicated that it does not have a policy on participation and was not planning to formulate one in the near future. <sup>63</sup>

The lack of policy is problematical in that, if collective positions are absent, self-interest will prevail. Collective planning on how to address strategically important issues like retrenchment or restructuring, which are often dealt with in participatory structures, is inhibited. <sup>64</sup> A further consequence is that the establishment of participatory structures tends to take place as a result of management initiatives or under management control, with trade unions passively accepting the outcome rather than helping to shape it. <sup>65</sup>

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These trends were confirmed by the fieldwork. At Company P the union indicated that it had no policy on workplace forums but 'if members wanted such a structure [the union] would be constitutionally bound to yield to such demands and a policy would have to be evolved at national level'. NUMSA was thought to have a policy but no copies were available. At

Company Q it was believed that the union would not be opposed to the establishment of a workplace forum provided that it was 'union based and driven by shop stewards'. At Company R and Company O the view was that the union would not trigger a workplace forum but would 'not stand in the way of another union doing so'. The initiative, in general, was left to others.

There are a number of possible explanations for trade unions' reluctance to engage with the challenges of worker participation, even to the limited extent of developing a policy on paper. These include:

- trade unions do not have confidence in participation in view of past experience; <sup>66</sup>
- unions already have their hands full with collective bargaining;
- unions may be reluctant to engage with structures which are usually seen as dealing with issues like restructuring that involve job losses. Understandably, they may prefer to steer clear of processes leading to decisions which are seen as detrimental to the workers; <sup>67</sup> and
- unions may see participation at enterprise level as resulting in the diffusion of their powers.

The last mentioned concern is probably related to capacity problems within unions and the haemorrhage of leadership into governmental structures (for example, the CCMA and the Department of Labour). The outcome in many cases is pockets of powerful shop stewards operating under the umbrella of a ever-weakening union structure. These shop stewards are not looking at overall strategic responses to issues but are rather concerned what is happening at their individual workplaces. <sup>68</sup> Participatory structures, even if they consist of shop stewards, may in practice be autonomous of union control.

This was graphically illustrated at Company P, where amicable relations appeared to exist between the union and the company but tensions were manifest between shop stewards and the union - for example, alleged failure by shop stewards to attend meetings and attempts to undermine the union by refusing to pay dues.

Since it is difficult for unions to express lack of confidence in their local leadership, the lesser of two evils may be to abstain from any

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form of involvement with participatory structures or, where engagement cannot be avoided, to hold employers responsible for any divisions that may open up within union ranks. The reluctance to develop policy would be explicable in this context, since any policy would in effect amount to conditional endorsement of a second channel. Denial is the safer course of action.

### *(iii) Negative union attitudes towards participation*

Generally, trade unionists seemed sceptical about the reasons for participation. At Companies O, R and Q they believed it was part of management's 'overall strategy to limit interruptions to production'. At Company F the union was aware of the limits to the influence it could exert and had begun to resist 'cooption'. At another company shop stewards had a range of negative perceptions of management conduct. Inter alia:

'They say "yes, we will do this' but at the end of the day when they were supposed to take action we would find that they were not abiding by decisions.' [69](#)

'Management made things difficult by saying that we need certain training. . . . They said we should concern ourselves with issues and decisions related to our specific jobs on the shop floor and end there. In other words, they were shifting the emphasis away from decision-making at a management level to the specific jobs that workers were doing. . . . This "training' and discussion process conducted by ITISA started appearing as a strategy to co-opt us.' [70](#)

It is striking that these views consist of value judgments made over issues where management may safely be expected to arrive at opposite value judgments. They reflect, in other words, an underlying conflict of perceptions and a predisposition to disagree rather than actual deadlock over material issues where consensus was sought but could be found.

Whether based on substance or perception, however, adversarial attitudes exert a very real influence on events. Negative perceptions appear to be the single greatest reasons why applications for the establishment of workplace forums are so frequently aborted after being lodged. In fully 50% of cases the reason for non-establishment was subsequent opposition from the ranks of the union that had applied for establishment. [71](#)

One exception to the rule of trade union scepticism appeared to be the Workplace Challenge Project. It may be that the 'pilot site' approach appears non-threatening because it is seen as a short-term programme - the unions participation can be terminated at any time. [72](#)

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#### *(iv) Advantages for unions*

Notwithstanding the difficulties experienced by unions in engaging with participatory structures in general and workplace forums in particular, there are practical benefits also. Baskin notes:

'[Workplace] forums encourage substantial employee involvement and workplace democratisation; an extensive list of consultation items are included. And while the joint-determination agenda is fairly limited the potential exists for unions to extend these rights. Forums will also provide unions with opportunities to recruit members, especially from the ranks of the more skilled and white-collar employees. And they could encourage inter-union cooperation at the workplace even while rivalry continues at sectoral level.' [73](#)

In addition, trade unions might in certain situations be persuaded that improvements in productivity or efficiency could increase take home pay more than industrial action. [74](#)

#### *(v) Shop stewards' views*

Very little evidence emerged as to the relationship between trade unions and workplace forums. At Company A a shop steward said the union 'was satisfied with the workplace forum structure. There was no confusion [as to] the roles of the workplace forum and the union'. [75](#) This rather bland statement, however, can hardly be taken as conclusive. In reality there is likely to be a diverse range of relationships varying widely from workplace to workplace.

A clearer picture emerges from case studies of non-statutory structures. In one workplace (Company I) participation was perceived as producing the following advantages for unions:

- additional information;
- better communication in the factory;
- winning new members every day;
- being closer to the point where decisions are made.



At Company P, where the system of participation is uninstitutionalized, shop stewards were pleased with 'the degree of openness, flexibility and responsiveness that existed'. They realized, however, that the system was extremely vulnerable and would have difficulties if confronted with 'tougher' issues. A good working relationship existed between the company and the union, which admitted that due to its 'interdependence with management' it was 'committed to cooperation in the expansion of the business'.

In companies such as Company S and Company Q sophisticated participatory systems seek to ensure that issues are dealt with at the

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most efficient level by the most appropriate structure. At Company Q, the negotiating committee is the core of the system and decides where matters should be referred to. The basic question is: 'What belongs where?' If a matter cannot be resolved at the consultation business unit, it must be resolved through the appropriate dispute resolution procedure. This seems to ensure that 'parties enjoy the flexibility [that it offers] but at the same time there is a certain amount of certainty' about which structures will have the competency to deal with which issues. At Company P, similar thinking underpinned the functioning of the participatory structure. <sup>76</sup>

(b) *Germany*

The Works Constitution Act extends certain rights to unions with members at the enterprise.

<sup>77</sup> First, all unions have initiating functions. The formation of a works council is mandatory but not in the sense that there is any state mechanism for enforcement if the employer fails to call an election. 'So the enforcement mechanism is that the unions have the right to call for an election, provided that there is at least one member of the union employed there.' <sup>78</sup> The union may also initiate a works meeting where the workers are to decide whether they want a works council or not. But, as Weiss points out, 'these initiating functions in practice only play a very marginal role, otherwise the widespread non-existence of works councils or the non-conductance of works meetings would not be possible'. <sup>79</sup>

Secondly, trade unions have 'controlling' functions. The trade unions have extended rights of control over the election procedure and may even apply to court for the nullification of an election if legal rules were not properly applied. If a member of the works council, or the council as such, has neglected the duties of the office the union may apply to court to have the member removed from office or the works council dissolved. If the employer does not abide by the duties as defined by the Works Constitution Act, the union is entitled to initiate the enforcement of sanctions by the Labour Courts. <sup>80</sup>

However, to obtain a truer reflection of the unions' influence on works councils' policy one has to go beyond the formal structure of the works council system. In some sectors, especially in larger corporations, the unions have their so-called trusted representatives (*vertreuensleute*) inside the plant, who in some cases are appointed by the union and in other cases are elected by union members. Weiss

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comments: 'These union representatives are seen as the communication link between union members and union administration. In addition, they support, influence, and sometimes even to a certain extent control, works council activities.' <sup>81</sup>

The large involvement of the DGB in works councils has led to close cooperation between unions and works councils. This is expressed inter alia in the way that collective agreements

are framed. Collective agreements often apply to a region or sector, while the detail is worked out at enterprise level through agreements between the employer and the works council. In this way the trade union and works council complement each other - the trade union provides central outlines and the works councils fill in the details per Senterprise. <sup>82</sup>

The WCA says that works council members have the right to participate in training activities at the expense of the employer. 'In practice', according to Weiss, 'you'll find almost hundred percent are offered by the trade unions. Trade union in this country, because they are big and rich, have facilities. They have teaching facilities and they have specialised teaching personnel'. <sup>83</sup> In addition, members of the trade union which are also works council members usually receive free training 'on all legal matters and all areas that you have to cover as a works council member'. <sup>84</sup>

The deputy president of a works council at a large corporation confirms:

'We frequently invite representatives of IG Chemie to join us in our meetings, depending on the subject. . . . We may decide for instance this case of negotiation with management on flexitime agreement is highly sophisticated, so we want some outside advice, and we ask IG Chemie to support us in that negotiation.' <sup>85</sup>

A specific instance arose when the works council had to negotiate with the company about the possible retrenchment of 225 workers:

'Trade unions have a wide range of experience with the reduction of the work force in many German companies, which they can bring into our negotiations with management. If we had only our [own] experience available in this particular case, we would certainly not have been in the position to optimally pursue individual employees' interests.' <sup>86</sup>

German unions appear to have overcome the institutional problem of dual representation by having a large proportion of union members

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who are also works council members. <sup>87</sup> The representation of unions affiliated to the DGB <sup>88</sup> in the works councils is on average about 80%, giving it a predominant voice in many works councils. <sup>89</sup> Other trade unions account for a further 4%. Conversely, many works councils are almost helpless without union support; and many works council members perform functions in trade unions. <sup>90</sup>

Trade unions are, however, only entitled to help their members or works councils on which their members serve. <sup>91</sup> According to law, works councils can ask for the presence of trade union officials at meetings. '[A]nd then', Weiss observes, 'the works council gets lots of input on what the policy of a decent works council, from the perspective of the trade union, should be. This is very, very Simportant.' <sup>92</sup>

Against this background, can it still be said that participation by works councils remains distinct from collective bargaining as in the textbook definition? Weiss responded to this question as follows:

'If you talk to 95% of my colleagues in Germany, they would say that [participation] has nothing to do with bargaining because the statute, well, labels it differently. I would say that that's rubbish. Of course it's bargaining, but its bargaining with a different structure. Because bargaining in the context of collective bargaining in the strict sense in this country means bargaining with the threat of industrial action. Whereas here industrial action is out, so you only bargain with the threat of the arbitration committee. If you bargain in the area of economic matters, you do not have the right to co-determination. You bargain without threat. You bargain on the basis of goodwill. And of course this is a totally different type of bargaining, but it is still bargaining.' <sup>93</sup>

Given the degree of overlap between the functions of trade unions and works councils, does conflict arise in practice over the demarcation of their respective domains? Experience suggests that, where necessary, trade unions will jealously guard their primacy in the area of collective bargaining. In a number of cases trade unions have gone to court.<sup>94</sup> In one case the court pronounced that extra allowances which the employer had granted to employees were a hidden increase of the wage as determined in the collective agreement. The judge declared this allowance null and void on the basis that the collective agreement takes precedence. But in another case it was ruled that,

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although wages were fixed by the collective agreement, this did not make it impossible for the works council in special instances to agree on allowances with management. The prohibition does not extend so far, the court found, that a collective agreement about wages makes an allowance provision impossible.<sup>95</sup>

Other differences between trade unions and works councils may arise over matters of policy. The classic example of a division of labour between unions and works councils, the arrangement of working times at enterprise level within the framework of a sectoral agreement, also demonstrates the potential for conflict. Trade unions have supported a policy of shorter working hours as a means of stimulating job creation. This has, however, led to tension between trade unions and works councils because it implies a reduction of overtime and overtime pay which works council members find it difficult to support.<sup>96</sup> Summers argues that, although the vast majority of works council members are also unions members, their primary loyalty is towards the employees at the workplace; as a result they do not feel 'rigidly bound' by union policies.<sup>97</sup>

These examples illustrate the forms of inherent strain between trade unions and workplace structures which South African unions appear to be apprehensive about. Even in the absence of employer intervention, the immediate pressures and demands upon workplace structures may impel them in directions at variance with union policy and detract from the union's ability to pursue its broader aims. The position of the unions in South Africa is compounded by their relative organizational weakness and the relative autonomy of shop stewards' committees in many workplaces. Whereas in Germany the problem might be limited to manageable proportions, unions in South Africa are evidently less confident of their ability to contain it.

*(c) The Netherlands*

There are about 8 000 to 9 000 works councils in Holland. Some works councils organize their elections on the basis of electoral lists which include trade union lists. In general, a high proportion of candidates are union members.<sup>98</sup> Recent research has shown that about 50-55% of works council members are union members. But 15% of employees interviewed did not know which of their works council members were also union members, which means that the real

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percentage is probably close to 60%.<sup>99</sup> And, as in Germany, many active trade union members are works council members.<sup>100</sup>

The relationship between trade unions and works councils in the Netherlands, as elsewhere, is characterized by a combination of tension and cooperation.<sup>101</sup> A trade union lawyer comments:

'The relationship works council-trade union has a loaded history. Although a mindshift is noticeable, many trade union representatives, especially in traditional sectors like the metal and building industries, see the works council as competition or as a threat to the position of the trade union. As a result the declarations of intent at a central level, where the trade union welcomes a bigger role for works councils, are not always very meaningful at lower levels. On numerous occasions it has been pointed out that trade union representatives are often selected from their own ranks, which slows down the penetration of new ideas. Outsiders who could bring a breath of fresh air into the trade union get little chance, and as a result old concepts only change slowly.' [102](#)

The predominant trend, however, is towards increasing cooperation. As in Germany, works councils are heavily dependent on the practical assistance that trade unions are able to offer. This arises not so much from the unions' legal powers over councils as from works councils' need for union support in areas such as training and expert advice. [103](#) Conversely, trade unions have discovered the strategically important role that works councils can play:

'In the context of the Netherlands we say that we need the works councils, because they provide us with a legal foothold in the enterprise. Also as a trade union, in order to enable our members in those firms to exercise their influence as works council members. As a trade union we cannot deliver customized negotiations in each and every enterprise, and we're less and less able to reach detailed agreement at the sectoral level. Increasingly it all boils down to differentiation, depending on the particular position in which the enterprise finds itself.' [104](#)

Or, as Slomp puts it:

'[T]he unions couldn't function very well if they didn't have a clear connection with the works councils. If they had no connection with the works councils, you'd have to join the union merely because it bargained at industry level. That would motivate very few people to join a union.' [105](#)

Moreover works councils, in contrast to trade unions, have a legal right to information. [106](#) Works councils are therefore an important source of information for unions:

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'Unions are dependent, when negotiating, on what they know of an enterprise and of the various industries. And works councils can inform the unions very well about problems in enterprises, about solutions etc. . . . You therefore see that unions convene meetings of works council members in a particular enterprise or sector to exchange ideas about automation, new technology and all the developments which flow from that.' [107](#)

While both institutions thus derive benefit from their association, trade unions are clearly the dominant partners. Contrary to the frequently expressed view in South Africa that workplace forums represent a 'more powerful version of the shopstewards' committee', [108](#) it is evident in the Netherlands that the contrary is true:

'It's clear that the trade union movement, being organized at a level higher than the individual enterprise, will have more insight into industrial relations, into what is happening in the sector as a whole. It has considerable resources, it has its own staff, it can deploy expertise, all of which works councils in themselves don't dispose over. Unless they can engage experts from outside, at the company's expense. That is provided for in the Works Councils Act. So, in organizational terms, a trade union will generally be far more powerful than a works council. More powerful in terms of expertise as well as a more independent position in relation to the enterprise. And with more insight into developments elsewhere in the economy. That is why we maintain that trade union membership is extremely important also for works council members. Because one can fall back on a whole system of expertise and training.' [109](#)

The Director of the Centre for Works Councils elaborates:

'The most important thing about a trade union is that it can embody the principle of solidarity far better than a works council. A works council can also do it, but not beyond the limits of the enterprise. And they hardly do so in practice. The trade union looks beyond the limits of enterprises, promotes equal treatment, equal positions of employees in the labour market. . . . That is something which the works councils will not address because they are enterprise based.' [110](#)

It is, indeed, the relative weakness of workplace based structures which render them potentially more pliable bargaining partners for employers and, hence, a potential threat to trade unions. Rather than competing, trade union structures <sup>111</sup> at workplace level in the Netherlands are said to 'stimulate' works councils by serving as a channel of communication between the union and the latter. <sup>112</sup>

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The trend towards practical cooperation is illustrated by the growing incidence of 'framework' collective bargaining agreements in which the social partners determine the extent of the powers which they devolve to consultation between employer and works council. <sup>113</sup>

In addition, collective agreements have been signed in the information technology sector where on the side of the employees both works councils and trade unions were present. The employee position had been worked out in collaboration. <sup>114</sup>

This process has undoubtedly created areas of potential overlap and tension. Instances have occurred where the employer refused to negotiate with a trade union but turned to the works council instead. One such case was in the civil engineering industry:

'About two years ago the service sector unions of the FNV and CNV were busy negotiating collective agreements in the civil engineering sector and found it very difficult to get into a particular workplace. Trade union membership in that workplace had risen to 30 or 35 per cent while in the sector as a whole it was about five per cent. So, at the request of the workforce, the unions were trying to sign a collective agreement. In this case the employer used the works council to keep the union out. That led the unions to start legal proceedings on the basis that the arrangements between the employer and the works council gave the works council a consultative status more or less equivalent to that of a trade union, which was in conflict with the law - with the Works Council Act as well as international conventions - and also in conflict with the standards of the good employer. The unions lost the case. The judge said that in s 32 of the Works Councils Act, which deals with additional capacities for works councils, there was nothing to prevent it from including primary conditions of employment. That was one of the few cases where a trade union and a works council really found themselves in a legal conflict situation.' <sup>115</sup>

This dispute led to serious conflict within the works council and between the works council and its constituency. In the end the works council ceased to exist due to lack of motivation on the part of its members to continue. This case is generally seen as cause célèbre of how it should not be done. <sup>116</sup>

Another example was at Fuji Films, where the conditions of employment likewise were fixed in an agreement with the works council (the so-called 'Fuji labour agreement'). The trade unions did not play a role in reaching this agreement. In contrast to the civil engineering case, trade union membership at Fuji was very low (approximately 1%), and as a result the position of the trade unions vis-à-vis Fuji was weak. <sup>117</sup>

Santberg reviews the emerging pattern:

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'A tendency of the last few years is that works councils are more and more concerned with conditions of employment. Traditionally that is the territory of the trade unions. But in an enterprise where no collective agreement is applicable, it may be the case that the employer in practice imposes terms of employment unilaterally. In such cases you often see the employer consulting with the works council because he wants the employees to be committed to his decision. You also see in sectors which have a collective agreement that not all the details are filled in, and that further consultation is needed to fill them in. More and more works councils become involved with this. It is a growing tendency, that we can see from the questions we get. At the central

level the agreements become more and more general, people want to work out the specifics at enterprise level. One enterprise is not like another, even if they are in the same sector.' [118](#)

(d) *Belgium*

In 1995, 3 041 collective agreements were registered with the Ministry of Labour. Five were concluded in the NLC, 837 in the Joint Labour-Management Committees and 2 199 at enterprise level. A breakdown based on topics discerns the following categories: wages and working conditions, meal vouchers, end of year bonus, other bonuses, restructuring, early retirement, collective dismissal, representation of employees, social elections, working time, reduction of working time, new working time regulations, shift work, part-time work, long-term unemployed, redistribution of available work, promotion of employment and social funds. [119](#)

This wide range of bargaining topics demonstrates the effect of enterprise level collective bargaining: issues dealt with by works councils in the Netherlands and Germany are adopted as part of the bargaining agenda. Collective bargaining functions more visibly as the primary channel of interaction between management and labour, with consultation and joint decision making in the role of 'second channel'. The union delegation is seen as the most strategically important representative body as it is responsible for concluding company level collective agreements, handling grievances and generally conducting industrial relations at this level. In most cases it is the focus of union activities and its members are often also works councillors or members of the CPPW (health and safety committees), thus enjoying full legal protection. [120](#)

The works councils, in contrast, are generally seen as being concerned with day-to-day matters rather than strategic matters. They are, however, important bodies in many larger companies and the legal protection granted to their members is seen as providing a guarantee for union organization. [121](#)

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The manifest presence of the trade unions in the enterprise ensures almost complete dominance over the works council. [122](#) The election of representatives of leading personnel ('cadres'), [123](#) however, is regarded as a more accurate measure for gauging the trade union federations' level of support since it is the only election where they do not have a monopoly in putting forward candidates. In the 1987 elections the cadres' union NCK and the independent 'house lists' won a resounding victory. This trend was, however, not continued in 1991 and 1995, when the three traditional confederations won a majority of seats in the election of cadres. [124](#)

## Conclusions

Coexistence between trade unions and works councils in the European context is not unproblematical but demonstrates advantages for trade unions, works councils and employees. In South Africa a more entrenched level of adversarialism presents an additional barrier which is easier for employers than trade unions to overcome. Non-statutory structures appear to present fewer problems from both employers' and unions' points of view. The key to promoting a more favourable climate for employee participation by means of workplace forums would seem to lie in addressing trade union concerns without

transforming workplace forums into organs of industrial conflict. In this context consideration can be given to the following reforms:

- 1 Consultation and joint decision making by workplace forums should be excluded over matters regulated by collective agreement as well as matters normally subject to collective bargaining.
- 2 The primacy of collective bargaining and the exclusion of consultation and joint decision making in respect of matters normally subject to collective bargaining should be included in the objects clause of chapter V of the LRA (s 79).
- 3 The scope for representative trade unions to be involved in regulatory functions at workplace level could possibly be defined in line with the Belgian precedent.
- 4 Trade unions could be encouraged to address the needs of their members at workplace level more systematically, for example, by providing funding in terms of the Skills Development Act for training provided to members of workplace forums or non-statutory participatory structures.

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<sup>1</sup> s 23(5) of the Constitution of the Republic of South Africa (Act 108 of 1996).

<sup>2</sup> Buhlungu S 'Workplace Change for Who?' December 1995 19(6) *SA Labour Bulletin* 54.

<sup>3</sup> Labour Relations Bill: Explanatory Memorandum 136-7.

<sup>4</sup> But see the statement by Minister of Labour M Mdlalana below.

<sup>5</sup> This may be taken to mean that '[w]here a matter is effectively regulated by collective agreement, there will be no need to include it in the scope of consultation and joint decision-making. But where a collective agreement deals with a matter in broad outline only, the exclusion provided for by s 84(1) and 86(1) should not apply': Du Toit D et al *The Labour Relations Act of 1995* (1998) at 288-9.

<sup>6</sup> Though intended to exclude the possibility of collective bargaining being ousted by consultation or joint decision making, these provisions are effective only in situations where collective agreement have actually been arrived at. There is no insurance against a situation where a trade union wishes to regulate a particular matter by collective agreement whereas the employer wishes it to be dealt with by the workplace forum. Merely by failing to sign a collective agreement the employer will be able to ensure that it remains on the workplace forum's agenda. Below it will be seen how this problem is dealt with in Germany.

<sup>7</sup> By exercising the latter option, the parties will not only restore managerial prerogative over the topic in question but will also restore the union's right to strike in the event of a dispute.

<sup>8</sup> But not to the agenda of joint decision making. Given the far-reaching implications of joint decision making for employers as well as unions, this delicate question is left to the parties most directly concerned: the employer and trade union at the level of the workplace itself.

<sup>9</sup> Briefing by the Minister of Labour, M Mdlalana, on 8 February 2000: reported on internet at [www.labour.gov.za](http://www.labour.gov.za).

<sup>10</sup> 'In Germany, the functions of the works council are legally prescribed, limiting by implication the functions of collective bargaining agreements. The union and the employer cannot, by collective bargaining, encroach on the statutorily defined functions of the works council, though they can, in effect, delegate functions to the works council': Summers C 'Workplace Forums from a Comparative Perspective' 1995 16 (4) *Industrial Law Journal* 807 at 808.

- [11](#) Section 2 of the WCA furthermore provides that union representatives 'after notifying the employer or his representative, shall be granted access to the establishment'. See Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 370.
- [12](#) Weiss explains: 'If a collective agreement exists, it is sufficient that it covers the region and the branch, no matter whether it applies to the specific establishment and to the employment relationships within this establishment. This implies that, even in establishments where neither the employer is a member of the employers' association nor the workers are union members, remuneration or other working conditions cannot be regulated by work agreements. This very rigid rule only applies to work agreements on matters where the works council has no right of co-determination.' (*Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 402.)
- [13](#) Interview with Windbichler at 1.
- [14](#) Dutch Report at 3.
- [15](#) Dutch Report at 19.
- [16](#) Belgian Country Report at 13.
- [17](#) In 1995, 3 096 companies held elections for works councils: 2 212 in the profit sector and 857 in the non-profit sector. According to Blanpain (op cit para 399) elections were held for works councils in 3 162 enterprises (2 315 in the profit sector and 847 in the non-profit sector). The elections due in 1999 were postponed to May 2000: Belgian Country Report at 14.
- [18](#) Belgian Country Report at 16.
- [19](#) If the union is not representative (eg the small liberal unions), it will be able to participate in the establishment of the union delegation if its candidate has a seat on the (d) Committee for Prevention and Protection at Work. If there were no elections for such committee, the union will have to prove that it organizes a minimum of 10% of the organized workers.
- [20](#) Belgian Country Report at 11
- [21](#) Belgian Country Report at 13.
- [22](#) Belgian Country Report at 13.
- [23](#) Du Toit D 'Industrial Democracy in South Africa's Transition' May 1997 1 *Law, Democracy & Development* 60.
- [24](#) Baskin J & Satgar V 'South Africa's New LRA - A Critical Assessment and Challenges for Labour' November 1995 19(5) *SA Labour Bulletin* 50.
- [25](#) Brassey M & Brand J 'Flaws and Fantasies: A Conceptual Analysis of the Bill' March 1995 11(4) *Employment Law* 79.
- [26](#) Summers C 'Workplace Forums from a Comparative Perspective' 1995 16(4) *Industrial Law Journal* 807.
- [27](#) in terms of s 81.
- [28](#) Von Holdt K 'Workplace Forums: Can They Tame Management?' March 1995 19(1) *SA Labour Bulletin* 32.
- [29](#) Von Holdt K 'Workplace Forums - Undermining Unions?' December 1995 19(6) *SA Labour Bulletin* 61.
- [31](#) Von Holdt K 'Workplace Forums: Can They Tame Management?' March 1995 19(1) *SA Labour Bulletin* 32.
- [32](#) 'Cooperative', it should be noted, does not necessarily mean the same as 'without conflict'. When the relationship between parties is intensely adversarial, 'they are often very polite and their language is correct - they do not want to make a mistake. And when parties trust each other, the manner in which they interact with each other may include intensely robust exchange': Preliminary Workshop Report at 15.
- [33](#) Weiss *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 402. Anstey makes the same point: '[C]ollective bargaining is in general the realm of trade unions, and is centralised at regional sectoral level. . . . The right to strike is dedicated solely to trade unions. At the level of the enterprise, relations between the employer and the works council are cooperative in character and works councils may not strike on any issue whatsoever. . . . Sophisticated systems of advisory and final arbitration are provided in order to resolve deadlocks which might arise in this arena of relations' ('Can South African Industrial Relations Move Beyond Adversarialism' 1995 19(4) *South African Journal of Labour Relations* 24.
- [34](#) 'The potential for non-confrontational problem solving is greatly increased by the separation of functions. The resolution of distributive issues - that is, basic economic issues - must be separated from the resolution of workplace and productivity issues. . . . Distributive issues, I would restate, are inescapably confrontational; workplace and productivity issues need to be cooperative': Summers C 'Workplace Forums from a Comparative Perspective' 1995 16(4) *Industrial Law Journal* 807.



- [35](#) Workplace forums are characterized as structures 'to facilitate communication and co-operation between management and labour on production-related matters, more or less free of distributive conflicts over wages': Labour Relations Bill: Explanatory Memorandum at 136.
- [36](#) Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 402.
- [37](#) FNV principles 1994.
- [38](#) Dutch Report at 5.
- [39](#) Interview with Rood at 2.
- [40](#) Interview with Lawyers' Collective Utrecht at 5.
- [41](#) Protestant trade union federation.
- [42](#) Dutch Report at 5
- [43](#) Interview with Slomp at 1.
- [44](#) Interview with Santberg at 9.
- [45](#) Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 403.
- [46](#) As argued by the FNV, the country's major trade union federation. See Interview with Bloemarts at 3-4.
- [47](#) Sociaal-Economische Raad *Het arbeidsreglement: het instemmingsrecht van de ondernemingsraad* 94/06 (1994) 106-107. The FNV suggested, however, that - in contrast to the position in Germany - proposals assented to in this manner should not be incorporated into the employee's contract of employment.
- [48](#) In addition, the aggregation of employee interests (skilled and unskilled, blue-collar and white-collar) represented by works councils and workplace forums offers trade unions with opportunities of promoting broader unity among groups of employees that have traditionally been divided.
- [49](#) Interview with Lawyers' Collective Utrecht at 2.
- [50](#) Interview with Lawyers' Collective Utrecht at 5-6.
- [51](#) Van Ruyseveldt & Visser (1996); Belgian Country Report at 5.
- [52](#) Adu-Amankwah & Kester G (*s*) *How to Make Democratic Participation a Success* (1999) at 50-1.
- [53](#) at 51.
- [54](#) at 53.
- [55](#) Deale P 'Meeting Eye to Eye: The Workings of Workplace Forums' September 1995 *People Dynamics* 20.
- [56](#) Bendix takes a contrary view: 'The power of a trade union stems from its members and is embodied in the potential, lawful withdrawal of labor in the case of a dispute' whereas the power of a works council 'stems from rights granted by law and the enforcement of their realization through the courts of law proper. . . . Recruitment and representatives are, therefore, the life blood of a trade union. No outside authority can assist in creating a power base. By contrast, employee representative bodies formed on the grounds of universal rights enshrined in legislation do not comply with the principles of the freedom of association and thus do not qualify for collective bargaining and industrial action in the conventional sense. Structurally, conceptually and practically, collective bargaining rights in the traditional trade union sense and worker committees are incompatible for more reasons than can be enumerated' ('Workplace Forums: Shadows of a Shady Past or Beacons for Reform' 1995 15(2/3) *Industrial Relations Journal of South Africa* 3). While this argument highlights one facet of the distinction between the two processes, it is submitted that the concluding generalization is practically and theoretically unsound.
- [57](#) 'Here we make a distinction between primary, secondary and tertiary conditions of employment. We take the view that primary conditions of employment are a typical job for trade unions and collective bargaining. On the other side of the spectrum are the tertiary conditions of employment, which typically do not belong to collective bargaining negotiations. With the secondary conditions of employment it sometimes goes this way and sometimes the other way': Interview with Rood at 1.
- [58](#) 'If you make a separation between collective bargaining and participation, it doesn't matter whether participation takes place via the union or via a works council. In Scandinavia you have few or no works councils but the nature of worker participation is the same as in Germany or the Netherlands. In Belgium the works councils are dominated by the trade unions, unlike the Netherlands or Germany, but the kind of participation is the same': interview with Slomp at 1.
- [59](#) 'Each of the systems are driven by a different logic: narrowness versus broadness; using different means to achieve the end; tactics of struggle versus tactics of persuasion': SANPAD Workshop Report at 15.
- [60](#) SANPAD Workshop Report at 3-4.

- [61](#) Bendix W 'Workplace Forums: Shadows of a Shady Past or Beacons for Reform' 1995 15(2/3) *Industrial Relations Journal of South Africa* 2.
- [62](#) Without wishing to stray into the province of political science, the resemblance between arrangements of this nature and South Africa's first Government of National Unity, embodying a remarkable pre-arranged division of power between erstwhile political enemies, is obvious.
- [63](#) SANPAD Workshop Report at 3.
- [64](#) *ibid.*
- [65](#) Thus, a recent study of participatory structures revealed that although 57,1% of workers in the survey were unionized and a significant number of organizations had formal agreements with unions regarding their involvement, unions were for practical purposes not involved in the process. Veldsman T & Harilall R 'The Dawning of Workplace Democracy: Are We Ready?' 1997 12(10) *Human Resource Management Yearbook* 18.
- [66](#) Adu-Amankwah & Kester *How to Make Democratic Participation a Success* (1999) at 53.
- [67](#) In Germany, works councils are actively involved in facilitating redeployment of workers facing retrenchment. Also in the Netherlands the problem is diminished by employers training or reskilling retrenched workers so that they can be re-employed.
- [68](#) SANPAD Workshop Report at 6.
- [69](#) Buhlungu S 'Workplace Change for Who?' December 1995 19(6) *SA Labour Bulletin* 54.
- [70](#) at 55. Comments such as these suggest situations which, in a more developed participatory system, might have prompted joint problem-solving exercises rather than deadlock.
- [71](#) Psoulis et al 'Workplace Forums: What is Their Future?' *Labour Studies Research Report* 9 April 1999 at 1-13.
- [72](#) SANPAD Workshop Report at 6-7.
- [73](#) Baskin J & Satgar V 'South Africa's New LRA - A Critical Assessment and Challenges for Labour' (November 1995) 19(5) *SA Labour Bulletin* 50.
- [74](#) Fourie J 'Workplace Forums: Make them Work' May 1996 22(3) *Productivity* SA 37.
- [75](#) Company A, interview with shop steward at 13.
- [76](#) SANPAD Preliminary Workshop Report at 15.
- [77](#) See discussion on Germany above.
- [78](#) Interview with Windbichler at 7.
- [79](#) Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 369.
- [80](#) *ibid.*
- [81](#) Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 371.
- [82](#) German Report at 22.
- [83](#) Interview with Weiss at 4.
- [84](#) Interview with Dive at 5-6.
- [85](#) Interview with Dive at 4.
- [86](#) Interview with Dive at 6.
- [87](#) Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* (1989) para 369.
- [88](#) Deutsche Gewerkschaftsbund, the major German trade union federation.
- [89](#) The degree of union power varies per industry. The unions IG Metall (in the metal industry) and IG Chemie (in the chemical industry) are particularly strong, resulting in a high degree of control over works councils in these industries: interview with Windbichler at 4.
- [90](#) German Report at 22.
- [91](#) Interview with Dive at 4.
- [92](#) Interview with Weiss at 3.
- [93](#) Interview with Weiss at 9.
- [94](#) German Report at 22.

- [95](#) *ibid.* The position in South Africa is different. Following conflicting decisions by the labour courts, the new LRA defined the term 'remuneration' broadly enough to include ancillary benefits (s 213).
- [96](#) Interview with Maier at 4.
- [97](#) Summers C 'Workplace Forums from a Comparative Perspective' 1995 16(4) *Industrial Law Journal* 811.
- [98](#) Dutch Report at 19.
- [99](#) Interview with Santberg at 1.
- [100](#) Dutch Report at 19.
- [101](#) Dutch Report at 19.
- [102](#) Interview with Bloemarts at 1.
- [103](#) Dutch Report at 17; Du Toit D 'Industrial Democracy in South Africa's Transition' May 1997 1 *Law, Democracy & Development* 59.
- [104](#) Interview with Bloemarts at 5.
- [105](#) Interview with Slomp at 7.
- [106](#) Dutch Report at 25.
- [107](#) Interview with Santberg at 8.
- [108](#) Brassey & Brand 'Flaws and Fantasies: A Conceptual Analysis of the Bill' March 1995 11(4) *Employment Law* 79. This view is presumably based on the legal rights to consultation and joint decision making enjoyed by workplace forums. Arguably, the range of compulsory bargaining topics and organizational rights laid down by the LRA in favour of trade unions is no less significant in practice. Von Holdt's belief that 'workplace forums should be stronger because they have more resources' is questionable since workplace forums are entitled only to 'facilities . . . to perform [their] functions' (s 82(1)(r) LRA).
- [109](#) Interview with Bloemarts at 3.
- [110](#) Interview with Santberg at 8.
- [111](#) 'Bedrijfsledenengroepen', or 'workplace membership groups'.
- [112](#) Du Toit D 'Corporatism and Collective Bargaining in a Democratic South Africa' 1995 16(4) *Industrial Law Journal* 801.
- [113](#) Dutch Report at 17.
- [114](#) Dutch Report at 17.
- [115](#) Interview with Lawyers' Collective Utrecht at 9.
- [116](#) Dutch Report at 5.
- [117](#) Dutch Report at 19.
- [118](#) Interview with Santberg at 5.
- [119](#) Belgian Country Report at 16.
- [120](#) Belgian Country Report at 23.
- [121](#) Belgian Country Report at 23.
- [122](#) Belgian Country Report at 23.
- [123](#) See discussion on Belgium above.
- [124](#) Belgian Country Report at 16.