



System of Employee Representation at the Enterprise

– 2012 JILPT Comparative Labor Law Seminar –



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Foreword

The Japan Institute for Labour Policy and Training (JILPT) held the Eleventh Comparative Labor Law Seminar on February 28th and 29th, 2012 in Tokyo. This Comparative Labor Law Seminar has been held biannually for the purpose to provide researchers of this area the opportunity to discuss and learn across borders. In the seminar, we planned to have cross-country discussion and analyses on the theme of “System of Employee Representation at the Enterprise.” We invited ten scholars from Australia, China, France, Germany, Korea, Sweden, Taiwan, the U.K, the U.S. and Japan to present their national papers on the theme.

The issue of employee representation system is recently garnering attention not only in Japan but in other countries as well. The main focus of this seminar is how the voices of the employees should be institutionalized in today’s changing and diversified workplace.

We believe the seminar was a great success, as it enabled participants to learn more about the diverse regulatory approaches and provided an opportunity to explore normative direction for labor law and policy in the age of the diversified workforce. Through enlightening discussion, participants mentioned not only the legal framework but its relationship to the actual application of employee representation system in each country. This Report is a compilation of papers presented to the seminar. We very much hope that these reports will provide useful and up-to-date information and also benefit those who are interested in comparative study of the issue.

We would like to express our sincere gratitude to the guests who submitted excellent national papers and we are deeply grateful to Prof. Hiroya Nakakubo and Prof. Takashi Araki for the effort to coordinate the seminar, and also to the Japanese researchers for their participation.

June 2012

Koichiro Yamaguchi
President
The Japan Institute for Labour Policy and Training

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Introduction

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Hitotsubashi University

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The Theme and Its Background

The Japan Institute for Labor Policy and Training hosted its 11th Comparative Labor Law Seminar (Tokyo Seminar) on February 28th and 29th, 2012. As the organizers of the seminar, we chose the theme of “System of Employee Representation at the Enterprise” and invited 10 distinguished scholars from Australia, China, France, Germany, Japan, Korea (ROK), Sweden, Taiwan, the U.K. and the U.S. to present reports on their respective countries. The following memo was sent to these participants to explain the theme.

The employee representation system is firmly established by law in continental European countries, such as the Betriebsrat in Germany and the comité d'entreprise in France. It coexists with the framework of collective bargaining at the industry or regional level and seems to have been assuming a greater role in recent years amid the trend towards decentralized industrial relations. At the other end of the spectrum, employee representation schemes are likely to be held to be illegal in the U.S., being seen as a tool to thwart genuine collective bargaining, although there are voices calling for a change in the law to cast off the legacy of the New Deal era.

In Japan, there is no full-fledged employee representation system. However, the Labor Standards Act and some other statutes have a mechanism under which certain deviations from the minimum labor standards are permitted if there is a written agreement to this effect between the employer and the representative of the majority workers at the establishment. A majority union, if there is one, automatically becomes such a representative; otherwise, a person should be elected by some means by the workers of the establishment as their majority representative. There is a concern, however, as to whether such a person can deal with the employer properly without organizational support behind him/her. On the other hand, the unionization rate has declined to less than 20% (currently 18.5%) in Japan, and it may not be realistic to look to labor unions to represent the interests of workers at an enterprise. Moreover, we are witnessing a rapid increase in non-standard employees, such as fixed-term and part-time workers (currently such non-standard employees account for one-third of the Japanese workforce), who have been excluded from membership of traditional enterprise-based unions. Accordingly, there is a growing interest in the issue and some people are calling for the introduction of a brave new system of employee representation.

We believe a comparative study of the employee representation system would be timely and beneficial. It would be exciting to exchange information and opinions concerning how the voices of employees should be institutionalized in today's workplace.

Proposed Outlines

Together with the explanation of the theme, we provided the following guidelines to the representatives from each country, to ensure consistency in the composition of their papers.

1. *Description of the employee representation system (if any)*
 - *Is there a legal framework for an employee representation system, such as a works council, at enterprises?*
 - *If so, please provide basic information about it, e.g.*
 - *Historical development*
 - *Unit of representation (group of enterprises, enterprise, establishment, etc.)*
 - *Role and power of the representative body*
 - *Formation of the representative body*
 - *Method of electing the representatives (if there is a legal mechanism preventing intervention by the employer, please describe it. In addition, please give information as to how non-standard employees are involved in the election procedures)*
 - *Methods of deliberation and decision-making of the representative body*
 - *Protection for the activities of the representatives*
 - *Bearer of the cost (e.g. financial support from the employer)*
 - *Rate of adoption in reality (does it differ significantly between industries?)*
 - *If not, please explain why not.*
 - *Historical background*
 - *Legal status of voluntary employee representation system*
 - *Prevalence of the voluntary employee representation system*
 - *Attitudes on the part of labor, management, and the general public*
 - *Is there a movement for change?*
 - *Is there a mechanism for employee representation on corporate boards? If so, please describe this briefly.*
2. *Relationship with collective bargaining*
 - *Please provide a very concise description of unionization and collective bargaining today.*
 - *Do labor unions exert special influence upon the selection or working of employee representatives?*
 - *Is there a limit to the authority of employee representatives when there are collective bargaining agreements?*
 - *Can (or does) the employee representative system supersede the functions of collective bargaining?*
3. *Function and dysfunction of the employee representative system*
 - *What are the main functions of employee representatives? (Establishing terms and conditions of employment; codetermination of important employment issues; flexibilization of or derogation from statutory regulations; communication between labor and management; resolution of conflicts arising from employment relations; representation of diversified voices in the workplace; or other functions).*
 - *If possible, please show typical ways in which the employee representative system works, taking concrete examples such as dismissal, wage determination and equal*

- treatment of non-standard employees.*
- *What are the defects of the current employee representative system in your country?*

4. *Evaluation and trends*

- *How would you evaluate the working of the current employee representation system (or the lack of such a system)?*
- *Are there particular issues to tackle with regard to employee representation?*
- *What is the future direction of employee representation in a broader sense?*

Papers and Discussion

At the seminar, those delivering the national reports gave excellent presentations based on their papers, and lively discussions followed. The papers are contained in the following chapters, with several revisions to reflect the seminar discussions. Our readers will appreciate their rich content. It is impossible to summarize them here, but what impressed us most was the great variety between the countries.

As we stated in the memo explaining the theme, Germany and France are both characterized by “dualism” – works councils and labor unions. However, there are notable differences between them, starting from such basic features as the formation of works councils (company managers form part of these in France, but not in Germany). It is also interesting to see the impact of a 2008 French law which may blur the distinction between the two systems. On the other hand, the U.K. and Sweden adopt a single-channel representation system through labor unions. EU directives have had minimal influence on these countries in this regard, though it is true that U.K laws have become quite complicated because of them.

Outside Europe, the U.S. has the ultimate form of single channel representation through majority labor unions and, in spite of attempts to modify the law or its construction, remains hostile to any other scheme of employee representation. However, given the decline in union density, it clearly needs changes to enable greater participation by employees. Australia is another country with a single-channel representation system through labor unions, although the locus of collective bargaining has shifted from industries to individual enterprises through volatile legislative reforms.

Turning to East Asia, South Korea is similar to Japan in that it has a system of majority unions/representatives at an establishment for the purpose of certain derogations under the Labor Standards Act. Yet South Korea also has a system of mandatory labor-management committees, and there are problems between these systems that need to be solved. Taiwan also mandates the establishment of labor-management councils, but in reality such councils are rare and ineffective, as are labor unions and the practice of collective bargaining. Finally, China has a unique representation system utilizing staff congresses, which underwent considerable reforms after 1992, based on the current regime of market economy under socialism.

Observations

At the end of the seminar, we concluded the fruitful discussions with the following points. We hope that they will provide useful analytical viewpoints to accompany the fascinating national papers.

Firstly, the issue of employee representation at enterprises is inevitably intertwined with the conditions of labor unions and collective bargaining. Whether they are based on

the industry level or not would certainly affect the need for a separate system of representation at the enterprise level. How much they are accepted is also a significant factor. After all, Sweden may well be happy with its single-channel system given its extremely high unionization rate (71% in 2008).

Secondly, attention should be paid to the source of the legitimacy of the representative body. The employee-members of works councils or labor-management committees are elected directly by the employees, and the procedures and mechanisms of such elections are an important part of the system. In the case of labor unions, individual employees authorize the union to represent them by joining it. However, the majority union may be entitled by law to represent even non-members, such as the exclusive bargaining system of the U.S. and, to a lesser extent, the derogation agreements in Japan.

Thirdly, the concrete form of the representative body matters. Labor unions are presumably able to deal with employers effectively utilizing their resources. Members of works councils are not necessarily experienced nor unified, but it is not uncommon for them to include union staff and agents. The members also usually enjoy special protection and support provided by the law. When the representative is an individual employee, like majority representatives in Japan, there is a question as to how well he/she can function. Beyond this lies the issue of what “representation” is for, and thus the recent trend for direct methods of communication in the U.K. is quite interesting.

Fourthly, another issue of importance is the subjects tackled by the representative system. While a broad range of employment conditions and other matters are open to collective bargaining by labor unions, the subjects for works councils and labor-management committees are usually enumerated by law, often with varying degrees of participation rights (information, consultation, discussion, codetermination, etc.) depending on the nature of the matter. Even among the countries with a single-channel representation system, some subjects, such as safety and health, may be assigned to a special joint committee.

Fifthly, there is the problem of discrepancies between law and reality. Despite legal mandates, works councils may be nonexistent or malfunctioning in real workplaces. This depends on the history, culture, legal system, economic conditions, attitude of labor unions, and many other elements in each country, but it would be a worthwhile task to explore a model of employee representation that is practicable and adaptable.

Finally, we believe that there should be some kind of channel through which employees can be heard and their interests represented, whether it is via a labor union, works council, or any other type of participatory mechanism. If there is a representation gap, efforts should be made to fill it. Given the universal trends of declining union density found in most advanced countries, it is especially important to secure a channel for those employees who are not represented by labor unions at the workplace level. The increase in non-standard or atypical employees, who are less likely to belong to labor unions, highlights this as a pressing issue in contemporary labor policies. The national reports, which elaborate on the conditions and new developments in regard to this important issue, would provide ample basis on which to build a better system of employee representation in the era of diversified workforces in the globalized market.

The System of Employee Representation at the Enterprise in Japan

Hisashi Takeuchi-Okuno*

I. Introduction

Enterprise unions in Japan, especially those organizing the majority of employees in the workplace, have represented member employees as well as non-member employees in an enterprise through collective bargaining as well as the joint-consultation system.¹ However, due to the fact that the unionization rate has continued to decline and that the ratio of non-regular employees not yet organized has been sharply rising, more and more employees are left without representation through labor unions.

Meanwhile, although Japanese labor law has developed statutorily institutionalized mechanisms through which employees in the workplace are represented, namely the majority representation system and the labor-management committee, these are far from full-fledged systems of employee representation like the works councils in European countries, especially in terms of their function and organization.² Simply put, employees are insufficiently represented through the statutorily institutionalized system of employee representation in Japan.

In this article, the nature of enterprise unions, the roles they play (or have played), and their presence in modern workplaces are analyzed (section II). Then, the historical development, functions, organization, and operation of a majority representative and a labor-management committee will be discussed (section III). The article concludes with an evaluation of the current systems of employee representation at the enterprise and the scholarly calls for reform (section IV).

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¹ See generally Takashi Araki, *Labor and Employment Law in Japan* 179-181 (2002), for the explanation of the joint-consultation system. Under the joint-consultation system, an employer and a union mainly provide information and/or consult over a variety of matters, including working conditions as well as managerial matters. It is a voluntary, cooperative rather than adversarial system, and even when the parties cannot agree, resort to industrial action is not expected. Informal joint-consultation between management and labor can be found even in some non-unionized companies (*see infra* note 17). This article focuses on the formal, legally institutionalized system of employee representation at the enterprise, and will not discuss the details of the informal joint-consultation mechanism.

² It is possible, therefore, to say that *virtually*, the Japanese system of employee representation at the enterprise is the *single channel system* through labor unions.

II. Employee Representation through Enterprise Unions

1. Enterprise Unionism

In Japan, slightly more than 10 million of the roughly 54 million (or 18.5%) employees in both public and private sectors were organized by labor unions in 2010.³ Nearly 90% of unionized workers were organized by enterprise unions, accounting for more than 95% of all unions nationwide.⁴

Enterprise unions, as the name indicates, are organized and bargain collectively on an enterprise (or establishment⁵) basis. Union membership is limited to the employees (in most cases regular employees) of a particular firm and a union is managed by officials elected from the union members who are employees of the company. Each enterprise union bargains collectively with its company over the concrete terms and conditions of employment with the company. Though many of the enterprise unions are affiliated with industrial alliances and through them, national centers such as JTUF-RENGO (the largest national center), control by these groups over enterprise unions is quite limited. About a third of organized employees are members of enterprise unions that are not affiliated with any industrial alliances or national centers and instead remain purely in-house organizations.⁶

2. Enterprise Unions as the Representative of Employees at the Enterprise

A labor union, whether it is an enterprise union, a regional union, or an industrial union, enjoys the rights “to organize and to bargain and act collectively” as guaranteed in article 28 of the Constitution. Unions also enjoy protections provided in the Labor Union Act such as a remedy from the Labor Relations Commissions for an employer’s unfair labor practices, including disadvantageous treatment, refusal to bargain without just cause, or dominance and interference. These protections are provided if, basically speaking, the union is an organization mainly composed of workers and maintains independence from an employer.⁷ Such a labor union can bargain with an employer who employs a member of the union (the employer is obliged to bargain with the union) and is immune from civil and criminal liability for “justifiable”⁸ strikes and other industrial actions. Under Japanese labor law, a plural representation system is adopted instead of an exclusive representation system, and each union has the right to bargain collectively with respect to matters affecting its own members irrespective of its size or the number of its members.⁹ Since

³ Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/10/index.html> (last accessed Apr. 6, 2012). In 2011, union members fell slightly short of 10 million (9.96 million) for the first time in 47 years. Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2011*, available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/11/index.html> (last accessed Apr. 6, 2012). The unionization rate in FY2011 is not available due to the Great East Japan Earthquake.

⁴ Takashi Araki, *supra note 1*, at 165. Note that the number of labor unions amounts to about 26,000 in 2010 (see Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra*), which itself indicates that labor unions are established in decentralized, enterprise-by-enterprise bases in Japan.

⁵ See below III 1 (3) (i), for the meaning of an “establishment.”

⁶ Kazuo Sugeno, *Koyo Shakai no Ho Hoteiban (Employment System and Labor Law, revised ed.)* 291 (2004).

⁷ See Hisashi Takeuchi-Okuno, *General Unions and Community Unions, and Japanese Labor Law*, 9 *Japan Labor Review* 86 (2012) (available at: <http://www.jil.go.jp/english/JLR.htm> (last accessed Apr. 6, 2012)), at 88-95, for detailed requirements for these rights and protections and an overview of the contents of these rights and protections.

⁸ See *id.*, at 93-94 and Araki, *supra note 1*, at 184-186, for the meaning of “justifiability.”

⁹ *Nissan Jidosya v. Cent. Lab. Rel. Comm’n*, 39 *Minshu* 730 (S. Ct., Apr. 23, 1985) (the Supreme Court held that where two or more labor unions concurrently exist within one firm, each of these unions, irrespective of its size or the number

under Japanese labor law, the independence of enterprise unions is confirmed with almost no doubt, these unions represent member employees at an enterprise with regard to terms and conditions of employment through collective bargaining.

In addition, enterprise unions that organize the majority of employees at an establishment have historically more or less represented *all* the employees of the establishment. Under the Japanese labor law, a union-shop agreement is valid as long as it is concluded between the employer and the majority union of an establishment and it does not stipulate expulsion of members of other unions.¹⁰ A majority union, having concluded a union-shop agreement, will represent all of the employees as long as there are no other unions in the workplace. Also, if there is a majority union in the workplace, modification of work rules,¹¹ through which an employer is able to change working conditions of *all* the employees in the workplace, is usually made through collective bargaining with the majority union. Finally, some Supreme Court cases presume the reasonableness of modification of work rules (in other words, the binding effect of modified terms and conditions of employment) if the modification is made with the approval of a majority union,¹² thus implicitly recognizing the majority union as a desirable body to represent all the employees in the workplace.

3. Decrease or Lack of Union Presence in an Enterprise

Although, as mentioned above, enterprise unions represent employees at the enterprise level and in some respects function as a body to represent all the employees at that level, their presence continues to decline. The unionization rate was a little more than 30% until 1975, but has continued falling annually since then (with the exception of 2009). The unionization rate declined until the mid-90s because the increase in the number of entire employees outgrew the increase in the number of union members. Since the mid-90s, the decrease of union members¹³ combined with the rapid increase of non-regular

of its members, has its own right to bargain collectively with the firm). According to the Japan Institute for Labor Policy and Training ed., *Rodo Jyoken no Settei Henko to Jinji Shogou ni Kansuru Jittai Chosa (A Research on the Reality of Setting and Changing Working Conditions and Human Resource Management)* 123 (2005), there exists more than one labor union in 4.8% of establishments.

¹⁰ *Mitsui Soko Ko'un v. Miura*, 43 Minshu 2051 (S. Ct., Dec 14, 1989) (the Supreme Court held that a part of a union-shop agreement which stipulated the employer's obligation to discharge an employee who is a member of another labor union and not a member of the one which is the party to the agreement was null and void because such a provision would be an infringement on the right to organize of members of other labor unions). 60.9% of labor unions concluded union-shop agreements with their employer in 2008. Ministry of Health, Labor and Welfare, *Survey on Labor-Management Communications FY 2008*, statistical chart no. 3 (available at: <http://www.e-stat.go.jp/SG1/estat/List.do?bid=000001023484&cycode=0> (last accessed Apr. 6, 2012)).

¹¹ "Work rules" (called as *Syugyo Kisoku* in Japanese) are a set of rules stipulated by employer, and although an employer can install them unilaterally (as discussed below III 1 (2) (ii), an employer is obliged by the Labor Standards Act only "ask the opinion" of majority representative at the establishment when he/she stipulates work rules), the Supreme Court has confirmed that work rules would be the contents of employment contract if its contents were "reasonable." *Yoshikawa v. Shuhoku Basu*, 22 Minshu 3459 (S. Ct., Grand Bench, Dec. 25, 1968); *Satoh v. Daishi Ginko*, 51 Minshu 705 (S. Ct., Feb. 28, 1997). Article 10 of the Labor Contract Act of 2007 incorporated the case law and stipulates that contents of employment conditions shall be in accord with those of work rules, as far as the modification of work rules are "reasonable" and if the modified work rules are made public to employees in the establishment. As for the case law on work rules, see generally Araki, *supra* note 1, at 51-55.

¹² *Dai Ichi Kogata Haiya v. Oikawa*, 630 Rodo Hanrei 6 (S. Ct., Jul. 13, 1992); *Satoh v. Daishi Ginko*, *supra* note 11. *But see, Murose v. Michinoku Ginko*, 54 Minshu 2075 (S. Ct., Sep. 7, 2000) (the Supreme Court denied the reasonableness of modified work rules with the approval of majority union, putting emphasis on the severity of the disadvantage brought to employees).

¹³ The Japan Institute for Labor Policy and Training ed., *Rodo Jyoken Kettei Sisutemu no Genjyo to Hokosei (The Present and Future of the System of Determining Terms and Conditions of Employment)* 38 (2007).

employees (such as part-time workers and temporary workers) to whom enterprise unions in the majority of cases have been denying membership and who therefore are far less organized by unions,¹⁴ has resulted in a decrease in union density.

Additionally, employees of smaller companies are less represented by labor unions. In 2010, the unionization rate (the ratio of union members to those employed) was 46.2% among private enterprises with 1,000 workers or more, whereas the rate was lower among those with 100 to 999 workers (14.2%) and far lower among those with 99 workers or less (1.1%).¹⁵ There exists a labor union in 73.6% of companies employing 1000 or more workers, whereas the rate decreases as the size of the firm gets smaller: 46.2% in companies employing 300 to 999 workers, 33% in companies employing 100 to 299 workers, 16.3% in companies employing 50 to 99 workers, and only 4.4% in companies employing 10 to 49 workers in 2004.¹⁶ These number shows that employees in medium- and small-sized companies are often not represented by labor unions.¹⁷

III. Majority Representation and Labor-management Committee

Apart from representation through labor unions, Japanese labor and employment law provides —albeit in a sporadic and immature way—alternative systems of employee representation at an enterprise, namely, the majority representation system and the labor-management committee system. These are the systems of employee representation on an establishment basis, enabling employees to voice their views on certain matters concerning their working conditions and especially allowing employers to derogate from statutory regulations. There is no system of employee representation on corporate boards.

1. Majority Representation

The majority representation system is the system in which a labor union organized by a majority of the employees at an establishment or a person representing a majority of the employees at an establishment where a majority union is not organized will be designated as the representative of all the employees in the establishment with regard to the regulations of certain working conditions under statutes such as the Labor Standards Act (hereinafter the LSA).

(1) Historical Development

The majority representation system originates from articles 36 and 90 of the LSA, enacted in 1947. Article 36 of the LSA allows an employer to derogate from the working

¹⁴ The unionization rate of part-time workers is 5.6% in 2010. Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra* note 3. As for temporary workers, estimated unionization rate in 2005 is 8.3%. The Japan Institute for Labor Policy and Training, *supra* note 13, at 43. The ratio of “non-regular worker” to entire employees has risen relatively sharply since mid-90s, and is 34.4% in 2010. *Labor Force Survey*, historical data no. 9, available at: <http://www.stat.go.jp/english/data/roudou/Ingindex.htm> (last accessed Apr. 6, 2012).

¹⁵ Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra* note 3.

¹⁶ The Japan Institute for Labor Policy and Training, *supra* note 13, at 44-45.

¹⁷ Note that the fact that employees are not represented by a labor union does not necessarily mean that they have no mechanism to voice their views. In about a quarter of establishments where there is no union, joint-consultation between an employer and employees is conducted. About 60% of such establishments have an association of employees such as an amity association, and about 20% of them perform a function to voice views of employees. This is possible because, unlike in the U.S., it is not necessarily an unfair labor practice for an employer to initiate a non-union mechanism of employee representation. Note further, however, the employees’ voice through these mechanisms is largely confined to matters concerning working hours and benefits. See Japan Labor Institute ed., *Mukumiai Kigyo no Roshi Kankei (The Labor-Management Relations in Enterprises without Union)* 5-6, 105-128 (1996).

hour regulation and rest-day regulation by ordering overtime work under the condition of concluding a labor-management agreement with a majority representative (i.e., a labor union organized by a majority of the employees at an establishment or a person representing a majority of the employees at an establishment where a majority union is not organized) and thereafter submitting the agreement to the local labor inspection office. Mr. Kosaku Teramoto, the government official who played an important role in enacting the LSA in 1947, explains the purpose of requiring the consent of the majority representative for derogation from the working hour and rest-day regulations as effectuating these regulations by allowing deviation only with the collective consent of employees, which is more enlightened than the consent of individual employees.¹⁸

Article 90 of the LSA requires an employer seeking to establish or amend work rules¹⁹ to ask an opinion²⁰ of the majority representative. Mr. Teramoto expected that the involvement of the majority representative in establishing work rules “allows for employees to be assured the opportunity to participate collectively in the determination of working conditions and leads to the conclusion of the collective bargaining agreement.”²¹ It should be noted that with regard to the regulation of article 90 of the LSA, Mr. Teramoto seems to mainly assume a majority union, not a person representing the majority of employees at an establishment, as the majority representative (in other words, representation through labor unions).²²

After its enactment, provisions were gradually added to the LSA that involved the majority representative in conclusion of labor-management agreements that are required for an employer to derogate from the regulation in the Act similar to the stipulations of article 36.²³ Other labor and employment statutes also came to involve the majority representation system.²⁴ At present, there are about 50-60 provisions stipulating the involvement of a majority representative in various labor and employment statutes.^{25 26}

(2) The Functions of Majority Representative

The functions of the majority representative are stipulated in provisions in the LSA and other labor and employment statutes. They can be grouped into four categories: (i) to be a party to a labor-management agreement, (ii) to deliver an opinion when an employer establishes or amends work rules, (iii) to appoint or nominate members of workplace committees such as a labor-management committee, and (iv) to be consulted with regard to

¹⁸ Kosaku Teramoto, *Rodo Kijyun Ho Kaisetsu (Commentary on the Labor Standards Act)* 237 (originally published in 1948).

¹⁹ Article 89 of the LSA requires an employer employing 10 or more employees in an establishment to install work rules for the establishment.

²⁰ See below (2) (ii), for the meaning of “ask an opinion.”

²¹ Teramoto, *supra* note 18, at 354.

²² At the time when the LSA was enacted, nearly half (45.3%) of those employed were organized by labor unions and it seems that assuming labor unions (most of which were enterprise unions) as the representative at the enterprise level was quite realistic at that time.

²³ The number of provisions stipulating the involvement of the majority representative for a derogatory purpose especially increased in 1987, when the LSA was amended to introduce various measures for flexible working time arrangements such as hours-averaging schemes, flextime, and discretionary work schemes for professional work. See generally Araki, *supra* note 1, at 89-96 for the explanation of these arrangements.

²⁴ See *infra* note 33, for examples of provisions involving the majority representative.

²⁵ See Noriaki Kojima, *Jyugyoin Daihyo Sei (the System of Employee Representation)* in *Rieki Daihyo Sisutemu to Danketsuken (the System of Representing the Interests of Employees and the Right to Organize)* 50 (Nihon Rodo Ho Gakkai ed., 2000), 56-60 (reporting 60 provisions stipulating involvement of majority representative effective in 2000).

²⁶ In addition to these functions in labor and employment law, statutes concerning reorganization procedure of companies stipulate that majority representative shall be notified or deliver an opinion with regard to the reorganization.

a split of a company. Of these functions, (i) is the most important role that majority representatives play. Nearly half of the provisions referring to a majority representative fall into this category. In contrast, functions (ii) and (iii) are relatively less significant, and function (iv) is quite exceptional.

(i) Concluding a Labor-management Agreement

As mentioned above, the most important role of a majority representative is to be a party to a labor-management agreement. These labor-management agreements are concluded in most cases as a pre-condition²⁷ for allowing an employer to derogate from statutorily stipulated standards with regard to all the employees²⁸ in an establishment.

The most typical labor-management agreement occurs under article 36 of the LSA (often called an *article 36 agreement*). If an employer and a majority representative in an establishment conclude a labor-management agreement in writing stipulating the specific reasons for requiring employees to work overtime or on rest-days, the type of jobs and number of employees with regard to which overtime work or rest-day work are required, the number of hours the employer may order overtime work in a day and a fixed period exceeding a day (week, month, etc.), and the days off on which the employees may be required to work in accordance with the article 36 of the LSA and the article 16 of the Ordinance for Enforcement of the LSA, the employer *may* require all the employees within the establishment to work overtime or on rest-days. In other words, the employer will be exempt from the penalty²⁹ for requiring employees to work beyond the daily and weekly maximum hours allowed under the LSA or to work on the rest-day irrespective of the regulation in the LSA that requires employers to provide at least one rest-day per week, and the employer's order for overtime or rest-day work will not be nullified by these regulations.

Conclusion of a labor-management agreement does not, in general, directly affect rights and duties of employees.³⁰ For example, an article 36 agreement itself does not establish employees' contractual duty to work overtime or on rest-day.³¹ An employer must provide a proper contractual basis through a collective bargaining agreement, work rules, or individual employment contract. Note, however, that the Supreme Court³² held with regard to the duty to work overtime that a provision in work rules stipulating that an employer may order overtime work based on business necessities in accordance with a labor-management agreement is sufficient as a contractual basis even when the labor-management agreement provided reasons for overtime work in general terms. Concluding an article 36 agreement, therefore, has a significant *de facto* influence on the working hours of employees.

²⁷ This means that a majority representative has a veto on employer's derogation from labor and employment statutes. However, it seems less common that the veto power is exercised, especially with regard to derogation from the regulation on overtime and rest-day work.

²⁸ Therefore, for example, when a majority union concludes a labor-management agreement, the agreement is effective even in terms with an employee who is not the member of the majority union.

²⁹ Article 119 of the LSA stipulates that any person who violated the regulation on maximum working hours or rest-days shall be punished by imprisonment with work of not more than 6 months or by a fine of not more than 300,000 yen.

³⁰ One exception is that a labor management agreement on scheduled paid leave concluded in accordance with article 39, paragraph 6 of the LSA. The period of annual paid leave designated in or determined in accordance with the agreement is binding on both the employer and the employees, and an employee cannot designate another period for his/her paid leave. *Masuda v. Mitsubishi Heavy Industries Ltd.*, 45 Rominshu 123 (Fukuoka High Ct., Mar. 24, 1994).

³¹ Araki, *supra* note 1, at 87.

³² *Tanaka v. Hitachi, Ltd.*, 45 Minshu 1270 (S. Ct., Nov. 28, 1991).

The labor-management agreements that an employer is required to conclude with a majority representative for derogation from the regulations of the LSA other than an article 36 agreement include: an agreement authorizing an employer to take charge of employees' savings entrusted to him/her (article 18); an agreement allowing an employer to deduct a part of wage (article 24); an agreement which enables an employer to introduce a flexible working hour scheme, such as an hours-averaging scheme or flextime (articles 32-2, 32-4, 32-5 and 32-3); an agreement allowing an employer to derogate from certain rest-period regulation (article 34); an agreement permitting an employer to give paid leave in lieu of payment of overtime premium (article 37); an agreement granting an employer to presume working hours for work performed outside of the establishment (article 38-2); an agreement allowing an employer to introduce the discretionary work scheme for professional work (article 38-3); an agreement authorizing an employer to allow paid leave of less than a day on request from an employee (article 39, section 4); an agreement on scheduled paid leave, authorizing an employer to give paid leave as designated in the agreement (article 39, section 6); and an agreement enabling an employer to derogate from certain regulation for the method of payment for the leave taken (article 39, section 7). Many of these agreements relate to implementing flexible ways of working with regard to working hour regulation.³³

(ii) Delivering an Opinion

As described in (1), article 90 of the LSA requires an employer when establishing or amending work rules to “ask an opinion” of the majority representative in order to assure employees to voice their opinion.³⁴ It only requires an employer to “ask an opinion” of the majority representative. Neither consultation with nor obtaining the agreement of majority representative is needed. Even obtaining absolutely opposing opinion from a majority representative is enough with regard to fulfilling the duty under the article.³⁵ Except in the case that a majority union acts as the majority representative, where the procedure can also function as collective bargaining, the power of a majority representative to have his/her opinion heard has limited significance.

(iii) Appointing or Nominating Members of Workplace Committees

The third function a majority representative performs is to appoint or nominate members of several workplace committees such as a labor-management committee (see 2. below), an occupational safety and health committee, and a committee for improving working hour arrangement.

An occupational safety and health committee is a body consisting of representatives of both the employer and the employees required in principle wherever an employer has 50 or more employees in an establishment. Its role is to research measures needed to prevent work-related accidents and to advance an opinion on this matter to the employer. Half of

³³ Other important labor-management agreements for derogation under the labor and employment statute include, among others: an agreement stipulating the scope of employees with regard to which an employer may deny parental leave or family care leave (article 6 and 12 of the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave); an agreement setting a standard for re-employment after reaching to the mandatory retirement age (article 9 of the Act on the Stabilization of Employment of Elderly Workers).

³⁴ Similar provisions can be found in the Occupational Safety and Health Act with regard to plans for the improvement of occupational safety and health (article 78, paragraph 2).

³⁵ Note, however, that the attitudes of employees including that of majority representative are one of the factors the courts consider when they examine the reasonableness of the work rules (see the article 10 of the Labor Contract Act). There is a possibility that an absolutely opposing stance of the majority representative may affect the binding effect of work rules.

the members of this committee (excluding the chairperson) must be nominated by the majority representative.³⁶ Although these committees exist in nearly three-quarters of the establishments required to have them, the Japan Institute for Labor Policy and Training points out that they are rather inactive.³⁷

A committee for improving working hour arrangement is a body appointed at the option of the employer (but not required by regulation) that consists of the representatives of both the employer and the employees. It purports to research measures to improve working hour arrangement (such as measures to reduce working hours) and to advance an opinion to the employer. Its resolution can be a substitute for a labor-management agreement concerning working hour regulation if the half of the members of the committee are appointed based on the nomination of a majority representative.³⁸

Although these committees, especially labor-management committees, may be Japanese-style works councils, their impact is so far limited due to the fact that either that they are inactive or that the number of committees remains relatively small. The significance of the power of a majority representative to appoint or nominate the committee members is therefore also limited.

(iv) Consultation with regard to a Split of a Company

A majority representative is to be consulted only in an exceptional situation. Article 7 of the Act on the Succession to Labor Contracts upon Company Split, which purports to protect employees in case of company split, provides that “in conducting a split, the split company shall endeavor, . . . to obtain the understanding and cooperation of the employees.” Article 4 of the Enforcement Ordinance for the Act stipulates that the split company shall endeavor to obtain the understanding and cooperation of the employees through “consultation or other equivalent way with a majority representative.”

(3) Election and Operation of Majority Representative

The LSA provides only a few regulations with regard to the organization and operation of a majority representative. Although the representative’s function is largely confined to enabling an employer to derogate from or to perform the duties under the statutory regulations, improvement is apparently needed in order to better reflect employees’ views.

(i) Election of a Majority Representative

A majority representative stipulated in the LSA must be elected at each establishment (i.e., a unit of work performed in an interrelated manner at a certain place, such as a plant, a store, or an office).³⁹ An enterprise as a whole is not, in general, regarded as an establishment unless its size is quite small and has no branches.

The provisions stipulating involvement of a majority representative require election on an *ad hoc* basis. In other words, an employer must request employees to elect a majority representative every time he/she needs to conclude a labor-management agreement or to ask an opinion. Especially in the case where there is no majority union, this means that the

³⁶ See articles 17, 18 and 19 of the Occupational Safety and Health Act.

³⁷ See the Japan Institute for Labor Policy and Training, *supra* note 13, at 153-154.

³⁸ See articles 6 and 7 of the Act on Special Measures concerning the Improvement of Working Hour Arrangement.

³⁹ Tokyo Daigaku Rodo Ho Kenkyu Kai ed., *Chusyaku Rodo Kijyun Ho (Jyo) (Commentary on the Labor Standards Act (vol. 1))* 160-161 (2003).

majority representation system does not assume permanently-installed employee representation, such as that provided by standing committees.⁴⁰

If there is a union organized by a majority of the employees at an establishment, the union automatically becomes the majority representative.⁴¹ Where there is no such a union, an individual must be elected to serve as majority representative. Where there is a majority union, regulations do not permit designation of an individual to serve as majority representative. Although the scope of “employees at an establishment” is not stipulated in the LSA, it is considered in practice to mean *all* the employees at the establishment, irrespective of whether an employee will be affected by the activities of a majority representative.⁴²

The LSA does not provide any procedure, such as an election, to assure the majority status of a union. A labor union is only required to organize a majority of the employees at an establishment at the time when there is a need to elect a majority representative (e.g., for conclusion of a labor-management agreement). Even if the majority union, after the conclusion of a labor-management agreement, lost this majority status, it does not affect the validity of the agreement.⁴³ This derives from the *ad hoc* nature of the system.

With regard to “a person representing a majority of the employees at the establishment,” article 6-2 of the Ordinance for Enforcement of the LSA (introduced in 1998) stipulates eligibility of the representative and election procedure. The provision provide that “employees in positions of supervision or management” as stipulated in article 41, item 2 of the LSA cannot be elected majority representative, except where there are no employees other than those in positions of supervision or management in the workplace. This provision prevents the selection of a person representing the interest of employer and ensures the election of a representative who can represent the interest of employees.⁴⁴ The provision also stipulates that a majority representative must be selected according to election procedures “such as vote or a show of hands.” Administrative circulars⁴⁵ with regard to article 6-2 of the Ordinance for Enforcement of the LSA additionally allow a majority representative to be selected based on discussion among employees and other democratic procedures, while requiring that the majority representative must not be elected based on the employer’s wish. The Supreme Court denied the eligibility as the majority representative in a case where the president of the amity association of employees was automatically designated as a majority representative.⁴⁶

Although the election of an individual serving as majority representative is thus regulated, in reality election of a majority representative is not always conducted properly.

⁴⁰ Even if, in case that there is no majority union, a person is elected for a certain term to represent the majority of employees in an establishment (according to the Japan Institute for Labor Policy and Training, *supra note* 9, at 29, 30.2% of the employer answers that the majority representative was elected for a certain term), the majority status of the person must be examined every time the person acts as the majority representative under the LSA. Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra note* 39, at 45.

⁴¹ The Japan Institute for Labor Policy and Training, *supra note* 13, at 45 and 141 points out that the ratio of establishments where there is a majority union is not so high, explaining that the number of enterprises where there is a union itself is on decline and that majority union exist in only about 60% of companies where there is a union.

⁴² See Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra note* 39, at 40.

⁴³ *Id.*, at 42.

⁴⁴ *Id.*, at 43.

⁴⁵ Jan. 29, 1999, Kihatsu No. 45 and Mar. 31, 1999, Kihatsu No. 169. Administrative circular is an internal message of an administrative agency that is issued by upper bodies as an instruction to lower bodies. Though courts are not bound by an administrative circular since it is merely internal message within an administrative agency, in practice it is fairly often respected by courts.

⁴⁶ *Tokoro Co. v. Idehara*, 808 Rodo Hanrei 11 (S. Ct., Jun. 22, 2001).

According to research conducted by the Japan Institute for Labor Policy and Training in 2004, about 30% of employers responding to the questionnaire admitted that the president of the amity association of employees was automatically designated as a majority representative or that the employer appointed the majority representative.⁴⁷ Even with regard to an election, a vote of confidence, or discussion among employees, it is pointed out that candidates are decided in a manner that is not necessarily proper.⁴⁸

(ii) Operations of the Majority Representative

As for the operations of the majority representative, there exist no regulations beyond a protection from disadvantageous treatment. Article 6-2, paragraph 3 of the Ordinance for Enforcement of the LSA prohibits the employer from treating an employee disadvantageously by reason of being the majority representative or performing a proper act as a majority representative.⁴⁹ The LSA does not provide provisions concerning the decision-making procedure of the majority representative, including the manner in which the representative collects the views of the fellow employees whom he/she will represent. Nor does the LSA stipulate the cost of the activities of majority representative. The lack of regulations are due to the fact that the majority representative (especially where the representative is an individual rather than the majority union) is elected on an *ad hoc* basis, as mentioned in (i).

2. Labor-management Committee System

(1) Functions of the Labor-management Committee

A labor-management committee is “a committee ... comprising an employer and representatives of employees at an establishment ... instituted with the aim of examining and deliberating on wages, working hours and other matters concerning working conditions at the establishment and of stating its opinions regarding the said matters to the employer” (article 38-4, paragraph 1). The resolution by a four-fifth majority of the members of this committee on matters stipulated in article 38-4, paragraph 1 is one of the prerequisites for an employer to introduce the discretionary work scheme⁵⁰ for workers engaging in the work of planning, drafting, researching and analyzing matters regarding business operations. The labor-management committee system was introduced when the discretionary work scheme for aforesaid workers was instituted in the LSA in 1998. The purpose of introducing the system is to let labor and management in the workplace decide the proper scope of employees covered by the work scheme and the conditions under the work scheme, while empowering employees so that they can communicate their views on the scheme more effectively.⁵¹

In addition to introducing a discretionary work scheme, the committee can also act as a substitute for a labor-management agreement concerning working hour regulations.⁵² In

⁴⁷ The Japan Institute for Labor Policy and Training, *supra note* 9, at 23 (2005).

⁴⁸ *Id.*, at 25-26 reports that in the case of a vote of confidence, 26.5% of employers answered that he/she nominated the candidate, while another 51.3% said that the president of the amity association of employees or certain employees were automatically designated as the candidate.

⁴⁹ “A proper act as a majority representative” includes, among others, having vetoed to the conclusion of a labor-management agreement. Jan. 29, 1999, Kihatsu No. 45.

⁵⁰ See generally Araki, *supra note* 1, at 94-98, for an explanation of the discretionary work scheme.

⁵¹ See Araki, *supra*, at 97 and Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra note* 39, at 35-36.

⁵² Labor-management agreements that can be substituted for include those stipulated in the articles 32-2, 32-3, 32-4, 32-5, 34, 36, 37, 38-2, 38-3, 39 of the LSA (see accompanying texts for footnote 33, for the contents of these provisions).

other words, the committee is able to perform the function of allowing an employer to derogate from working hour regulations stipulated in the LSA. The committee is further empowered to “examin[e] and deliberat[e] on wages, working hours and other matters concerning working conditions at the establishment and... [to] stat[e] its opinions regarding the said matters to the employer” (article 38-4, paragraph 1), although the LSA is silent on the effect of the opinions expressed by the committee. Although it is presumed that the rate of establishment of these committees in workplaces remain low,⁵³ there is a possibility that its activities lead to consultation on working conditions between the employer and employees. As discussed later, some scholars expect the committee to be developed into a Japanese version of works councils.

(2) Election of Members and Operation of the Committee

Unlike a person representing the majority of employees in the establishment, the committee is clearly expected to be a standing body to represent employees in an establishment.⁵⁴ Half of the members of the committee shall be appointed by a labor union organized by a majority of the employees at the establishment or a person representing a majority of the employees at the establishment where a majority union is not organized.⁵⁵ “Employees in positions of supervision or management” as stipulated in article 41, item 2 of the LSA cannot be members representing employees (article 24-2-4, paragraph 1 of the Ordinance for Enforcement of the LSA). As for the election of “a person representing a majority of the employees at the establishment,” the same regulations mentioned in 1(3) (i) will be applied.

As for the operation of the committee, article 24-2-4, paragraph 6 of the Ordinance for Enforcement of the LSA prohibits the employer from treating his/her employees disadvantageously by reason of being or trying to be a member of the committee or performing a proper act as a member, and article 38-4, paragraph 2 of the LSA obliges the committee to keep the minutes and make them public to the employees of the establishment. Otherwise, the law does not regulate the operations of the committee. Except where certain resolutions must be made by a four-fifth majority, there is no regulation of the decision-making procedure, including whether or how the committee should collect the views of the employees whom it represents. Nor is there a provision stipulating the cost of the activities of the committee.

3. Relationship of Labor Unions and Majority Representation System and Labor-management Committee System

There is a distinction between the role that labor unions play and the ones that a majority representative and a labor management committee perform with regard to working conditions. The functions of a majority representative and a labor-management committee are basically confined to allowing an employer to derogate from the statutory regulations or enabling an employer to perform his/her duty. The rights and duties of

⁵³ According to the General Survey on Working Conditions in FY 2011 (available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/jikan/syurou/11/index.html> (last accessed Apr. 6, 2012)), only 0.7% of enterprises introduced the discretionary work scheme for workers engaging in the work of planning, drafting, researching and analyzing matters regarding business operations. Since the committee is deeply interrelated with the scheme, it is presumed that the number of the committees so far established remains small.

⁵⁴ The article 38-4, paragraph 2 of the LSA stipulates that members shall be appointed for a fixed term. There is, however, no regulation on the length of the term.

⁵⁵ The remaining half of the members who represent the employer will be appointed by the employer.

employees are determined through the collective bargaining agreement that unions conclude with an employer, through work rules an employer establish or through individual employment contract. In other words, the statutory representatives of employees are not expected to be a body that determines the rights and duties of employees.

As for the involvement of labor unions in the statutorily provided system of employee representation, both in the majority representation system and the labor-management committee system, a majority union is expected to be the primary representative (or designator of the representative) of employees. In other words, a labor union can play a role or take control of the majority representative or the committee as far as the union organizes the majority of employees of the establishment. Conversely, if a union remains in the minority, it cannot act as the representative of employees unless it (or a person whom it nominates) will be approved as an entity that represents the majority of employees in just the same way as “a person representing a majority of the employees at the establishment.”

IV. Concluding Remarks: Evaluation of the Present System and Discussions for Reform

In Japan, collective bargaining has been practiced throughout at the enterprise level, and enterprise unions (especially majority unions) have performed the function of representing employees at the enterprise. However, this primary channel of employee representation at the enterprise is faced with difficulty because union density has been declining since the mid-70s while the number of non-regular employees has increased significantly since mid-90s. These trends have resulted in the absence of union representation in many companies, especially in smaller ones.

Meanwhile, the LSA has developed both the majority representation system and the labor-management committee system through which all the employees at an establishment will be represented. However, the function and institutional capacity of this secondary channel of employee representation at the enterprise is limited, especially when there is no majority union. Involvement of the majority representative or the committee is for the most part limited to reflecting employees' opinion in terms of derogation from the mandates of statutes, i.e., exempting an employer from penal sanction so that it can implement lower working conditions than the standards provided by statutes without violating them. Though a labor-management committee can convey opinions about matters concerning working conditions at the establishment to the employer, the impact of such a function is unclear. In addition, selection of the representative or establishment of the committee is not mandatory, unless an employer wishes to be exempted from the statutory regulation. As for institutional aspects, the majority representative, especially “a person representing a majority of the employees” is expected to be elected only on an *ad hoc* basis and completely lacks a standing, institutional basis. A labor-management committee is much more institutionalized, but still lacks the institutional guarantee of collecting and coordinating the opinions of employees. In sum, both functional and institutional reforms are needed if majority representatives and labor-management committees are to truly represent the interests of employees in an enterprise.⁵⁶

⁵⁶ See, e.g., Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra* note 39, at 37-39.

Concerning the direction of the reform, two aspects need special consideration. First, the position of labor unions or the relationship between labor unions and the statutory system of employee representation must be examined. Some scholars, considering the Constitutional guarantee of the right to organize coupled with the fact that labor unions have been playing, at least to some extent, a role to represent employees at the enterprise level, insist upon strengthening the power of majority unions and placing the duty of fair representation on them.⁵⁷ Alternatively, these scholars recommend taking measures to eliminate obstacles to unionization⁵⁸ rather than strengthening the function and organization of a labor-management committee that might turn out to be a sham union. Others insist that functions of such committees be limited so that they would not hinder the activities of unions.⁵⁹ Second, the system utilized must be able to properly consider and coordinate the diversified interests of employees. Here, scholars insist that the committee members shall be elected proportionally so that even a non-regular, minority employee can make his/her voice heard.⁶⁰

Examining the position of unions in representing employees' interests and considering the way to properly reflect the diversified interests of employees present major challenges for the system of employee representation at enterprise level in Japan.

⁵⁷ See, e.g., Tetsunari Doko, *Roshi Kankei Ho no Syorai (The Future of Labor-management Relations Law)* 97 *Nihon Rodoho Gakkaishi* 187 (2001), 198-203.

⁵⁸ See, e.g., Shinya Ouchi, *Rodosya Daihyo Hosei ni Kansuru Kenkyu (Study on the Legal System of Employee Representation)* (2007).

⁵⁹ See, e.g., Katsutoshi Kezuka, *Nihon ni Okeru Rodosya Daihyosei no Genzai Kako Mirai (The Past, Present and Future of the System of Employee Representation in Japan)* 216 *Kikan Rodoho* 4 (2007).

⁶⁰ See, e.g., Yuichiro Mizumachi, *Arata na Rodoho no Gurando Dezain (The Grand Design of New Labor and Employment Law)* in *Rodoho Kaikaku (Reform of Labor and Employment Law)* (Yuichiro Mizumachi and Rengo Sogo Seikatsu Kaihatsu Kenkyusyo ed., 2010) 47, 47-56. The report of study group on the future of labor contract law, published in 2005, also suggests a modification that puts an emphasis on securing that the committee will fairly represent the diversified interests of employees.

Employee Representation at the Enterprise in Germany

Bernd Waas*

A. Introduction

The essential feature of the German employee representation system is the dualism of the representation of workers' interests by trade unions, on the one hand, and of works councils, on the other.¹

Under German law works councils are independent legal bodies with the specific task of representing workers in the respective unit (the establishment in the case of a works council, the enterprise in the case of a so-called joint works council or *Gesamtbetriebsrat*, or a group of companies in the case of a so-called (company) group works council or *Konzernbetriebsrat*). Trade unions, on the other hand, have a more comprehensive task, namely to represent workers' interests at the bargaining table.

This paper seeks to elucidate the employee representation system under German law and to thereby shed light on the role trade unions play within this system (B.). Subsequently, the relationship between works councils and trade unions (as well as their respective powers to bargain collectively) will be examined (C.). Finally, the system's functions (and dysfunctions) will be explored (D.).

B. Description of the employee representation system

In Germany the interests of workers are represented on two levels: At plant level (by works councils) within the system of what is referred to as the 'works constitution', and on the corporate level within corporate boards.

I. Employee representation at plant level

The so-called works constitution currently in force (on the legal basis of the so-called Works Constitution Act or *Betriebsverfassungsgesetz*) is the outcome of a rather long development and is worth a brief historical overview.

1. Historical development

By the early 1950s, so-called "factory committees" (*Fabrikausschuss*) had already been established in Germany. The Workers Protection Act (*Arbeiterschutzgesetz*) of 1891 provided for "workers committees" (*Arbeiterausschuss*) to be instituted voluntarily. The idea met with

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¹ It should be noted that executive staff in Germany is not represented by works councils but by a separate body called executive committee (*Sprecherausschuss*), whose legal basis is the Act on Executive Committees (*Sprecherausschussgesetz*) of 12/20/1988.

considerable resistance at that time due to concern that such bodies could lead to a split in the workers' movement, weakening trade unions in the process. In 1916, the establishment of workers committees became mandatory in undertakings with 50 or more employees. Later, such committees were granted certain participation rights, their legal basis being the Act on Works Councils (*Betriebsrätegesetz*) of 9 February 1920. During the Nazi regime and dictatorship (1933-1945) works councils were completely abolished. An Act that was issued in 1934 introduced the categories "leader of the establishment" (*Betriebsführer*) and "followers" (*Gefolgschaft*) instead, clearly indicating that employees' participation in decision-making was completely out of the question. After World War II, the Council of the Allied Forces established the possibility to re-introduce works councils. In 1952, the Works Constitution Act (*Betriebsverfassungsgesetz* 1952), the forerunner of current legislation, came into force. Twenty years later the Works Constitution Act 1972 (WCA) substantially modified the provisions of the Act. Initially, the government's intention (which was led by the Social Democrats at that time) was to make works councils extensions of trade unions. Ultimately, however, trade unions' influence on works councils remained limited. The most recent significant amendment of the WCA² occurred in 2001 without changing the structure of workers' co-determination.

2. Basic features of employee representation

Two basic features distinguish the German system of employee representation: Independence of works councils (which comes with a restricted role of trade unions within the works constitution) and a legal imperative for both employers and works councils to collaborate in a spirit of trust and to abstain from industrial conflict.

a) Independence of works councils and limited role of trade unions

Works councils form autonomous legal bodies which represent workers' interests independently. Workers' representatives at plant level are not necessarily members of a trade union. Nor are they simply nominated by a trade union. Instead, they are essentially elected by all employees who work in a given establishment, independent of whether they are members of a trade union or not.

This is not to say that trade unions (or employers' associations for that matter) would not play a role in employee representation. Instead, the legislator granted trade unions specific rights within the context of the works constitution: Section 2(1) WCA not only requires employers and works councils to cooperate "in a spirit of mutual trust", but also asserts that they have "to abide by collective agreements that are applicable to them and must co-operate with the trade unions and employers' associations represented in the establishment". Moreover, section 2(2) WCA explicitly establishes the right of trade union representatives to be granted access to the undertaking with the aim of permitting trade unions represented in the undertaking to exercise the powers and duties stipulated in the Act.³ One thing is perfectly

² Act Reforming the Works Constitution Act (*Betriebsverfassungs-Reformgesetz*) of 07/23/2001, Federal Gazette, Part I, p. 1852.

³ Another example is section 31 WCA according to which the delegates of a trade union represented on the works council may be invited to attend work council meetings in an advisory capacity. Apart from that, the Federal Labour Court has elaborated certain rights of trade union representatives to be granted access to works councils (in a broad sense) on the basis of freedom of association as enshrined in Article 9(3) of the German Constitution; see, for instance, Federal Labour Court of 01/20/2009 – 1 AZR 515/08 and of 06/22/2010 – 1 AZR 179/09.

clear, however: Trade unions are in no position to control works councils, even less to push them aside and take their place.⁴

Apart from the legal set up of dual worker representation (by works councils and trade unions), it should be noted that in practice a clear majority of works council members might also belong to one or the other trade union.⁵ It should furthermore be noted that many establishments have so-called union workplace representatives (*gewerkschaftliche Vertrauensleute*) who exclusively represent trade union members and who form a sort of transmission belt between the trade union and the workplace.⁶

b) Trustful cooperation and peace duty

The relationship between the employer, on the one hand, and the works council, on the other represent the core of the rules on employee representation. Two important features characterise this relationship: Trustful cooperation (*vertrauensvolle Zusammenarbeit*) and the prohibition of, in particular, any strike action by a works council.

The principle of trustful cooperation between the works council and management is enshrined in section 2(1) WCA according to which “the employer and the works council shall co-operate 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”. Though containing a general clause, section 2(1) WCA is considered legally binding for both the employer and the works council.⁷ It is the *Leitmotif* and the central principle of the works constitution.

According to section 74(2) sentence 1 WCA “industrial action between the employer and the works council shall be unlawful”.⁸ Section 74 WCA sets down an absolute peace duty in the sense that even if one of the parties does not obey the legal duties specified in the WCA, there is no way of having recourse to industrial action. What all this boils down to is that if differences of opinion exist between the works council and management, they need to be resolved by entering into negotiations. If negotiations fail, one of the parties may decide to either have recourse to conciliation⁹ or take the counterpart to court. In any event, differences of opinion must “unravel in a peaceful way”, to put it in the words of the Federal Labour Court.¹⁰ It should be noted, however, that the exclusive aim of the peace duty is to ensure that industrial action is not used as a means to shift influence from the employer to the works

⁴ See, for instance, *Krause*, Gewerkschaften und Betriebsräte zwischen Kooperation und Konfrontation, in: *Recht der Arbeit (RdA)* 2009, p. 129.

⁵ Around 70 per cent according to the Federal Confederation of Trade Unions (*Deutscher Gewerkschaftsbund*); see also *Goerke/Pannenberg*, Trade Union Membership and Works Councils in West Germany, Institute for the Study of Labor Discussion Paper No. 2635, 2007.

⁶ In some respects it is not entirely clear what rights these representatives enjoy. For instance, there are doubts in some quarters as to whether it is admissible to provide for specific dismissal protection on the basis of collective agreements, which is quite often the case in practice; see, for instance, *v. Hoyningen-Huene*, in: Richardi a.o. (ed.), *Münchener Handbuch des Arbeitsrechts*, 2009, vol. 2, No. 215 note 19.

⁷ The consequences are exemplified by a more recent ruling of the Federal Labour Court (of 05/18/2010 – 1 ABR 6/09) in which the court held that “trustful cooperation” translates into an obligation of the employer to abstain from all actions which may interfere with the co-determination rights of the works council.

⁸ See also section 74(2) sentence 2 WCA according to which “the employer and the works council shall refrain from activities that interfere with operations or endanger peace in the establishment”. Moreover, section 74(2) sentence 3 WCA states that the employer as well as the works council must “refrain from any activity within the establishment in promotion of a political party”. Recently it was ruled, however, that no injunctive relief is available in this regard. Apart from that it should be noted that section 74(2) sentence 3 WCA does not encompass expressions of opinions that are of a general political nature; see Federal Labour Court of 03/17/2010 – 7 ABR 95/08.

⁹ In cases where the award of the conciliation committee substitutes an agreement between the employer and the works council, the conciliation committee shall act at the request of either side (section 76(5) sentence 1 WCA).

¹⁰ Federal Labour Court of 12/17/1976 - 1 AZR 772/75.

council (or the other way round). Members of a works council are not prevented from participating in a strike that was called by their union with the aim of pressuring the employer to conclude a collective bargaining agreement as demanded by the union: Though section 74(2) sentence 1 WCA declares industrial action between the employer and the works council to be unlawful, it explicitly states that such is not the case with “industrial action between collective bargaining parties”. Moreover, section 74(3) WCA asserts that “the fact that an employee has assumed duties under this Act shall not restrict him in his trade union activities even in the case that such activities are carried out in the establishment”. During times of industrial strife between trade unions and employers’ associations (or individual employers), certain co-determination rights of the works council may, however, be temporarily suspended.¹¹

3. Unit of representation

Works councils represent the workers of a specific establishment (*Betrieb*). In establishments that have at least five employees who are employed on a regular basis, works councils are to be elected.¹² If several works councils exist in a given enterprise, a so-called joint works council (*Gesamtbetriebsrat*) has to be established.¹³ In a group of companies, a so-called (company) group works council (*Konzernbetriebsrat*) can be established at the parent company¹⁴ on the basis of a decision by the joint works councils that represent the majority of employees in the given group.¹⁵

The legislator acknowledged some time ago that more flexible structures of employee representation may be necessary in some cases. A wide range of options to establish structures that deviate from the statutory model have been introduced since 2001. For instance, enterprises or groups of companies may be established, which are organised based on different products or branches. In such cases the relevant players may find it useful to establish works councils that are organised along the same lines. The law has opened the door for the conclusion of corresponding agreements, with the power to conclude such agreements accorded primarily to the parties to collective agreements (individual employers, employers’ associations, trade unions)¹⁶. Only if no collective agreements exist may different structures of employee representation be established based on the conclusion of an agreement between the employer and the works council.¹⁷

4. Bodies of representation

Works councils may exist at different levels: Establishment, enterprise and group of companies. Works councils are not, however, the only form of employee representation. Another important body of employee representation is the co-called workers’ assembly (*Betriebsversammlung*) which comprises all workers¹⁸ and essentially has the right to be

¹¹ See Federal Labour Court of 12/13/2011 – 1 ABR 2/10 according to which the works council’s consent is not required if an employer wants to transfer employees (as strikebreakers) from an establishment that is not the subject of a strike to an establishment that is the subject of a strike.

¹² Section 1(1) WCA.

¹³ Section 47(1) WCA.

¹⁴ See Federal Labour Court of 02/09/2011 – 7 ABR 11/10.

¹⁵ Section 54 WCA.

¹⁶ Problems arise if there is more than one trade union representing workers at a given establishment; see Federal Labour Court of 07/29/2009 – 7 ABR 27/08 according to which these trade unions are not obliged to join forces.

¹⁷ Section 3(1) and (2) WCA.

¹⁸ See section 32(1) sentence 1 WCA. The assembly is headed by the chairman of the works council.

informed by the employer.¹⁹ Workers' assemblies may submit recommendations to the works council and take a stand on its decisions.²⁰ It should be noted, however, that the assembly of workers, albeit important, has no overriding authority over a works council.

Another body of representation that plays an even more significant role is the so-called economic committee (*Wirtschaftsausschuss*). The economic committee is a body that must be established in enterprises²¹ consisting of at least 100 employees. The economic committee has the right to be regularly informed and consulted by the employer on business matters and is obliged to report back to the works council (sections 106 et seq. WCA).

5. Election and formation of a works council

a) Election

Section 1 WCA states that “works councils shall be elected in all establishments that normally have five or more permanent employees with voting rights”. This does not imply that employees are obliged to elect a works council. Electing a works council is only an obligation in the sense that *not* holding an election results in the rights to participation becoming ineffective, because in nearly all cases the existence of a works council is required.

Works Councils are elected by the staff of an undertaking. All employees who belong to the establishment and are at least 18 years old enjoy the right to vote.²² Temporary agency workers, who were hired-out for work, are entitled to vote if they have been working in the establishment for more than three months.²³ To enjoy the right to be elected, a worker must have worked for the establishment for at least six months.²⁴

Elections are initiated by the works council if one already exists in the given undertaking.²⁵ In case no works council has been established yet, elections may be initiated upon initiative of either a joint works council or a (company) group works council.²⁶ But what if no such bodies exist either? In that case an election commission may be nominated during a meeting of employees. Such a meeting must take place if either a group consisting of three employees or a trade union with at least one member²⁷ from the establishment has issued such an invitation.²⁸ If a called meeting does not take place or if the participants of such a meeting fail to elect an election commission, such a commission will be appointed by the labour court upon application by three or more persons with voting rights or a trade union represented in the establishment.²⁹ In other words, the legal obstacles for initiating election procedures are

¹⁹ According to section 43(1) WCA the employer has to inform the assembly of workers about issues of interest every three months. Section 45 WCA further states that “workers' assemblies (...) may deal with matters of direct concern to the establishment or to the workers, including issues relating to bargaining policies, social policy, environmental and financial matters, issues concerning the promotion of equality between women and men and the reconciliation of family and employment as well as the integration of the foreign employees working in the establishment (...)”.

²⁰ Section 45 sentence 2 WCA.

²¹ Not establishments.

²² Section 7 sentence 1 WCA. Employees who are younger than 18 may elect a representative body of youths and apprentices (*Jugend- und Auszubildendenvertretung*), which is a body that represents the specific interests of younger persons.

²³ Section 7 sentence 2 WCA. On the other hand, according to section 14(2) sentence 1 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*) temps are not eligible for election in the establishment of the hirer-out; see also Federal Labour Court of 02/17/2010 – 7 ABR 51/08.

²⁴ Section 8 WCA.

²⁵ Section 16(1) WCA.

²⁶ Section 17(1) WCA. The joint works council is not allowed to campaign for the establishment of a works council, however; see Federal Labour Court of 11/16/2011 – 7 ABR 28/10.

²⁷ See Federal Labour Court of 11/10/2004 – 7 ABR 19/04.

²⁸ Section 17(3) WCA.

²⁹ Section 17(4) WCA.

minor, a fact which has met with criticism from some quarters on the grounds that a works council can be easily established against the will of what may be a clear majority of workers in an individual undertaking.³⁰

Works councils are elected directly by secret ballot. Elections must be held according to the principles of proportional representation if more than one list of candidates is submitted. Lists of candidates for works council elections may be submitted by employees with voting rights as well as by trade unions represented in the establishment. Each list of candidates which is submitted by employees shall be signed by at least one twentieth of the employees entitled to vote, but by no less than three employees with voting rights.³¹ In the year 2001, the legislator introduced a simplified electoral procedure for small establishments. This procedure aims to make the election process more straightforward by establishing tighter time limits, by eliminating certain organisational burdens and, finally, by establishing the principle of majority voting for these elections.³² The underlying purpose of these amendments was to reduce the “white spots” in the German landscape of co-determination.

Under section 119(1) No. 1 WCA, interfering with an election to the works council or influencing such elections by inflicting or threatening reprisals or promising or even granting incentives is a criminal offence punishable by a term of imprisonment not exceeding one year or a fine, or both.³³ Moreover, candidates enjoy far-reaching dismissal protection under section 15(3) sentence 1 of the Act on Dismissal Protection (*Kündigungsschutzgesetz*).³⁴

b) Formation

The size of a works council essentially depends on the number of employees to be represented. If the number of employees with voting rights who are employed in the establishment on a regular basis ranges from 5 to 20 employees, the works council consists of one member only. If that number ranges from 21 to 50, 51 to 100, 101 to 200, 201 to 400, 401 to 700, 701 to 1000, 1001 to 1500, 1501 to 2000, 2011 to 2500, 2501 to 3000, the works council consists of 3, 5, 7, 9, 11, 13, 15, 17, 19 or 21 members, respectively. In establishments that employ more than 9,000 employees the statutory minimum number of works council members must be increased by two members for every additional fraction of 3,000 employees.³⁵ As far as the composition of works councils is concerned, the law requires them to be composed “to the extent possible” of employees of the various units and of different employment categories of workers (for instance, craftsmen, clerical workers, etc.) employed in the establishment. In addition, the law states that the gender which represents the minority of staff shall at least be represented according to its relative numerical strength whenever the works council consists of three or more members.³⁶

The regular term of office of a works council is four years.³⁷ Regular elections to the works council are held every four years sometime between 1 March and 31 May.³⁸

³⁰ See *Löwisch*, Betriebsrat wider den Willen der Belegschaft, in: Betriebs-Berater 2006, p. 664 (“works council against the will of staff”). Employers have been urging the legislator to set a quorum of at least one third of eligible voters; see *BDA/BDI*, Mitbestimmung modernisieren – Bericht der Kommission Mitbestimmung, 2004, p. 47.

³¹ See section 14(4) WCA.

³² See section 14a WCA.

³³ See Federal Civil Court of 09/13/2010 – 1 StR 220/09 (financial support for candidates by employer).

³⁴ Which is interpreted extensively by the courts; see Federal Labour Court of 07/07/2011 – 2 AZR 377/10.

³⁵ Section 9 WCA.

³⁶ Section 15(1) and (2) WCA. The latter provision was changed from a (non-binding) request into a legal obligation in 2001.

³⁷ Section 21 WCA.

³⁸ Section 13(1) WCA.

6. Conduct of business of works councils

A works council has to elect a chairman and vice-chairman from among its members. The chairman of the works council represents the works council and the decisions adopted by it. In addition, the chairman can receive statements to be submitted to the works council.³⁹ If a works council consists of nine or more members, it shall set up a works committee (*Betriebsausschuss*) which is tasked to deal with the works council's day-to-day business. The works committee consists of the chairman of the works council, the vice-chairman, as well as additional committee members whose number depends on the size of the works council.⁴⁰ In establishments with more than 100 employees, the works council may have the right to establish additional committees and assign them specific tasks.⁴¹

Normally, the works council meets during working hours. When scheduling the meetings, the works council shall take account of the operational needs of the establishment. The employer shall be notified of the date of the meeting in advance. Meetings of the works council shall not be public.⁴² If one-fourth of the works council members so request, a delegate of a trade union that is represented on the works council may be invited to attend the meetings in an advisory capacity.⁴³

In principle, decisions of the works council require a majority of votes by the members present.⁴⁴ Minutes of all proceedings of the works council shall be taken, covering at least the text of all decisions taken and the majority by which these were adopted. The minutes shall be signed by the chairman and one additional member. They shall be accompanied by a list of the members present, in which each member shall personally enter his name.⁴⁵

Work council members carry out their duties in an honorary capacity. Section 37(1) WCA expressly states that "the post of member of the works council shall be unpaid". Works council members must be released from their work duties, however, without loss of pay as far as such is necessary for the proper performance of their functions, having regard to the size and nature of the establishment.⁴⁶ During his term of office and for one year thereafter, the remuneration of a member of a works council may not be set at a lower rate than the remuneration paid to workers in a comparable position and who have followed the career that is customary in the establishment.⁴⁷ The honorary nature of works council membership has been criticised by many observers. They argue that workers' representation comes with a lot of responsibilities which require adequate remuneration. It is further argued that increased pay may result in an increase of professionalism. Finally, it is argued that the remuneration of

³⁹ Section 26 WCA.

⁴⁰ Section 27 WCA.

⁴¹ Section 28 WCA.

⁴² Section 30 WCA.

⁴³ Section 31 WCA. The same applies to meetings of the economic committee, for section 31 is to be applied analogously in this regard. The works council may even include a general right of trade union representatives to attend meetings of the works council in its by-laws; see Federal Labour Court of 28.02.1990 – 7 ABR 22/89.

⁴⁴ In case of a tie, the motion shall be deemed defeated (section 33 WCA).

⁴⁵ Section 34(1) WCA.

⁴⁶ Section 37(2) WCA. The same holds true for attendance of training and educational courses in so far as the knowledge imparted is necessary for the activities of the works council. With regard to scheduling the time for attending such courses, the works council is obliged to take the operational requirements of the establishment into consideration. If the employer is of the opinion that the operational requirements of the establishment have not sufficiently been taken into account, he may submit the case to the conciliation committee (section 37(6) WCA). Whether or not training is "necessary" within the meaning of section 37(2) WCA is often controversial. In a recent ruling, the Federal Labour Court (of 01/12/2011 – 7 ABR 94/09) held that depending on the circumstances, even the teaching of oratory skills may be regarded as necessary.

⁴⁷ Section 37(4) WCA.

works council members should reflect the pay of their counterparts. Others, however, contend that amending the rules on pay would result in the works constitution being distorted.⁴⁸

As soon as an establishment reaches a certain size, a minimum number of works council members must be fully released from their work duties. The exact number of works council members to be released depends on the number of employees normally employed in the establishment. If 200 to 500 employees are employed in a given establishment, at least one member of the works council must be released from his work duties.⁴⁹ If 501 to 900, 901 to 1500, 1501 to 2000, 2001 to 3000, 3001 to 4000, etc. employees are employed in an establishment, the respective minimum number of works council members to be released is 2, 3, 4 and 6, etc.⁵⁰ In determining the relevant number of employees a head count is decisive, which means that no pro-rata principle applies to part-time employees.

7. Bearer of the cost

The cost of having a works council falls on the employer. According to 40(1) WCA, any expenses arising out of the activities of the works council must be paid by the employer. This may even entail the right of a works council member to request a (partial) reimbursement of expenses for home care of minor children, if such home care is necessary to solve a conflict between the duties as a works council member and the parental duty of taking care of one's children.⁵¹

In addition to bearing the costs, the employer is bound to provide the necessary premises, material facilities, means of information and communication⁵² as well as office staff required for the meetings, consultations and day-to-day operation of the works council.⁵³ Employees' contributions towards the works council are explicitly prohibited. The same applies to the collection of such contributions.⁵⁴

Empirical studies on the costs of employee representation differ significantly. According to some estimates workers' co-determination comes at a (direct) cost of EUR 650 per worker and year.⁵⁵ According to other studies, the (direct) costs are lower by far, but even so, may roughly amount to EUR 270 per worker and year in establishments which regularly employ between 100 and 200 workers.⁵⁶ Apart from the difficulties of measuring the costs, there is no agreement on whether or not the positive effects of co-determination outweigh the costs incurred.

8. Protection of activities of works council members

Works council members act in an honorary capacity. They receive no pay. Moreover, the law expressly prohibits either prejudice or favouritism of works council members by reason of their office. Employers may neither interfere with works council members nor obstruct

⁴⁸ See, for instance, *Fischer*, Das Ehrenamtsprinzip der Betriebsverfassung "post Hartzem" – antiquiert oder Systemerfordernis?, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 484.

⁴⁹ The threshold was lowered from 300 to 200 in 2001. At the same time it was provided that releases may also take the form of partial releases.

⁵⁰ Section 38(1) WCA.

⁵¹ See Federal Labor Court 06/23/2010 – 7 ABR 103/08 interpreting section 40(1) WCA in the light of Article 6 of the Basic Law ("marriage and the family shall enjoy the special protection of the state").

⁵² Including, for instance, providing internet access and setting up e-mail addresses for the individual council members; see Federal Labour Court of 07/17/2010 – 7 ABR 80/08.

⁵³ Section 40(2) WCA.

⁵⁴ Section 41 WCA.

⁵⁵ According to a study conducted by the Institut der deutschen Wirtschaft (IW), see: <http://www.iwkoeln.de>.

⁵⁶ *Bierbaum*, Nutzen und Kosten der Mitbestimmung, 2003.

them in carrying out their duties. No prejudice or favouritism may be expressed by reason of their office (section 78 WCA). Prejudice or favouritism of a member of the works council is a crime that is punishable by a term of imprisonment not exceeding one year, or a fine, or both.⁵⁷

Furthermore, works council members enjoy extensive dismissal protection. According to section 15(1) of the Act on Dismissal Protection (*Kündigungsschutzgesetz*), the dismissal of a works council member is in principle prohibited. Works council members can only be dismissed if the (stringent) requirements of an extraordinary dismissal (without notice)⁵⁸ are met in an individual case.⁵⁹ In addition, dismissal of a works council member requires the consent of the works council. If the works council does not give its consent, the employer can turn to the labour court for a decision substituting the missing consent.⁶⁰

9. Role and powers of the works council

Section 80 WCA defines the works council's general tasks. Generally speaking, it can be said that works councils must ensure that employers abide by the duties arising from labour law.⁶¹ The extensive rights that derive from specific provisions of the WCA, however, play a far more important role. In addition, works councils in principle enjoy the right to bargain collectively with the employer.

a) Rights of the works council

The rights of work councils range from rights to information and consultation to true co-determination rights in the sense that an agreement with the works council is necessary. In order to enable the works council to fulfil its duties, the employer is obliged to inform the works council in depth and in good time. The works council must, if it so requests, be granted access to any documentation at any time, which it may require to fulfil its duties.⁶²

aa) Information and consultation

Works councils enjoy far-reaching rights to be informed, to be heard and to be consulted.⁶³ Section 99(1) WCA represents an example of a specific right to information.⁶⁴ According to this provision the employer is obliged to notify the works council in advance of any recruitment⁶⁵ or transfer of an employee, must submit the appropriate documents to the works council and, among other things, inform it of the implications of the measure envisaged. The right of a works council to be heard arises from various provisions of the WCA. For instance, the works council must be heard before every dismissal, be it individual or collective.

⁵⁷ Section 119(1) No. 3 WCA; see, in this regard, Federal Civil Court of 09/17/2009 – 5 StR 521/08 (bribing of works council members of *Volkswagen*).

⁵⁸ As stipulated in section 626 of the Civil Code (*Bürgerliches Gesetzbuch*).

⁵⁹ If an extraordinary dismissal is linked to a certain behaviour that is related to the employee's position as a works council member, it can only be justified if the behaviour is (also) in breach of duties arising from the employment contract; see Federal Labour Law of 05/12/2010 – 2 AZR 587/08.

⁶⁰ Section 103 WCA.

⁶¹ According to section 80(1) No 1 WCA, the works council must “guard the effectiveness of Acts, ordinances, safety regulations, collective agreements and works agreements that are in force for the benefit of the employees”.

⁶² Section 80(2) WCA.

⁶³ Section 79 WCA subjects works council members to a duty to observe secrecy.

⁶⁴ The provision applies in companies which normally employ more than 20 employees.

⁶⁵ Recruitment in that sense encompasses the hiring-out of agency workers. Even so, the influential Metal Workers Union *IG Metall* is not satisfied with the legal situation. The trade union recently made it clear that it demands even more far-reaching co-determination rights for hirers-out on the part of the works councils and will make this demand one of the main issues of collective bargaining in the year 2012.

Any notice of dismissal that is given without consulting the works council is null and void.⁶⁶ Apart from that, the general right to be heard exists on issues listed in section 80(1) WCA. A general right to be consulted arises from section 74(1) WCA according to which the employer and the works council shall meet at least once a month and discuss the matters at hand “with an earnest desire to reach agreement”. In addition, specific rights to consultation have been elaborated. According to section 111 sentence 1 WCA, in establishments which normally employ more than 20 employees with voting rights,⁶⁷ employers are obliged to inform the works council in depth and in good time of any proposed change in business operations (for instance, the closing down of an establishment or parts of an establishment, a transfer of the entire establishment or important parts thereof, etc.) that may entail substantial prejudice to staff, and consult the works council on the proposed changes. According to section 106(1) WCA the employer is obliged to consult with the economic committee on economic matters.⁶⁸

bb) Power to raise objections

Furthermore, works councils may enjoy a so-called power to object to certain decisions taken by the employer. Section 102(3) WCA, in particular, specifies situations in which works councils have the right to object to an employer’s decision to dismiss an employee by giving notice. If, for instance, the employer did not sufficiently take into account the “social aspects” of his decision, the works council may object to the dismissal. Though such objection does not influence the lawfulness of the dismissal, it does have consequences, for the employer will be obliged to continue employing the employee at the latter’s request until a final decision is taken by the court, if the employee has brought a claim of unlawful dismissal under the Act on Dismissal Protection.

cc) Power to refuse consent

In some cases, the consent of the works council is required for fundamental decisions by the employer. Under section 99(2) WCA, for instance, a works council may (under certain circumstances) refuse to consent to the recruitment or transfer of an employee. In such cases the employer will not be able to implement his decision and must apply to the labour court for a decision substituting the lack of consent. Only if the employer is urgently required for reasons based on facts to recruit or transfer the employee before giving the works council the opportunity to take a position, is he permitted to make a decision on a temporary basis.⁶⁹

dd) Co-determination rights

The most far-reaching rights enjoyed by works councils are the so-called true co-determination rights (*echte Mitbestimmung*). Co-determination rights place the works council and the employer on an equal footing, with the works council enjoying discretionary power to consent to a decision taken by the employer. If no agreement between the parties can be reached, the matter is referred to and decided by a so-called conciliation committee

⁶⁶ Section 102(1) WCA.

⁶⁷ In determining whether the requirements of that threshold are met, temporary agency workers must be taken into account, if they have been working in the establishment for more than three months; see Federal Labour Court of 10/18/2011 – 1 AZR 335/10.

⁶⁸ As further substantiated by section 106(3) WCA. According to section 106(3) No. 9a WCA, which was introduced in 2008, the take-over of a company by another company constitutes an “economic matter” as well.

⁶⁹ Section 100 WCA.

(*Einigungsstelle*)⁷⁰ with the pronouncement of the committee substituting the lack of agreement between the employer and the works council.⁷¹

The cornerstone of what in Germany is referred to as “co-determination that can be enforced upon the employer” (*erzwingbare Mitbestimmung*) is section 87(1) WCA. The matters stipulated in this provision are, for instance, “rules of operation of the establishment and the conduct of employees in the establishment” (no. 1); “beginning and end of the daily working hours including breaks and the spreading of working hours over the days of the week” (no. 2); any temporary reduction or extension of the hours normally worked in the establishment (no. 3); “the time and place for and the form of payment of remuneration” (no. 4); “the establishment of general principles for holiday arrangements and the preparation of the holiday schedule as well as fixing the time at which the leave is to be taken by individual employees, if no agreement is reached between the employer and the employees concerned” (no. 5); “the introduction and use of technical devices designed to monitor the behaviour or performance of the employees” (no. 6), as well as many others. Works councils have a right of co-determination on all the issues outlined above. Moreover, the courts⁷² regularly grant them a corresponding so-called “right of initiative” (*Initiativrecht*), meaning that the works council does not need to wait for the employer to approach it, but may take the initiative even if the employer feels there is no need to regulate a given matter.

The rights of works councils are particularly strong in the area of “social” matters (see, in particular, section 87 WCA) and in the area of “personal” matters (such as recruitment, transfer or dismissal, sections 99 and 102 WCA). This is not to say, however, that works councils do not play a role when it comes to entrepreneurial issues. Though the rights of the works council are limited in this regard (not least because entrepreneurial freedom is guaranteed by the Constitution⁷³), works councils do enjoy certain rights in this context. In particular, if an employer plans staff cutbacks or other so-called business-related changes affecting staff he may be obliged to arrive at a so-called “reconciliation of interests” (*Interessenausgleich*) as well as to reach an agreement to (fully or partly) compensate employees for any financial harm sustained as a result of the proposed changes (social compensation plan or *Sozialplan*).⁷⁴

b) Works agreements

Works councils are powerful because they enjoy far-reaching rights (especially within the realm of “social” and “personal” issues) and because of their ability to conclude collective agreements with the employer, which take normative effect.

Works agreements (*Betriebsvereinbarung*) may be concluded between the works council and the employer on a voluntary basis.⁷⁵ What is more, they are the means of choice for exerting a co-determination right. A legal definition of works agreements can be found in section 77 WCA. According to section 77(2) sentence 1 WCA, works agreements shall be negotiated by the works council and the employer and recorded in writing. According to section 77(3) sentence 1 WCA, works agreements shall be mandatory and directly

⁷⁰ Whose costs are also borne by the employer (section 76a(1) WCA).

⁷¹ Section 87(2) WCA. It should be noted that a pronouncement of the conciliation committee does not preclude court proceedings (section 76(7) WCA).

⁷² See, for instance, Federal Labour Court of 11/29/1989 – 1 ABR 57/88.

⁷³ Article 12 of the Basic Law (Grundgesetz).

⁷⁴ See sections 112 and 112a WCA.

⁷⁵ Section 88 WCA, in particular, deals with such agreements.

applicable.⁷⁶ Consequently, works agreements have the same legal effects as statutory provisions and the same effects as collective bargaining agreements which, according to section 4(1) sentence 1 of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*), also take direct and mandatory effect.

10. Number of works councils

Empirical studies show that often no works councils have been established, even if the statutory requirements are met. This applies in particular to small and medium-sized establishments. According to a survey carried out in 2009, only about 45 per cent of workers in the private sector were represented by a works council. On the other hand, in about 90 per cent of large establishments (with more than 500 employees), works councils are likely to exist.⁷⁷

II. Employee representation at board level

In addition to employee representation at plant level, there is also a system of employee representation on corporate boards in Germany.

1. Works constitution and representation at board level: Similarities and differences

The purpose of both systems is to give workers a say in the employer's decision-making process, but the means used differ. As regards co-determination at plant level, the legislator has established distinct institutions referred to as the organs of workers' representation in Germany, in particular, the works council. As regards co-determination at the corporate level, the means employed are to reserve seats for employee representatives in corporate boards. While co-determination by works councils takes place at the level of the individual plant or establishment, the level of "entrepreneurial co-determination" (*unternehmerische Mitbestimmung*), as it is called in Germany, is the enterprise level, if not the level of a group of companies. This corresponds with the fact that the works council's entitlements seek to restrict the powers of the employer in relation to (organising and running) the establishment. In contrast, "entrepreneurial co-determination" aims to allow employees (or their representatives) to participate in decisions that are taken in corporate boards.

2. Levels of co-determination at board level

The extent of co-determination at board level depends on the provisions that apply in a given case.

The form of co-determination established in the so-called One-Third Participation Act 2004 (*Drittelbeteiligungsgesetz*)⁷⁸ is the least far-reaching. Under this Act workers' representatives enjoy the right to occupy one-third of the seats in a company's supervisory board (*Aufsichtsrat*). The most far-reaching form of co-determination, on the other hand, is established in the Coal, Iron and Steel Industry Co-determination Act 1951 (*Montan-*

⁷⁶ Any rights granted to employees under a works agreement cannot be waived except with the agreement of the works council. In addition, such rights cannot be forfeited (section 77(3) sentences 2 and 3 WCA).

⁷⁷ By the Institute for Employment Research, the research institute of the Federal Employment Agency.

⁷⁸ Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat of 05/18/2004.

Mitbestimmungsgesetz).⁷⁹ In these industries supervisory boards consist of shareholders and workers' representatives in equal numbers with additional "neutral board" members as well.

In between the two models lies the form of co-determination established in the Co-determination Act 1976 (*Mitbestimmungsgesetz*).⁸⁰ As is the case with co-determination in the coal, iron and steel industries the seats on supervisory boards are equally split between shareholders and workers' representatives. In contrast to the former models, however, there are no "neutral" board members. The Co-determination Act 1976 is applicable to, among others, stock corporations (*Aktiengesellschaft, AG*) and limited liability companies (*Gesellschaft mit beschränkter Haftung, GmbH*). There is, however, a requirement for such companies to employ more than 2000 employees on a regular basis.⁸¹ The supervisory board elects a chairman and a deputy from its ranks with a majority of two-thirds of the total members of which it is to consist.⁸² In the (not unlikely) case that this majority is not reached, a second ballot must be held. In this ballot, the board members of the shareholders shall elect the chairman of the board with a majority vote and the board members of the employees shall elect a deputy with the majority of votes.⁸³ In other words, if a second ballot is needed a simple majority of votes of the shareholders suffices to elect the chairman of the board.

Section 29 represents the key provision of the Co-determination Act. According to section 29(1) resolutions of the supervisory board require the majority of votes cast unless otherwise provided in the Act. Where the votes cast in the supervisory board result in a tie, a new ballot shall be cast on the same subject.⁸⁴ If this ballot again results in a tie, the chairman of the board shall have two votes.⁸⁵ With this provision the legislator sought to ensure that an impasse resulting from the parity between shareholders and employees can be resolved and that the operability of the supervisory board can be ensured. At the same time, the Act guarantees shareholders predominance, because shareholders are in the position to ensure that one of their own is elected as chairman of the board.⁸⁶

3. Legal doubts and criticism

Whether or not co-determination on the basis of an equal representation of employees and shareholders conforms to the Constitution was the subject of an intense debate as soon as the Co-determination Act entered into force. In a judgement issued by the Constitutional Court (*Bundesverfassungsgericht*) in 1979 the court held, however, that the Co-determination Act was constitutional and did not violate the constitutional guarantee of property as enshrined in Article 14 of the Basic Law (*Grundgesetz*).⁸⁷

Over the last couple of years the debate on co-determination on corporate boards has been intensifying, nevertheless, not least against the background of the fact that the "German model" is rather unique and may eventually be eroded by developments at the European

⁷⁹ Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie of 05/21/1951.

⁸⁰ Gesetz über die Mitbestimmung der Arbeitnehmer of 05/04/1976.

⁸¹ Art. 2(1) of Co-determination Act.

⁸² Section 27(1) Co-determination Act.

⁸³ Section 27(2) Co-determination Act.

⁸⁴ Section 29(2) sentence 1 Co-determination Act.

⁸⁵ Section 29(2) sentence 2 Co-determination Act

⁸⁶ For more details, see *Waas*, Co-determination on board-level in Germany, in: *European Company Law 2009*, p. 62.

⁸⁷ Federal Constitutional Court of 03/01/1979, Official Collection of Judgements of the Court, vol. 50, p. 90.

level.⁸⁸ One of the arguments that have been put forward by critics is that co-determination at plant level and at the board level is detrimental because it leads to an accumulation of co-determination rights and a shift in the balance of power too far into the direction of workers.⁸⁹ Due to the resistance of the trade unions it is difficult to imagine, however, that the legislator will amend the existing system in the foreseeable future. This holds true, in particular, with regard to a comprehensive legal package, demanded by some, that would put together the works constitution and co-determination at company level and address them as two “sub-systems” of workers’ co-determination.⁹⁰

C. Relationship between employee representation and collective bargaining

As described earlier, works councils, in principle, enjoy the right to conclude normative agreements with the employer. The same is also true for trade unions. In fact, the power to conclude collective agreements is considered part and parcel of the freedom of association (*Koalitionsfreiheit*) as enshrined in Article 9(3) of the German Constitution. Against this background, the question must be addressed what line is to be drawn between the respective powers of works councils and trade unions.

I. Unionisation and collective bargaining

Trade unions have a long history in Germany and continue to play an important role. The most important labour organisation is the German Confederation of Trade Unions (*Deutscher Gewerkschaftsbund*) which is an umbrella organisation of several individual trade unions for specific sectors of the economy. The member unions of DGB organise around 6.2 million workers or approximately 20 per cent of all employees in the country.⁹¹ The largest single trade union is the Metal Workers Union *IG Metall* which has about 2,245,000 members. Traditionally, trade unions are organised along the lines of specific sectors or branches. Over the last couple of years, however, trade unions representing specific professions (for instance, train drivers or doctors) instead of workers in a given area have been on the rise. There are several reasons for this, one of them being that the Federal Labour Court, which applied the so-called principle of unity of collective agreements (*Grundsatz der Tarifeinheit*) for a long time, has recently changed course and now allows different collective agreements to be applied in one single establishment.⁹²

The set-up of collective bargaining in Germany is far more stable than many observers would expect. In particular, rumours of the demise of collective agreements have proved to be greatly exaggerated. Apart from a steady decline of union membership rates, severe pressure is being exerted on the system, which has led to certain disruptions. For instance, a considerable number of employers have either left employers’ associations altogether over the last couple of years or changed to memberships that do not require commitments to collective bargaining (so-called *OT-Mitgliedschaft*). This has created problems for trade unions which

⁸⁸ In particular, the fact that the European Court of Justice tends to decide in favour of the freedom of establishment, finding that rules submitting foreign companies to the company law of the host state were inadmissible; see, in particular, ECJ of 09/30/2002 – Case C-167/01 (*Inspire Art*).

⁸⁹ See, for instance, *Wiese*, in: *Wiese e.o. (ed.)*, *Gemeinschaftskommentar Betriebsverfassungsgesetz*, Introduction note 45.

⁹⁰ For more details, see *Waas*, *Co-determination on board-level in Germany*, in: *European Company Law*, p. 62.

⁹¹ At the end of 2011, according to the latest figures available from the DGB.

⁹² See Federal Labour Court of 07/07/2010 – 4 AZR 549/08.

may not have the bargaining power to force these employers to sign collective agreements individually and as a result are moving out of their reach. Against this background we can observe that increasing use has been made in the more recent past of collective bargaining agreements being extended by the state. The most recent example of this practice was the establishment of statutory minimum pay (derived from a collective agreement) for temporary agency workers, which entered into force on 1 January 2012.⁹³

II. Demarcation of powers

It can easily be claimed that the relationship between works councils and employers, on the one hand, and the parties to collective agreements, on the other, represents one of the key problems of German labour law. Specifically, both works councils and trade unions have the power to arrive at agreements that take normative effect: Works councils enjoy the right to conclude collective agreements, so-called works agreements, with the employer. Similarly, the right to conclude collective agreements (so-called collective bargaining capacity, *Tariffähigkeit*⁹⁴) is enjoyed by trade unions and employers' associations as well as by individual employers.⁹⁵ Because works councils and trade unions are able to conclude collective agreements, the question arises which collective agreements should take precedence in case of a (possible) conflict.

This question is essentially addressed by section 77(3) sentence 1 WCA.⁹⁶ It states that “works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are usually fixed by collective agreement”. This means that even if a works agreement is more beneficial for an employer⁹⁷ than an applicable collective agreement, the latter agreement prevents the works agreement from becoming effective. Section 77(3) WCA makes it clear that there should be no rivalry between works councils and trade unions with reference to collective bargaining. In particular, the legislator sought to ensure that works councils do not become “substitutes” for trade unions. Against the background of works agreements possibly fixing more beneficial terms and conditions of employment than collective agreements, workers could lose interest in joining trade unions and endanger the entire bargaining structure by abstaining.⁹⁸

⁹³ Even so there are demands to lend state support to collective bargaining. For instance, the parliamentary group of the Social Democrats recently asked the Federal Government to introduce legislation with the aim of making it easier in the future to declare collective agreements generally binding. At present such declaration requires at least 50 per cent of all workers in the area of application of a collective agreement to be bound to that agreement (section 5(1) sentence 1 No. 1 of the Act on Collective Bargaining Agreements). The Social Democrats would like to see this requirement replaced by the requirement of a collective agreement being “representative” only. In this context, they point to the fact that there has been a steady decline in the number of employers and workers who are covered by collective bargaining in the first place.

⁹⁴ The requirements of collective bargaining capacity are set out in some detail in *Waas*, Who is allowed to represent employees? The capacity to bargain collectively of trade unions in German law, in: Davulis/Petrylaite (ed.), *Labour Market of 21st century: Looking for flexibility and security*, Vilnius, 2011, p. 164.

⁹⁵ In addition to trade unions and employers' associations, individual employers also enjoy collective bargaining capacity, the reason being that trade unions may otherwise face difficulties in finding a partner, if employers abstain from becoming members of employers' associations. Though there are some collective agreements between trade unions and individual employers most collective agreements are still concluded by employers' associations.

⁹⁶ See also section 4(3) of the Act on Collective Bargaining Agreements.

⁹⁷ It should be noted that it is often difficult, if not impossible, to determine which agreement is more beneficial than the other; in this regard, see for instance, Federal Labour Court of 04/20/1999 – 1 ABR 72/98 (waiver of the right to dismiss, on the one hand, and a reduction of pay on the other amounts to an impossible comparison of “apples and oranges”).

⁹⁸ See also *Waas* in: Blanpain (ed.), *Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives*, The Hague/London/New York, 2007, p. 17.

Given all these facts it may not come as a surprise that section 77(3) WCA has been interpreted extensively by the courts: First, section 77(3) WCA deals with all conditions of employment independent of their quality or nature. Second, it is not required for the employer to actually be bound to a collective agreement (by being a member of the employers' association which entered into such an agreement) to legally block the conclusion of a works agreement. Instead, it suffices for the employer to fall within the area of application of the collective agreement. If, for instance, a collective agreement exists for the metalworking industry, the employer who does business in this sector is prevented from concluding a works agreement with the works council, even if he is not a member of the employers' association which concluded the agreement and, as a result, is not bound to that agreement.⁹⁹ Third, it is not required for a collective agreement to actually be in force. According to the wording of section 77(3) WCA, it is sufficient when a certain subject matter is "usually fixed by collective agreement", which is the case if, first, the matter was once the subject of collective bargaining and if, second, it is reasonable to believe that it will again become the subject of collective bargaining in the foreseeable future.¹⁰⁰

In practice, some employers and some works councils have been trying to circumvent the legal restrictions of their power to conclude collective agreements by entering into agreements that do not have normative effect, but are only binding for the parties to the agreement. The parties often may have reckoned that in practice the results could be the same at the end of the day if the works councils were to succeed in "convincing" staff that their contracts should be modified according to the content of the agreement reached with the employer. The Federal Labour Court, however, did not approve such practice and granted the trade unions, in principle, a right to injunctive relief.¹⁰¹

D. Function and dysfunction of the employee representation system

Employee representation essentially refers to co-determination by workers' representatives, intense communication between management and labour and the resolution of conflicts arising between them. In addition, the system enables works councils and employers to establish general terms and conditions of employment as far as the corresponding issues have not yet been dealt with by means of collective bargaining. In the German system of employee representation, works councils and employers are essentially equal, the former being able to participate in the decision-making process of the latter on an equal footing.

A clear advantage of the system from an employers' view lies in the fact that the works council has to observe a comprehensive peace duty, a fact which is clearly reflected in the statistics on strikes and lock-outs in Germany. Moreover, employee representation by works councils is a means of tapping into the specific know-how workers' representatives may have in many areas. By making use of this know-how, it might be possible to improve the decision-making process. Finally, another important element is the fact that workers' representation improves the chance of workers accepting the decisions taken by management.

⁹⁹ See section 3(1) of the Act on Collective Bargaining Agreements.

¹⁰⁰ With regard to works agreements which aim to regulate issues enumerated in section 87 WCA, only existing collective agreements have to be taken into account, however; see Federal Labour Court of 02/24/1987 – 1 ABR 18/85. It suffices, however, for the employer to be bound to these agreements; see, for instance, Federal Labour Court of 10/18/2011 – 1 ABR 25/10.

¹⁰¹ See Federal Labour Court of 04/20/1999 – 1 ABR 72/98 in case the works agreement aims at "displacing the collective agreement as a collective legal order and thus depriving it of its main function"; see also Federal Labour Court of 05/17/2011 – 1 AZR 473/09.

The dualism of workers' representation in Germany has clear advantages as well as drawbacks. On the one hand, works councils are not subjected to orders from union leadership. Instead, they are only bound to comply with the law. As they are independent, works councils are well equipped to protect the interests of minorities and, in particular, of workers who are not members of a trade union. For the very reason that they enjoy far-reaching co-determination rights, they are forced to deal with problems in depth and to make proposals of their own. On the other hand, some works councils may in some cases develop an "egoistic" stance, putting aside the overall interests of workers.

Critics of the existing works constitution tend to argue that the legal system is too rigid. They are of the opinion that more flexibility is needed, in particular with regard to the possibilities of establishing structures of co-determination that deviate from the statutory model. Though it is acknowledged that the legislator allowed for a bit more room when amending the Works Constitution Act in 2001, the fact that the legislator failed to achieve the goal of rendering "tailor made" solutions possible continues to be criticised. In addition, some observers criticise that the WCA, especially since its amendment in 2001, delays entrepreneurial decision-making and contributes to red tape.¹⁰² And though co-determination rights may promote a spirit of co-responsibility on the part of workers' representatives, there is also a danger of such rights giving rise to inappropriate "package deals" with management.

Trade unions¹⁰³ argue that the works constitution should more clearly address the danger of a possible split between regular and irregular staff (temporary agency workers, contract workers).¹⁰⁴ Additionally, there are demands to make it easier to adapt works council structures to the organisation of (transnational) groups of companies and to expand co-determination in the area of entrepreneurial decision-making.

¹⁰² *BDA/BDI, Mitbestimmung modernisieren – Bericht der Kommission Mitbestimmung, 2004.*

¹⁰³ See, for instance, *Deutscher Gewerkschaftsbund, Betriebsverfassung im 21. Jahrhundert – Rechtspolitische Empfehlungen zur Mitbestimmung im Betrieb, 2009.*

¹⁰⁴ By further extending the respective co-determination rights.

System of Employee Representation in Enterprises in France

Sylvaine Laulom*

1. Building the employee representation system in companies in France

Trade unionism emerged in France in the 19th century. In 1884 a fundamental law for trade unions was passed making it legal to form trade unions. Since then, trade unions have been free to organise themselves and to negotiate. However for a long time, if workers were free to join or not to join a union, trade unions remained outside companies and collective bargaining was mainly at industry level. The company was not a place for bargaining, and there was no mandatory representation. However, there were some practices of employee representation. Miners' delegates were established in mines and were responsible for health and safety; workplace delegates were also created in the public sector during the First World War. In 1936, in the wake of labour demonstrations and strikes, for the first time, a national intersectorial collective agreement, the Matignon agreement, was concluded. It established the 40-hour work week, annual paid leave and the extension procedure, under which the Minister of Labour may make a collective agreement binding on all employers in a given industry, regardless of their membership of employers' associations. The Matignon agreement, that became law later that year, also provides for staff delegates. For, R. Tchobanian, '*acceptance of the institution of personnel delegates was an employer concession made in a crisis to keep unions themselves out of the workplace*'.¹ However, the war made the elections of staff delegates in companies impossible.

It was after the end of the World War II, in a period of social consensus that employee representation in companies was finally set up. Works councils were established by the ordinance of 22 February 1945 with the aim of associating the workers more closely with the functioning of the company while maintaining management authority. They were to be the locus of peaceful interaction between management and its workers, conflict with the unions being at the level of industry. One year later, staff delegates were also established by the law of 16 April 1946. Even if trade unions still remained outside companies, an institutional link was recognised between elected representatives and trade unions as they obtained a monopoly over candidacies in works councils and staff delegates in the first round of the elections. The ordinance of 22 February 1945 has subsequently been repeatedly modified and amended by various acts, which have reinforced the rights and functions of workers' representatives.

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¹ 'From conflict to Social Dialogue', in J. Rogers and W. Streeck (eds), *Consultation, Representation and Cooperation in Industrial Relations*, University of Chicago Press, 1995, p. 115-152.

An important step in the building of the French system of employee representation at company level was the passing of a major Law of December 27, 1968, after widespread social conflict. The law ensured the unions a formal footing in the workplace for the first time. Since then, any representative unions can create a trade union section and designate a trade union delegate within a company. In the context of the French trade union pluralism, it means that it is possible to have several trade unions delegates representing different representative unions in a company.

In May 1981, the first socialist president of the post-1945 era, François Mitterand, was elected. One immediate consequence was the adoption of the 1982 Auroux laws (the name of the Minister of Labour at the time). The Auroux reforms of 1982 aimed to strengthen employee representation and collective bargaining but they kept the same structure of employee representation. Works councils were given more rights (the right to be assisted by an expert on certain issues, the right to an economic training course, better information, etc.). New structures of representation such as the group committee and the health and safety committee were established. The Auroux laws also introduced the obligation for employers to hold negotiations on particular issues, every year, where trade unions are present in a company. These mandatory obligations relate to current wages, actual hours and organisation of work. Other obligations to negotiate were also created at industry level.

Until 1996, representative trade unions had a monopoly of negotiating collective agreements. One of the most notable changes in the French system was that of giving companies the option of entering into collective bargaining agreements with representatives other than trade unions. This possibility was necessary to allow companies without trade unions to negotiate agreements, particularly on working times issues. Since 1996, various statute laws have concerned this issue. The last one is the law reforming social democracy on August 20, 2008. This law introduces major changes in the French industrial relations systems.² The aim of the reform is to strengthen the legitimacy of the role of trade unions and collective agreements, to reduce the number of trade unions, and to create an environment in which unions have to either work cooperatively to strengthen their position or merge. The law reforms the notion of representativeness, which is central to the French system. In legal terms, trade unions do not all benefit from the same treatment. Certain rights and prerogatives are reserved for trade unions regarded as representative. Before the 2008 law, for historical reasons, five major trade unions in France were automatically considered as representative, at all levels in collective bargaining and designating trade unions delegates. All other trade unions had to prove their representativeness within the company. Since 2008, all the trade unions (both at the company, industry and national levels) have to demonstrate their representativeness by complying with new criteria. These new criteria are: respect of republican values, independence, financial transparency, a minimum of two years seniority, an influence which is mainly characterised by activity and experience, importance of the membership and of the contributions received, and lastly, a minimum percentage of votes in the last professional elections (10% at company level, 8% at the industry and national level). The

² G. Borenfreund, 'Le nouveau visage de la représentativité syndicale', *Revue de droit du travail*, 2008, p. 712. F. Favennec-Héry, 'La représentativité syndicale', *Droit Social*, 2009, p. 630. M. Grévy, E. Peskine, S. Nadal, 'Regards sur la position commune du 9 avril 2008. A propos de l'avenir (incertain) des syndicats dans l'entreprise', *Revue de droit du travail*, 2008, p. 431. *Droit Social*, Rénovation de la démocratie sociale : deux ans d'application de la loi du 20 août 2008, janvier 2011.

representativeness will now be based on the results of the elections of the works councils and it will be questioned at every new election. Thus representativeness will no longer be determined top-down but bottom-up, depending on a union's electoral scores. This is a radical transformation in French labour history and culture: the system of election-based representation had been rejected since the early 20th century as unions represented not only their members, but the entire profession.³

The new legislation on representation will only come fully into effect at national and industry level in August 2013. However, at company level it starts taking effect as soon as elections under the new rules take place. For example, the works council elections in the French railway company SNCF in March 2009, resulted in the FO, CFE-CGC and CFTC losing their rights as representative unions at company level, as they gained fewer than 10% of the votes.

The 2008 law also recognizes a new employee representative in the company: the delegate of the trade union section (*'représentant de la section syndicale'*). He/she may be appointed by a trade union which is not representative. He/she has a much more limited role than the trade union delegate. Like the union delegate, he or she can distribute material and collect union subscriptions but negotiation is only possible in very unusual circumstances, where there is no union delegate and where no other employee representatives have the right to negotiate. Any agreement signed by the representative of the union section must be also approved by a majority of the workforce (this is not the case for agreements negotiated by the union delegate). Indeed, the main function of the trade union section delegate will be succeeding in obtaining representativeness at the next professional election.

Finally, the 2008 law authorises firstly the works council and secondly staff delegates to negotiate and to sign collective agreements on certain matters in the absence of a trade union delegate.

It is too early to appreciate the impact of the law, which will only have its full effect in 2013.⁴ However it is obvious that it creates a new complexity in adding another employees' representative and that it will have consequences on the traditional dual channel of representation as it reinforces the institutional links between elected representation and trade union representation.

The French system of employee representation can thus be described as a dual channel of workers' representation.⁵ This dual channel can be explained by historical reasons. The French system has been built up gradually and the present system is the result of an accumulation of representative bodies that appeared at various stages in the history of the French industrial relations system. It is thus a complex system and if there is an apparently clear distribution of roles between trade union representatives and elected representatives, the practice is different and there are various institutional and informal links between the two channels of employee representation. I will first present an overview

³ A. Bevort, A. Jobert, *Sociologie du travail: les relations professionnelles*, Armand Colin, 2008. A. Bevort, 'De la position commune sur la représentativité au projet de loi : renouveau et continuité du modèle social français', *Droit Social*, 2008, p. 823.

⁴ A report published in February 2011 examines the impact of the reform of representativeness on industrial relations in 12 French companies. The study demonstrates that the reform's aim to simplify the trade union landscape within companies has not been achieved because there are very few instances where the number of worker representatives has fallen or industrial relations within companies have become more straightforward. See, S. Bérout, K. Yon, '*La loi du 20 août 2008 et ses implications sur les pratiques syndicales en entreprise: sociologie des appropriations pratiques d'un nouveau dispositif juridique*', février 2011, rapport DARES.

⁵ C. Vigneau, 'France', in *Employee representatives in an enlarged Europe*, European Commission, 2008, p. 197.

of this complex system. Secondly, I will concentrate on the constitution and on the functioning of the works council. Thirdly, I will analyse the relationship between works councils and trade unions before concluding with an evaluation of the French system and of its possible evolution in the future.

2. A complex dual channel of workers' representation in the workplace

The French legal framework of employee representation system has a constitutional basis. The Preamble to the 1946 Constitution, which is part of the present Constitution, proclaims the right of *'all workers to take part, through their representatives, in the collective determination of working conditions and in company management'*. It has to be noted that Statute law plays an essential part in French labour law and the employee representation system is mainly defined by laws which are part of the Labour code.⁶

The French system is characterised by a dual channel of workers representation in the workplace. Works councils (*'comité d'entreprise'*) and staff delegates (*'délégué du personnel'*) are elected by the company employees: trade union delegates (*'délégués syndicaux'*) are designated by representative unions. The complexity of the workplace representation system required by law varies with the company size. In a company with at least 11 employees, staff delegates, elected by all employees, are required by law. Their main function is to present the employer with all individual and collective grievances concerning the application of legal rules and collective agreements. In companies with at least 50 employees, there are also works councils whose members are elected in the same way and at the same time, every 4 years (a collective agreement concluded with representative trade unions can reduce the mandate to 2 years). Their prime function is to manage the funds provided by the employer for social and cultural activities for the employees and their families and, secondly, to be informed and consulted on the company's organisation, management and general functioning. In any company employing 50 persons or more, the employer must also create a health and safety committee (*'comité d'hygiène, de sécurité et des conditions de travail'*), which is appointed by the elected members of the works council and by the staff delegates. The purpose of this committee is to contribute to the protection of the employees' health and security and to the improvement of working conditions. The committee must be consulted in all cases of major changes regarding hygiene, safety and working conditions within the company. In a company, employing at least 50 employees, where there are no works council or health and safety committee, the staff delegates perform their duties. In a company, employing fewer than 200 employees, the employer may choose to set up a sole body of employee representatives (*'délégation unique du personnel'*) whose duties and rights are those of the staff delegates on the one hand and on those of the works council on the other hand.

Beside these elected representation, the presence of trade unions in companies is also recognised. Each trade union may set up a trade union section (*'section syndicale'*), which is a de facto grouping with no legal identity. In a company with at least 50 employees, each representative trade union can designate a trade union delegate. As there is trade union pluralism in France, several trade unions in a company can be representative and can designate trade union delegates. Trade union delegates represent the trade union in the

⁶ J. Pélessier, G. Auzero, E. Dockès, *Droit du travail*, Précis Dalloz, 2012.

company. Legally they are in charge of ‘defending the material and moral interests’ of the workers, and in the French model, trade unions represent all the workers and not only their members. The main function of trade union delegates is to negotiate. Trade union delegates can bargain with the management and sign company or plant agreements.

It should be noted that all the rights granted to employees’ representatives are reinforced by repressive labour law since the employer who failed to respect these rights (for example, if he/she refused to organize elections, did not give information, did not consult the works council, did not bargain with trade unions, etc.) would be guilty of interference in the functions of employees’ representatives (*délit d’entrave*). Civil sanctions are also possible and tribunals can oblige employers to respect these rights.

This complex system is based on an apparently clear distribution of roles between trade union representatives and elected representatives. Works councils provide *‘collective expression of employees’ views, allowing their interests to be constantly taken into account in decisions relating to the company’s management and economic and financial development, work organisation, vocational training and production techniques’* (art. L 2323-1 of the Labour code). Their role is mainly consultative in the field of economic development and work organisation. Trade union delegates represent their unions and defend the interests of their members and of all the workers in the company. Their main function is to negotiate with employers. Until 1996, unions had a monopoly of collective bargaining. Labour legislation explicitly stipulates that trade unions are to be the exclusive bargaining agent in the workplace, at sectorial or national level. Thus works councils are legally excluded from the possibility of negotiating collective agreements even if recently the law has allowed for the fact that when there is no trade union representative and under certain conditions, they can negotiate.

3. The representation of employees through work councils

It is compulsory for all companies with at least 50 employees to set up a works council. The works council is a joint body. Works councils are made up of the company manager, who takes the chair and elected staff representatives. The number of seats available for elected employees depends upon the total number of employees employed by the company (from 3 to 15). Each representative trade union may also designate an employee to be its representative to the works councils. In companies employing fewer than 300 employees, the union representative is the trade union delegate. These trade union representatives have only consultative rights and they do not participate in voting.

3.1 How representatives are elected?

Any company employing at least 50 employees is required to organize works council elections. This threshold must have been reached during any 12 out of the last 36 months. Part-time employees are calculated by dividing the total amount of their contractual working hours by the legal duration of working hours in the company. Fixed term workers or temporary agency workers (in the company concerned) are calculated in proportion to the duration of their presence in the company during the 12 preceding months. As soon as this threshold is reached, the employer is bound by law to take the initiative to organize works council elections. Works councils are elected for a four-year term. However, the term can be reduced by company collective agreement to a two-year term.

It is up to the employer to initiate the organization of the works council elections by inviting all representative trade unions to present a list of candidates. If the employer does not take this initiative, any employee or a trade union can ask the employer to organize the election (the employee is protected against a dismissal), and the employer must start to organize elections within one month. The procedure for the election is defined by the law. Until 2008, the law gave representative trade unions in the company a monopoly of presenting candidates in the first round of such elections. As the results of these elections are now taken into account in evaluating the representativeness of trade unions, this condition is no longer required. However, trade unions (but not representative trade unions) still have a monopoly of candidature for the first ballot of the elections. There are certain criteria that unions must meet to be able to put forward candidates, such as being independent and having existed for at least two years, but they are less restrictive than was the case before the legislation introduced in 2008. In the event, there are no trade union candidates, or if fewer than 50% of the electors vote, a second ballot must be organised no more than 15 days later. For this second ballot the candidatures are free, which means that any employee (not only trade union candidates) fulfilling the eligibility conditions can be a candidate. In practice, votes for non-union candidates account for around a fifth to a quarter of all votes cast. Depending on size, the whole workforce votes together or in two or more separate groups, known as 'colleges', representing different grades of workers.

The elections are organized during working time and on the company's premises. The employer must provide ballot boxes and polling booths in order to ensure the secrecy of the votes. The vote is based on a system of proportional representation.

Voters must be at least 16 years old (16 years is the age at which children can legally work) and must have been employed by the company for at least three months. Fixed-term workers can vote if they fulfil this condition. A company's representatives, or close relatives, in principle have no voting rights, even if they are employed by the company.

To be eligible as a works council's candidate, a worker must be a voter. He/she must be at least 18 years old and must have been employed by the company for at least one year. Here again, a fixed term worker can be a candidate if he/she fulfils this condition, which is obviously difficult. Part-time workers can vote and they can be eligible.

It is to be noted that the exercise of the functions of a member of works council is compatible with the other workers' representative functions. The same individual may simultaneously occupy the position of staff delegate, trade union delegate, member of the works council and member of the health and safety committee. In practice, this situation is not unusual.

Regarding temporary agency workers, their employer is the agency, and the law organises their collective rights in the agency and not in the user company. Thus for the purposes of calculating company size thresholds in the agency in connection with worker representation, temporary workers are included on condition that they have been employed for more than 3 months in a reference period of 12 months.⁷ Temporary workers can vote in the elections of worker representatives if they have had an assignment for at least 3 months or have worked a minimum of 507 hours over a period of 3 months within the 12 months preceding the elections. In order to stand as a candidate they must have had an assignment of at least 6 months or have been on assignment for a minimum of 1014 hours over a period of 3 months within the 18 months preceding the election.

⁷ They shall also count for the purposes of calculating the threshold in the user undertaking in proportion of the duration of their presence in the company during the 12 preceding months.

3.2 Representation unit

The definition of the representation unit is an important point in the French system and the law attempts to adapt the structure of works council to that of the company. The structure of the works council follows, when possible, the structure of the company and of the corporate company. Thus each level of decision corresponds to a specific structure of representation: the establishment works council, the central works council, the group council and now the European works council.

Previous to the election of the members of the works council, the employer and the representative trade unions must negotiate a specific agreement, the pre-electoral agreement, in order to determine the modalities of the elections. If a company has several establishments, the agreement will define the various units of representation. In the absence of trade unions, the employer must organise the elections in compliance with the law. If no agreement can be reached, the departmental director of Labour and Employment takes the decision.

When a company has several separate establishments reaching the 50 employees threshold, each separate establishment elects an establishment works council. A separate establishment is defined by case law. Thus not all separate units of a company automatically constitute establishments. For the Supreme administrative Court, to qualify as a separate establishment, the unit must have a certain degree of managerial autonomy in order for the role that the law establishes for the works council to be fulfilled.⁸ The idea is that the works council can be properly informed and consulted by a manager who is not totally dependent on central management.⁹ These establishment works councils are made up of and operate in exactly the same way as ordinary works councils. They have the same prerogatives as ordinary councils. The establishment works councils are then headed by a central works council composed of representatives of the establishment works councils. The prerogatives of central and establishment works council depend on the issues that are subject to their information and consultation. For example, decisions of the central management are subject to the central works council's information and consultation whereas local management decisions are subject to the relevant establishment's local works council, and if a central management decision requires local implementation, information and consultation will need to be carried out at both levels.

Another representation unit of works councils is the social and economic unit. The notion of social and economic unit was first recognised by case law¹⁰ and then by the law (see Art. L 2322-4 of the Labour code). Social and economic units have been developed by case law in response to the issue of employers who have separate legal entities that each have fewer than 50 workers, but together exceed this threshold. When several companies which are technically separate legal entities, have strong operational, human resources,

⁸ Conseil d'Etat, 25 juin 2003, 252280.

⁹ What makes the system complex is that the definition of the establishment is not the same for the other workers representatives because they fulfil a different role. The function of staff delegates is to submit individual and collective claims relating to social protection and health and safety and collective bargaining agreements applicable in the company to the employer. Thus the representation unit of staff delegates could be more decentralised (also because they may be elected in companies employing at least 11 employees and not 50). For the Supreme Court, concerning staff delegates, it is not necessary for the manager of the establishment to have specific competences and to be able to directly answer the workers' claims. As a consequence, the definition of establishments may differ in the same company for different categories of workers' representatives (Cass. Soc. 29 janv. 2003, Bull. V n° 30; Cass. Soc. 18 mai 2011, n°10-60383).

¹⁰ Cass. Crim. 23 avril 1970, Ets Herriau, D. 1970.444.

economic and financial ties, they can be deemed to be a social and economic unit. Works council elections occur within this broader framework.

Another level of representation exists. Established by the 1982 Auroux laws, group councils are set up within groups consisting of a controlling company and controlled companies. A group council must be created within each group composed of a parent company having its registered office in France, its subsidiaries, and all affiliated entities (Article L. 2331-1 of the Labour Code). However, this is subject to the condition that the parent company directly or indirectly controls the subsidiary/affiliates. The group council is not a substitute for the works council. Its purpose is to provide the representatives of each company with more comprehensive information concerning the activity of the group as a whole. The group council meets at least once a year and must be informed on matters such as the group's businesses, its financial situation, the employment evolution and employment forecasts on an annual or several years' basis, possible prevention actions, and the economic prospects of the group for the year to come. The group council does not have a consultative function. A group council consists, on one side, of the controlling company manager, on the other side of representatives of staff in the group. Staff representatives are appointed by the representative trade unions among the members of the various works councils of all of the group companies and on the basis of the results of the latest elections.

Directive 94/45 of 22 September 1994 was transposed into French law and European works councils must be set up on the conditions defined by the Directive.

3.3 Role and power of the works council

The general function of works councils is to ensure the collective expression of the employees and to protect their interests professionally, economically, socially and culturally. Works councils are a legal body and may accordingly act in the courts to defend their interests in any jurisdictions. The interests defended must however be direct, current and personal. Unlike trade unions, works councils are not entitled to act in the collective interest of a profession or to act on behalf of the employees.

Works councils have two types of functions: social and cultural duties and economic duties. Their duties are very different in each of these areas. Although they exercise real managerial power in their social and cultural activities, they have only a consultative role in economic and occupational matters.

3.3.1 The Social and cultural duties

The granting of the management of the social and cultural duties in 1945 made it possible to withdraw social benefits from the former company paternalism and entrust them to the personnel representatives. According to Article L. 2323-83 of the Labour code, the works council shall perform or monitor the management of all social and cultural activities organised in the company especially for the benefit of employees and their families. The employer must provide the works council with funding for social and cultural activities. But the law sets no minimum amount and the funding can differ greatly from one company to another. However the employer's contribution cannot be less than that given during the last three years.

These social and cultural activities are the activities which the employer is not obligated to provide but which have been put in place for the benefit of the employees,

their families and retirees of the company. In this area are found activities such as canteens, organising trips, Christmas parties for employees' children, theatre outings, reduced-rate cinema tickets, etc. These social activities are important for the workers and they are sometimes the most visible activities of works councils. However, they do not imply any control by the works council over company operation.

3.3.2 Economic duties

The most important prerogatives of the works councils are their economic and occupational duties. According to article L. 2323-1 of the Labour code, the works council's purpose is '*to provide a collective expression of employees' views, allowing their interests to be constantly taken into account in decisions relating to the company's management and economic and financial development, work organisation, vocational training and production techniques*'. On all these matters, French law gives works councils extensive rights to be informed and consulted. Regulation on these matters is very detailed. The Labour code specifies the documents that companies must provide to works councils and at what moment the information must be provided (annually, every quarter, monthly). The information concerns the economic, financial, social and employment situation of the company. The information is needed in order for the works council to be consulted.

Information rights

First, French law requires employers to notify newly elected works councils of a range of information, to be supplied within a month of their election (art. L 2323-7 of the Labour code). The details in question are the company's legal status and organisation; its foreseeable business prospects; its position within its group, if applicable, in view of the information available to the company manager; the distribution of capital among shareholders owning more than 10% of its shares, and its position in the sector of activity to which it belongs.

Regularly, the employer may then provide different information. The information rights can be different depending on the size of the company. For example, in companies with fewer than 300 employees, economic and social information may be conveyed in a single annual report regarding the company's activity and financial situation, the developments in employment, qualifications and training.¹¹

The most important information includes:

- An annual general report relating to the company's activity and financial situation;¹²

¹¹ The law defines precisely the information content. For example, regarding information on developments in employment, qualifications and training, the employer may give: statistical data about the month-by-month changes in the company workforce, the distribution of the workforce by sex and qualification, the number of employees with open-ended employment contracts, the number of employees with fixed term contracts, the number of employees with temporary contracts, the number of workers belonging to external companies, the number of working days worked over the past 12 months by workers with fixed-term and temporary employment contracts, the number of alternative integration and training contracts open to young people aged under 26, the number of return to work contracts, the name, sex and qualification of part-time employees, the hours of part-time work done in the company, the reasons for fixed-term contracts, temporary contracts, part-time contracts and workers belonging to external companies, the comparative situation of men and women (analysis of statistical data by occupational category on the respective situations of men and women as regards recruitment, training, promotion, qualification, classification, working conditions and current pay, measures taken over the past year with a view to ensuring occupational equality, objectives and actions for the coming year, an account of actions planned but not performed).

¹² Turnover, profits or losses recorded, overall production results in value and volume, major capital transfers between the parent company and its subsidiaries, the subcontracting situation, distribution of profits made, European grants and financial grants or benefits, especially regarding employment, investments, trends in the company wage structure and total wage bill, trends in productivity and production, capacity utilisation.

- An annual report on the evolution of salaries;
- Information on improvements, changes, or transformation of the equipment;
- Analysis of the employment situation;¹³
- An annual social report containing information on employment, pay, working, health and safety conditions, training, occupational relations and employee living conditions;
- Information on vocational training;¹⁴
- Information on daily working conditions (all matters relating to changes in working hours, new technologies, changes in working conditions, competencies, qualifications, methods of remuneration and changes in career paths).

In trading companies, the company manager must also provide the works council with all the documents that must necessarily be furnished to the general shareholders' meeting, before their transmission, along with the annual accounts report.¹⁵

Information may also be given about any events that occur and may affect the company. According to Article L. 2323-6 of the Labour code, '*the works council must be informed and consulted on matters affecting the organisation, management and general development of the company, and in particular on measures liable to affect the volume or structure of the workforce or the company staff's working hours or employment, working and vocational training conditions*'. The information given must be in written and precise. The information is given to allow works councils to fulfil their consultative functions.

Consultation

French law gives wide scope to works council consultations (see Article L. 2323-6 of the Labour code below). The idea is that prior to making any important social or economic decisions, an employer must consult the works council. The Labour code also expressly indicates certain situations in which the works council must be informed and consulted, such as staff and dismissals, changes in working time organisation, technological developments and evolutions, etc. Pursuant to case law, a works council must also be consulted before a plant-level agreement is to be concluded.¹⁶

The notion of consultation is also defined by the Labour code as the exchange of views with the works council resulting in the works council formulating its opinion on a contemplated management decision. Consultation, in order to be respectful of works council prerogatives, requires that (i) sufficient information be provided to the works council to allow the works council to form its opinion, and (ii) the works council's opinion be requested before management is due to take the relevant decision and more precisely at a time where the works council's opinion could still arguably influence the management's

¹³ The employer must provide the works council with a whole set of information on employment in the company. In a company with more than 300 employees, this information is quarterly; otherwise it is given every six months. For example the employer must inform the works council of the general employment situation with in particular a month-by-month description of the workforce and employee qualifications by gender. The information includes the number of employees with open-ended and fixed term contracts, the number of part-time employees, the number of temporary workers and the number of workers belonging to external companies. The employer must explain the reasons for any outsourcing.

¹⁴ Every year the works Council has to be consulted about the coming year's training plan. It also gives its opinion about how the previous year's training plan worked out.

¹⁵ To analyse the information, the works council may be assisted by an accountant of its choice up to twice in the financial year.

¹⁶ Cass. Soc. 5 mai 1998, Bull. V, n° 219.

decision (whether or not this is actually the case). In practice, timing can be a major issue in any decision-making process that requires a prior works council opinion, because legislation does not prescribe any maximum time limit for the works council consultation procedure. Works council consultation procedures should therefore be started sufficiently in advance when considering a tentative timeline of business decisions to be taken. It is usually considered that it would be ‘too early’ to start a consultation procedure at a time when the project concerned is insufficiently advanced, i.e. where the parameters of the project are insufficiently determined or determinable. No meaningful information can be given at this stage to the works council, management will be unable to answer precise questions and consequently, the works council will be unable to render a well-informed and meaningful opinion. On the other hand, it is considered that it is too late to conduct a consultation procedure when the project is so advanced that it has reached an irreversible state, in particular if the company has already made legally binding commitments or decisions.

Consultation does not however mean a veto right nor a co-determination or decision-making right. The works council’s opinion is indeed “only” consultative, and not binding on management.

Except in one or two circumstances, works councils in France do not have any codetermination rights. An exception regards the setting of individualised working hours. In this situation, the Labour code foresees that such a measure may be implemented only if the employees’ representatives do not oppose it. Collective bargaining on profit sharing plans is also explicitly open to works councils and, in 2009, 95% of the agreements on this issue were concluded by elected representatives.¹⁷

Other rights

Linked to their economic duties, works councils have also an ‘alert right’ (art. L2323-78 of the Labour code). When the works council is concerned, with justification, over the economic situation of the company, it may ask the employer for explanations. If the answer is insufficient or confirms its concerns, the work council may draft a report, which is then transmitted to the statutory auditor. In the works council’s report confirms its concern, the works council may communicate this report to the board of directors who will then have to give a substantial answer within one month.

There is also a very light mechanism of employee representation on corporate boards through the works council. In trade companies, the works council has the right to nominate two of its members to sit with a consultative voice on the board of directors or on the supervisory board. Works councils representatives on these boards have fewer rights. They take part in proceedings only in a consultative capacity, though they are entitled to express their views. However these rights give them access to the same documents as those sent or handed over to the members of the board of directors or the supervisory board. Through them the works council may submit requests to the board of directors or supervisory board, on which a reasoned opinion must be delivered.

To fulfil its various functions, the Labour code provides for a meeting of the works council at least once a month in companies employing at least 150 workers and at least once every two months in the others. In any event, there may be a further meeting when so requested by a majority of the council members. The council elects a secretary, who in conjunction with the company manager draws up and signs the agenda, which is notified to

¹⁷ DARES, ‘*Les accords collectifs d’entreprise conclus en 2009*’, Avril 2011, n°031.

the other members at least three days before the meeting. Works council resolutions are adopted by a majority of the members present. The council chairman, who is the company manager, does not take part in the vote when consulting the council's elected members in their capacity as staff representatives.

Like all employee representatives (whether they are members of works councils, staff delegates or trade union delegates), elected members of works councils benefit from specific protection against dismissal. The law has provided for a specific procedure and special guarantees for the employees' representatives. The law considers that they run a specific risk of displeasing their employer in the accomplishment of their tasks and therefore must be specially protected against dismissal. Nevertheless, they remain regular employees submitted to the obligations arising from their contract of employment. Thus if the employer must follow a specific procedure before dismissing them, the dismissal can occur for exactly the same reasons as ordinary workers.

Workers' representatives can only be dismissed following an interview with the employer, consultation with the works council and with the permission of the local labour inspector. Regarding the works council, this protection is applicable to employees having initiated the elections (for 6 months), candidates (for six months), elected employees (during their term of office) and former elected employees (for 6 months following their term). The employer may ask for authorisation of the labour inspector who has a minimum of 15 days during which a preliminary inquiry will be held in order to verify compliance with the specific procedure and the absence of discrimination. The labour inspector's decision must be motivated. If the employer dismisses an employee representative without the labour inspector's authorisation, the employee representative has a right to be reinstated in his/her job. Penal sanctions are also possible.

Members of workers councils have also specific rights to fulfil their tasks. They are entitled to 20 hours of paid time a month to carry out their duties. They are entitled to move freely about the company both outside and during their hours spent on representational functions. They may make any contacts required within the performance of their functions, especially with employees. They also have up to five days' paid time for training during their period of office.

The employer bears all costs of a works council, by means of an annual works council budget equal to at least 0.2 per cent of the company's annual total gross payroll. This budget is in addition to any sums provided by the employer for running social and cultural activities in the company. The works council has also the exclusive use of a room together with the equipment and material necessary for it to function effectively – all provided free by the employer. Another important right is the possibility to use financial experts. They can be called in, at the company's expense, to analyse the annual accounts and to look at financial forecasts in companies with 300 or more employees. They also can examine proposals for large-scale redundancies, and to examine issues which the works council thinks are cause for concern. In companies with 300 or more employees the works council can also call in a technology expert, if necessary.

These rights are not always taken up, but the fact that the choice is left to the works council has resulted in the growth of national organisations of experts linked to the main trade union confederations.

3.4 A high compliancy rate

The compliancy rate is relatively high and it is increasing. According to the last report of the DARES (the research unit of Ministry of Labour), 77% of companies with at least 20 workers, and 90% of the companies with at least 50 workers do have some workers' representatives, either staff delegate or works council.¹⁸ In practice, works councils exist in 81% of the companies that should have them according to the same DARES figures. Among companies with 500 employees or more, all the percentages are above 95%.

In 2005, the participation rate of employees in the election of works council was around 63.2% (against 63.8% in 2003). Non trade unions lists obtain 23.5 % (against 23.2% in 2003), and in companies with fewer than 100 employees, around 50%.

4. Relationships with trade unions and collective bargaining

4.1 A concise description of unionization and collective bargaining today

In membership terms the French trade union movement is one of the weakest in Europe with only 8% of employees in unions (and even less in the private sector). It is divided into a number of rival confederations, competing for membership. The main confederations are the CGT, CFDT, FO, CFTC and CFE-CGC. Despite low membership and apparent division French trade unions have strong support in elections for employee representatives and are able to mobilise French workers. It should also be noted, that collective agreements have an *erga omnes* effect. The coverage rate is high and nothing in the French system really favours unionization.

In terms of support in the elections, the main test is the five-yearly election of employee members of the employment tribunals, although this only covers the private sector. Here, in the latest elections in 2008, the CGT is in the lead, with 34.0% of the vote, followed by the CFDT with 21.8%, FO with 15.8%, CFTC with 8.7%, the CFE-CGC with 8.2%, UNSA with 6.3% and Solidaires with 3.8%. At the professional elections, CGT is also in the lead with 22.5% of the vote, followed by the CFDT with 20.6%, FO with 12.5%, CFTC with 6.8% and CFE-CGC with 6.6%.¹⁹

Despite its low rate of unionization, the French industrial relation system has a very high rate of collective bargaining coverage, close to 97 per cent.²⁰ There is one major reason for this: the extension of collective bargaining agreements by the Ministry of Labour.

Collective bargaining can take place at three levels: at national level covering all employees; at industry level which can involve national, regional or local bargaining; and at company or plant level. National level negotiations for the whole economy cover a wide range of issues, including social security and industrial relations. For example, the 2008 Act was based on a common position agreed by the CGT and CFDT together with the employers' associations in April 2008. Industry level and company negotiations cover pay, pay structures, equality between men and women, financial participation, working time

¹⁸ *Les institutions représentatives du personnel : davantage présentes, toujours actives, mais peu sollicitées par les salariés*, DARES 2007. Because of the adoption of the 2008 law, the DARES is waiting until the end of the electoral cycles in 2012 before establishing new statistics.

¹⁹ DARES, *Evolution de l'audience des organisations syndicales aux élections aux CE*, 2005. <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/participation2005.pdf>.

²⁰ However, some of the agreements have only limited importance. DARES, *La couverture conventionnelle a fortement progressé entre 1997 et 2004*, DARES, 2006 <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/2006.11-46.2.pdf>.

and a range of other working conditions. Traditionally, industry level bargaining is the most important level for collective bargaining, in terms of numbers employees covered. However, collective bargaining at plant level is becoming more and more important.

Traditionally, the articulation of the levels of collective bargaining was centred around the traditional hierarchy of norms, called the 'favour principle', according to which each level was only supposed to add better conditions. However this principle has been progressively restricted. Since 1982, it has been possible for a collective agreement to depart from the legal provisions even when it is not in favour of the employees. This possibility of 'derogatory agreements' is limited to the areas enumerated by law but these areas have been extended since 1982 and are now quite considerable: flexibility of working hours, procedure for economic dismissals, etc. Derogatory agreements may be concluded either at industry or at the company level. In 2004, another major change in the French system of industrial relations was introduced. The law gave company-level agreements the possibility of departing from industry agreements, except for negotiations over minimum wages, classifications, supplementary social protection and professional training. However, industry agreements may exclude the possibility for company agreements to depart from higher-level agreements if this departure is not more favourable to the employees. Finally, the Act of 20 August 2008 allows the company agreements to fix working hours independently of the industry agreement. From now on, industry agreements are applicable only if there is no company agreement on working hours.

Another major change in the French system has been the modifications to the conditions affecting the validity of collective bargaining agreements as regards the signatory trade unions. Since the 2008 Act, the company or plant agreement must be signed by one or several representative unions with at least 30% of the votes in the 1st ballot of the last elections of the members of the works council. Besides, it cannot be rejected by one or several representative union organization(s) with a majority of votes in the 1st ballot on the same elections. These new conditions for signature equally apply to interprofessional and industry level agreements but will only come into force in 2013.

4.2 Trade Unions and elected representatives

Even if French law clearly separates the role of unions which involves collective bargaining from the role of elected works councils which involves information and consultation on certain decisions taken by managements, there have always been important, institutional links between trade unions and elected representatives. First, trade unions have a monopoly of candidature for the first ballot of the elections. Thus, many members of works councils belong to unions. Secondly, a representative trade union may designate an employee to be its representative on the works councils with a consultative voice. Therefore, representative trade unions know perfectly how the works council works and they receive the same information. The work council may also be informed and consulted on negotiation of collective agreements. Thirdly, French Labour code authorises an employee to fulfil different representative function. Thus the same person can be a member of works council and a trade union delegate. In practice this often happens. The recent 2008 Act has strengthened the relationship between trade unions and elected representatives. Among other criteria, to demonstrate their representativeness at plant level, trade unions must now obtain at least 10% of votes at the last professional elections and in order to be appointed as trade union delegate, the worker must have been a candidate for

either the works council or as an employee delegate (as a member or deputy) and must have received at least 10% of the votes cast in the first round of the elections.

Regarding collective bargaining, only representative trade unions can negotiate and conclude collective agreements. Strictly speaking, works councils do not have a role in the negotiations of collective agreements even if they must be consulted on the negotiation. However, here again the distinction is not always so clear. In practice, it happens that works councils conclude agreements with the employer. They are deprived of the legal force and binding effect attached to collective agreements. However, case law has recognised the validity of these agreements (so called ‘untypical agreements’) and has given them a certain legal force if they are more favourable to the workers. They can create obligations for the employer as a unilateral undertaking.

Moreover, although the right to negotiate is generally reserved for the union delegates, in some cases, where there are no union delegates, other representatives of the employees, in companies with fewer than 200 employees, can negotiate dispensatory agreements. Works councils, and if there are no works councils, staff delegates, can negotiate in the absence of trade unions delegates. The agreements the works councils can negotiate are ‘derogatory’ agreements (agreements which contain provisions that are less favourable than, or at least different from, legal provisions for workers). The agreement the works council signs must be endorsed by a joint employer-union commission for the industry.

Thus in practice, the dividing line between consultation, which is the prerogative of the works council and collective bargaining, which is the prerogative of the representative trade unions is a very fine one. However, the French system always gives priority to representative trade unions to negotiate and it is only when there is no trade union delegate in the company that the works council can negotiate.

5. Function and dysfunction of employee representative system

5.1 Main functions of employees’ representatives

As should be clear from the foregoing, French law separates the role of unions, which involves collective bargaining and entering into collective agreements, and the role of elected works councils, which involves information and consultation on certain decisions taken by the management. Trade unions and works councils fulfil different functions. The function of staff delegates has more to do with establishing better communication between workers and managements in order to avoid conflict. Through collective bargaining at company level, trade unions participate in defining terms and conditions of employment, but also in making statutory regulations more flexible. This is particularly true for example in working time issues. Working time is one of the mandatory objects of the obligation to negotiate. Every year, effective working time and organisation of working time in the company has to be negotiated with the unions. Since 1982, this negotiation has been supported by legal provisions allowing collective agreement to depart from some legal standards. Social partners are permitted to depart from the maximum daily working hours (from 10 to 12), they can also increase the amount of allowed overtime. Above all, they can decide that the reference period over which the average working time is calculated is a year instead of a week. The 1998 and 2000 statutes on 35 hours working time also favoured regulations by the social partners. Finally, the Act of 20 August 2008 allows the company agreements to fix working hours independently of the industry agreement. From now on, industry agreements are applicable only if there is no company agreement on

working hours. Working time has progressively moved from a state centralised regulation to a much more decentralised regulation.

The annual report on collective bargaining, published in June 2011 by the Ministry of Labour,²¹ shows that 33,826 agreements were signed at company level in 2010 (with a rise of 18% compared to 2009). 72% of these agreements were concluded by trade union delegates. Most of the agreements concluded by elected representatives were about profit-sharing plans and employee saving plans, which is an area where works councils can negotiate. 32.8% of the collective agreements concluded are about wages, 24.6 % about working time, 23.5% about employee savings plans, 12.4% about employment, 9.1% about unions rights and 8.7 % on gender equality.²²

Complementary to the negotiation function, the consultative functions of works councils do not mean that the works councils must agree before any planned changes go ahead. There must simply be an opportunity for the works council view to be heard, normally involving written submissions by the employer, and a delay before the decision is taken to allow a dialogue between the two sides. This means that the process of consultation is normally procedurally very precise and formal, but in practice may change nothing. Management is obliged to listen to the views of the employee representatives, but it continues as before.

One exception is the area of collective redundancy and restructuring, where a number of works councils have turned to the courts to block their employers' proposals, arguing that adequate consultation has not taken place. In a number of cases this has led to long delays before the employers have been able to implement their plans. If the works councils can be an important actor in a restructuring plan, it is also because a specific procedure has been defined. When there is a dismissal plan affecting more than 10 employees over a period of 30 days, in companies with at least 50 employees, the employer must convene the works council on two occasions. The two meetings must be separated by no more than 14 days (or more depending on the number of dismissals). Companies must also present 'an employment protection plan' to the works council. Designed to prevent redundancies or to limit their number and to facilitate the relocation of staff when dismissals cannot be avoided, the employment protection plan must be submitted for consultation to the works council. Failure to consult the works council is punishable by a declaration of invalidity of the redundancy procedure. The works council may also apply for assistance from an accountant paid by the employer. If the services of an accountant are engaged, the council may hold a third meeting. The formalization of the procedure of consultation and the obligation imposed on the employer to present the 'employment protection plan' have made the works council the most important negotiating partner for the employer in case of collective redundancies. The role of works councils in the area of collective redundancy and restructuring does not mean that trade unions delegates cannot interfere. Collective agreements on employment can be negotiated during this period. Legislation introduced in January 2005 also allows the possibility of signing so-called 'method agreements' with the union (not the works council) to better define the procedure of information and consultation of the works council and the content of a possible 'employment protection plan'.

²¹ *La négociation collective en 2010*, Bilans et rapports, Ministère du travail, juin 2011.

²² Some of the issues of collective bargaining like employees saving plan or gender equality are supported by the legislator.

5.2 Shortcomings of the current employee representation system

One of the main criticisms which can be made of the French system of representation is its complexity which is certainly reinforced by the 2008 Act. Staff delegates, the works council, health and safety committees, trade unions delegates and now the delegate of the trade union section share the functions of representation in a division of functions which is not so clearly defined. The low level of unionization combined with a highly pluralist system certainly reinforces this complexity. Even if this plurality of representation can lead to some competition, in practice they are more complementary than competitors (even if of course competition is possible among various unions, and the 2008 Act reinforces electoral competition). Where trade unions are present, they will usually play an important coordinating role. When they are no representative trade unions in companies, the possibility given to works councils or to staff delegates to negotiate dispensatory agreements could be discussed. Are these representatives independent and competent enough to negotiate agreements which can be less favourable than the law ?

6. Conclusion

Works councils are a well-established part of the French industrial relations system. Their existence is not a matter of debate on either the trade union's or employer's side. However, this does not imply that employers will support any extension of works council's rights. French employers sometimes call for a reduction in representation bodies' responsibilities, a reduction in the number of hours for which representatives are freed from their work to carry out their duties, and the creation of a single structure to replace current specialized bodies. Employers may, in some cases, wish to extend particular aspects of the role of works councils. For example, in France, many employers are keen to increase the bargaining role of works councils to enable greater company-level flexibility. Trade unions are against the creation of a single structure of representation, and they want to preserve their negotiating function.

The consequences of the 2008 Act are for the moment very uncertain. It is unclear whether the new rules will result in any of the existing nationally representative union confederations losing this status or any new confederation gaining it. At company level, it also remains to be seen whether the new rules on representativeness will lead to a fall in the number of companies with union delegates or reduce the number of union delegates from different unions. There is also a risk of disparities in representation from one workplace to another and even within companies (for example, a trade union can be representative in one establishment and not in another: this is not hypothetical, this situation has already occurred). Representation would also tend to be unstable, varying between electoral cycles: a union may be recognized in one election then disqualified in the next, thereby excluded from union rights while awaiting new elections four years later. It is also obvious that the relationships between representative trade unions and works councils are reinforced by the 2008 Act. Elections of works councils are becoming the test of representativeness of trade unions, trade union delegates must stand for the election to be designated (also as deputies), collective agreements are only valid if they are signed by one or more unions with at least 30% of votes at the last professional elections and works councils can bargain when there are no representative trade unions. Professional elections in companies tend to become essential for trade unions even if paradoxically the main aim of the elections is still to elect a specific representation distinct from the trade unions. This

evolution can support the demand for the creation of a single representation structure,²³ even if trade unions are against this evolution, fearing that it could reduce their position in companies.

²³ F. Petit, 'Faut-il instaurer un canal unique de représentation dans l'entreprise?', *Revue de droit du travail*, février 2010.

Employment Representation at the Enterprise – Sweden

Jenny Julén Votinius*

1. Introduction

The aim of this report is to present and discuss the Swedish system for employee representation at the enterprise level, which is assumed here to include the workplace level. The Swedish system of employee representation is a so-called *single-channel* system.¹ This means that employees are represented by their unions alone, and that there are essentially no parallel forms of representation through systems within the company, such as work councils. The Swedish trade unions thus represent the employees in their capacity of parties in collective agreements, but they are also the employees' representatives on location both at company level and in the actual workplace.² Swedish trade unions have a long tradition of a very strong position in the labour market. In international comparison, Sweden has a long history of extremely high unionization rates, and a very large proportion of Swedish employees are employed in workplaces covered by collective agreement.³ In addition, most of the comprehensive labour law legislation is designed in such a way that otherwise mandatory rules may be deviated from by collective bargaining.⁴ To a large extent, this system leaves the regulation of working conditions to the labour market parties. The unions thus have a high potential for impact on working conditions, and the fact that mandatory law applies unless the parties agree otherwise, contributes to the enhancement of the trade unions' bargaining position. Nevertheless, beyond the fact that the labour market is organized in a way that requires and supports collaboration between employers and employee organizations, there is also labour regulation that is directly aimed at employee representation. This legal framework is the theme of this Report.

The report is composed as follows. After an introductory historical survey, a detailed description presents the various forms of employee representation at enterprise level in the Swedish labour market of today. Next, a description is provided of the collective bargaining system and how this relates to the system of employee representation, followed by a discussion of the extent to which employee representatives can really make a difference. The report concludes with a prospective evaluation of the existing system.

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¹ Cf. Biagi & Tiraboschi 2010, pp. 525 and Rose 2009, pp. 49.

² Cf. Weiss 2004, and Bamber & Lansbury 1998. Cf. Rose 2009.

³ Cf. Larsson 1992. However, the proportion of the labor force affiliated to a union decreased from 77% in 2006 to 71% in 2008. This has mainly been explained as a result of legislative reforms initiated by the centre-right government that led to increased membership fees for almost all unemployment funds, at the same time that tax reductions for both union fees and unemployment fund fees (40%) were abolished. As a consequence of the reforms, some unemployment funds increased their fee six times from one day to the next. Cf. Kjellberg 2011 and Medlingsinstitutet 2011.

⁴ Cf. Industrial Relations in Europe 2006.

2. Description of the employee representation system

a) Historical background

The Swedish labour market is characterized by the importance of the collective agreement, at the same time that there is comprehensive labour law legislation.⁵ An overwhelming proportion of those in the workforce are members of a union. Throughout the 1900s, the labour market parties have been given – and they themselves have also been taking – a significant responsibility for the development of labour relations and working life.

The first basic agreement between the parties in the Swedish labour market was signed in 1938 – the so-called Saltsjöbaden Agreement or master agreement. This agreement became the cornerstone of the centralized so-called Swedish model, which has been characterized by strong social organizations with great freedom to freely negotiate wages and other working conditions, and of a state that, for a long time, almost completely refrained from interference by way of labour legislation. The Saltsjöbaden Agreement was the culmination of a development that began in the 1870s with the trade union movement's emergence, which eventually led to the formation in 1898 of the Swedish Confederation of Trade Unions (LO), a nationwide organization for blue-collar workers. Shortly after, in 1902, the private employers joined forces in the Swedish Employers Federation (SAF). Another four years later, in December 1906, LO and SAF concluded their first formal agreement. This historically significant agreement, called the December compromise, meant that the employees recognized the managerial prerogatives – the employers' right to direct and to allocate work and the right to freely hire and fire. In exchange, employers acknowledged the right of employees to organize themselves into trade unions – which is the prerequisite for being able to influence the work and working conditions through collective bargaining. This was the first real step towards a formalization of the upcoming Swedish system of employee influence through union representatives.

Eventually, legislation was also introduced which set the legal framework for trade union cooperation.⁶ In 1928, the Collective Agreements Act was adopted, which among other things contained the important rule that parties to a collective agreement are not allowed to take industrial action against each other. The same law also established the Swedish Labour Court, which was given jurisdiction in matters of interpretation and application of collective agreements. In 1936, the law on freedom of association and collective bargaining was introduced. This law codified the contents of the December compromise concerning the right of association, and was also the first explicit regulation of the right and obligation to participate in union negotiations.⁷

As we noted, the conclusion of the Saltsjöbaden Agreement was in 1938. A central achievement in this main agreement was that the parties agreed on limiting the use of industrial action. Together with the December compromise, the signing of the Saltsjöbaden Agreement constitutes a milestone in the development of the Swedish labour market model. It marked the beginning of a new and harmonious era in the relationship between the social partners – an era characterized by consensus; the so-called Saltsjöbad spirit. Characteristic of the Saltsjöbad spirit was the parties' joint efforts to reach settlement by peaceful means,

⁵ Cf. Bruun *et al.* 1992.

⁶ Already in 1906, the Act Mediation in Labour Disputes was introduced, cf. Lundh 2006.

⁷ The Employment (Co-Determination in the Workplace) Act (1976:580).

and the ambition that they alone would solve conflicts and disagreements without interference from the government, for example by legislation. During the Saltsjöbad era, the 1946 Agreement in the private sector on shop floor committees was signed.⁸ With this agreement, procedures for information and consultation were introduced in Sweden for the first time. The agreement was renewed in 1964, and it lasted until the introduction of the Co-determination Act.

Through the Co-determination Act, in which the Act on Collective Agreement and the Act on Organization and Negotiation were merged, legal provisions on Co-determination were introduced in Swedish labour law. This was in 1976. On the whole, the 1970s was a decade marked by legislative work in the area of labour law in the Swedish setting, partly as a result of the fact that the social partners no longer managed to achieve consensus. The tranquility in the labour market persisted until the end of the 1960s, and then the relations became much more turbulent and conflicted.⁹ Eventually, the government considered that it had reason to intervene, which to a certain extent was done by introducing new labour law legislation. In addition to the Co-determination Act which was adopted in 1976, laws on the protection of trade union representatives, board representation, and employment protection were prepared and adopted during this decade. During the same period, the legislation on work environment and working hours was updated.¹⁰ All these laws are relevant for the issue of employee representation.

b) Structure of the Swedish employee representation system

As will be discussed further, the Swedish industrial relations system operates on three levels – the national level, the industry level and the local level (cf. Section 3). For the issue of employee representation in the enterprise, the local level is of primary interest. As regards the right to represent employees, it is initially important to emphasize that in workplaces the union which has a collective agreement in the workplace enjoys a very privileged position. This fact can hardly be stressed enough. The rules on employee participation apply almost exclusively to the established, or signatory, union. Employees who are members of a non-established trade union are in most cases not represented by their own representative. Nor is there any representative who specifically monitors the interests of non-unionized workers. The established union's privileged position should be understood with regard for the facts that the vast majority of the workplaces in Sweden are covered by collective agreement, the proportion of workers in Sweden with union membership is extremely high, and that normally, most employees in a workplace are members of the established trade union.¹¹

A major part of trade union activities are conducted on the local level, in the workplaces, where often one or more employees are trade union representatives. The representatives are elected by the employees in the workplace who are members in the established union, but they are formally appointed by the union. Of the union representatives, at least one has been empowered by the union to negotiate with the employer.¹² Many workplace-related problems are resolved through negotiations directly

⁸ Adlercreutz 1954, Edström 1994.

⁹ Johansson & Hellmark 1981. Nycander 2002.

¹⁰ The Employment (Co-Determination in the Workplace) Act (1976:580), the Act on Trade Union Representatives (1974:358), the Board Representation Act (1976:351), the Employment Protection Act (1974:12), the Work Environment Act (1977:1160), and the Working Hours Act (1982:673).

¹¹ Fahlbeck 2008, p. 18.

¹² The extent of negotiating mandate differs between unions.

in the workplace. However, if the workplace representatives do not succeed in the negotiations, they can get help from a representative from the industry-wide organization. Most organizations have departments across the country. The departments provide support for the elected representatives in the workplace, and represent members in workplaces with no elected officials. A department also has regional safety delegates, who deal with work environment issues and support the safety delegates in workplaces (cf. Section 2 d) ii). Each department includes a number of sections, arranged in either geographic or professional subdivisions. The sections can be described as a kind of member groups in which union members who are engaged in trade union issues can meet and discuss questions related to working life and trade union activities in the workplace.

The legal rules on employee representation on the enterprise level initially include provisions on co-determination, as well as provisions on union priority right of interpretation and union's right of veto. Under these latter provisions, and in certain cases, the union can temporarily stop the execution of employer decisions that appear to violate the law or collective agreements. In addition, there are provisions on representation on health and safety committees, on representation on company boards, and on representation in European Works Councils.¹³ There are also rules on the right to information for the representatives.¹⁴

The following section is structured thus: initially, the rules on co-determination will be dealt with, followed by a section where the union's priority right of interpretation and the union's right of veto are presented together. Thereafter, the report addresses the question of employee representation in health and safety issues. Finally, the report will briefly touch upon the Swedish rules on European Works Councils, and for employee representation on company boards.

c) Employee representation according to the Co-determination Act

i) Co-determination

Every trade union which has a member in the workplace enjoys a right to negotiate with the employer on issues concerning the relationship between the employer and the member of the union. This right of so-called general negotiations is intended both to allow the union to represent its member in a dispute on legal issues, and to allow trade union initiatives aimed at achieving collective agreements to be put in place.¹⁵ In addition to this right to general negotiations, the established trade union enjoys a substantial right to negotiations on matters where the employer has the exclusive power of decision. The right to negotiate concerns all decisions regarding, first, significant changes in the employer's activities, i.e. the business management, and second, significant changes in working or employment conditions for employees who belong to the organization. The employer shall, on his own initiative, enter into negotiations with the employees' organization with which the enterprise has a collective agreement, and this must be done *before* the employer makes this decision.¹⁶ Where there is extraordinary cause, the employer may make and implement a decision before he has fulfilled his duty to negotiate under the Act on Co-

¹³ The Employment (Co-Determination in the Workplace) Act (1976:580), the Act on Trade Union Representatives (1974:358), the Work Environment Act (1977:1160), and the Working Hours Act (1982:673), the Board Representation Act (1987:1245), the (1996:359) Act on European Works Councils.

¹⁴ There are also certain provisions on information in the Employment Protection Act (1982:80).

¹⁵ Cf. Schmidt et al 1997, pp. 141 ff., Edström 2002, p. 5.

¹⁶ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 11 subsection 1.

determination.¹⁷ However, this exemption applies only if a lack of time has arisen because of something beyond the employer's control.¹⁸

Regarding employee representation according to the Co-determination Act, the unit of representation can normally be defined as the workplace. For nationwide companies, this normally means an obligation to negotiate with local representatives from all units in the company on issues that are important from the standpoint of the entire company.¹⁹ However, there is no fixed legal definition of the representative unit in these cases. As stated by the Swedish Labour Court, the question of how the negotiations are organized is in practice a matter for the employer and the local union to agree upon – for example, certain issues in the negotiation process may be delegated to specific groups or levels within the employer's business.²⁰

The right to negotiate in matters where the employer has the exclusive power of decision belongs primarily to the established unions. However, in two situations the employer is obliged to initiate a negotiation with another union than the established one. Thus, in cases where a matter specifically relates to the working or employment conditions of an employee who belongs to an employees' organization in relation to which the employer is not bound by a collective agreement, the employer has the same obligation to negotiate with that organization. In addition, in cases where the employer is not bound by any collective agreement, he is obliged to negotiate with *every* union that has a member in the workplace, before making decisions relating to redundancy or relating to the transfer of an undertaking. The latter of these two cases has been introduced in the Co-determination Act in order to bring Swedish law in compliance with EU directives on information and consultation in connection with collective redundancies and business transfers.²¹

The employer's duty to initiate negotiations is extensive. According to the preparatory works, the obligation to negotiate shall include all questions in the employer's activities that have such an extent and implications for the employees, on which a trade union typically would be expected to want an opportunity to negotiate. The fact that the decision has seemingly only positive effects for the employees does not eradicate the employer's obligation to negotiate, nor does the fact that the employees in question have already given their consent to the planned changes. However, decisions and actions of a recurring nature usually dealt with in an already-established arrangement fall outside the scope of the obligation to negotiate.²²

It is equally essential that the employer initiates negotiation in due time. The Act on Co-determination requires that the negotiation must take place before the employer makes the decision in question. In cases concerning complicated decisions on important issues, negotiations with the union should be requested at a very early stage in the employer's decision-making process.²³ The fact that the negotiations take place early in the decision-making process is essential for the process to be effective and fulfill its function – to give

¹⁷ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 11 subsection 2.

¹⁸ Cf. Olausson & Holke 2001, p. 107.

¹⁹ Swedish Labour Court judgement AD 1981 No 61. Olausson & Holke 2001, p. 97.

²⁰ Swedish Labour Court judgment AD 1990 No 117, inter alia concerning whether the employer – a retail chain – had an obligation to negotiate with union representatives in each of its stores – thus the workplace level – or whether it was enough if the employer negotiated on the enterprise level.

²¹ Cf. Government Bill Prop 1994/95:102; Art 2, Directive 98/59/EC on *Collective Redundancies*, and Article 7, Directive 2001/23/EC on *Transfers of Undertakings*. Employment Protection Act (1982:80), Section 6 b implements the main content of the business transfers Directive in Swedish law.

²² Government Bill Prop. 1975/76:105 Bil 1 p. 353, c.f. Swedish Labour Court judgment AD 1980 No 117.

²³ Swedish Labour Court judgment AD 1986 No 53.

the employee representatives an opportunity to express arguments that really could affect the content of the employer's decision.²⁴ On the other hand, the employer must have time to acquire a sound basis of information and get an idea about various possible alternatives before calling for negotiation. This is necessary for the employer to be able to come prepared to the negotiation.²⁵ To sum up, in considering how early in the process the employer shall initiate a negotiation, a balance must be struck between the union's interest in being involved in early decision-making and the employer's interest in getting into the matter thoroughly before the discussion with the union takes place. Nevertheless, the crucial factor in such a balance is always that the negotiations must begin while there still is a genuine possibility for the unions to affect the employer's decision.²⁶

Although the Co-determination Act imposes an extensive duty on employers to initiate and conduct negotiations on matters that are within the employer's discretion, it does not give the union any real right to effective co-determination in these matters. The real significance of the provisions on co-determination negotiations, and connecting rules, is that the union receives information in advance on impending changes, and that the union is given the opportunity to pose questions and make comments and suggestions to the employer. The preparatory works for the Co-determination Act specify that the parties' obligation to negotiate includes an obligation to do their best to reach an agreement.²⁷ Still, the final decision lies entirely with the employer. There is therefore no legal obligation for employers to take adequate account of the union's view. However, if the employer in no way takes the union views into account, this may indicate that the employer had already made his decision when he called for negotiation. If so, this would constitute a violation of the Co-determination Act, in the sense that employer has initiated negotiations too late in the decision-making process.²⁸

In addition to the provisions on employee participation, the Co-determination Act contains two provisions that enable the representatives of the established trade union to actually intervene and make decisions – albeit temporary – regarding issues falling within the scope of the employer's discretion. These provisions allow for priority of interpretation and for right of veto for the established union in certain cases.

ii) Union's priority right of interpretation and union's right of veto

The union preferential right of interpretation means that the union involved in a dispute with the employer is entitled to request that the view they represent will prevail over the employer's opinion, until the dispute is finally resolved. The union's preferential right of interpretation applies to disputes in three areas: on the interpretation of provisions concerning pay or other remuneration (concerns provisions in collective agreements, employment agreements and legislation), on the interpretation of co-determination agreements (cf. the following Section), and on the interpretation of provisions concerning a member's duty to perform work.²⁹ The situation where the union preferential right of interpretation has the greatest practical importance is that of determining the obligation to work. Here, the preferential right of interpretation means that when a dispute arises regarding a union member's duty to perform work under the collective agreement by

²⁴ Cf. Government Bill Prop 1994/95:102 pp. 355.

²⁵ Cf. Government Bill Prop 1994/95:102 p. 156.

²⁶ Olausson & Holke 2001, p. 103.

²⁷ Government Bill Prop 1975/76:105, p. 362.

²⁸ Olausson & Holke 2001.

²⁹ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 33-34.

which the employer and the trade union are bound, the organization's position shall apply until such time as the dispute has been finally adjudicated.

If the employer considers that extraordinary reasons exist against postponement of the disputed work, the employer may, notwithstanding that union priority right of interpretation, require that the work is performed according to his interpretation in the dispute. The employee is then obligated to perform the work. Such an obligation will not arise, however, where the employer's interpretation in the dispute is incorrect and the employer realizes or should have realized this, or where the work involves danger to life or health, or where there are similar obstacles.

The union veto means that the union can block a decision on the part of the employer to plan to have temporary workers or a contractor perform work that would otherwise be performed by those employed in the workplace.³⁰ Normally, the employer is free to hire workers or outsource work to contractors, after having negotiated the matter with the union under the provisions on co-determination (cf. the previous Section). However, in some cases, there is an opportunity for unions to use their right of veto against such a measure. This possibility exists in cases where it can be assumed that the hired person or contractor is going to break the law or collective agreement, or where the arrangement otherwise is contrary to what is commonly accepted within the industry concerned. For example, the veto may be used if there is reason to believe that the proposed subcontractor pays undeclared wages, or if the contractor has been guilty of tax fraud, and one can assume that this could happen again. On the contrary, the right of veto may not be used to shut out serious businesses from obtaining assignment.

In the event that the union has exercised the preferential right of interpretation or the right of veto, even though they lacked grounds for their position, the union may become liable for damages against the employer. On the other hand, if the employer ignores the union's opinion in a case where they are entitled to exercise the preferential right of interpretation or the right of veto, the union can claim damages from the employer.

iii) Collective agreement on co-determination

As soon as an employer enters into a collective agreement on pay and general conditions of employment, the signatory trade union may request that the parties also enter into a collective agreement on co-determination regarding the conclusion and termination of contracts of employment, the management and distribution of work and the operation of the activity in general.³¹ As suggested by the law, the parties in a collective agreement regarding rights of co-determination may agree that decisions that would otherwise be taken by the employer shall be taken by employee representatives or by a joint body specifically constituted for such purpose.³² The general idea is that the co-determination agreements complement the provisions in the law, on right to negotiation in co-determination matters. Unlike legal rules, co-determination agreements can be designed to match the different conditions in companies, depending on the size, sector and organization.³³ The detailed content of a co-determination agreement is not prescribed by the Co-determination Act, but generally any question that falls within the employers' discretion can be made the

³⁰ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 38-40.

³¹ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 32 Subsection 1.

³² The Employment (Co-Determination in the Workplace) Act (1976:580), Section 32 Subsection 2.

³³ Government White Paper, SOU 1982:60 p. 28.

subject to such an agreement; examples include questions on working time or training for staff, but also production issues such as budget and the company's business focus.

There are no legal sanctions for employers who refuse to enter into participation agreements. The question of whether such an agreement could be reached is entirely up to the parties, and therefore depends on the bargaining power of the union in the particular situation.

iv) The trade union's right to information

A trade union in relation to which the employer is bound by collective agreement enjoys a comprehensive right to information from the employer. The established trade union shall thus be provided with information about the manner in which the business is developing, in terms of production and finance, and the guidelines for personnel policy. To the extent required by the trade union in order to protect the common interests of its members, the employer must allow the employee representatives to examine books, accounts, and other documents that concern the employers' business.³⁴

If the employer is bound by a collective agreement, other unions than the established one have no corresponding right to information. An employer who is not bound by any collective bargaining agreement at all must, however, continuously provide certain information to trade unions that have members in the workplace. These unions must be notified of how the operations are developing as regards production and financial aspects and similarly on the guidelines for personnel policy.³⁵

Following the EU Directive on collective redundancies, the Co-determination Act imposes a specific obligation to provide information prior to negotiation of termination as a result of redundancy.³⁶ In these cases, the employer shall notify the other party in writing and in good time regarding details about the situation and about the employees whose employment will be terminated.³⁷

v) Protection for activities of the representatives, and financial matters

In close connection with the Co-determination Act is the Trade Union Representatives Act, which is intended to provide union representatives in the workplace with opportunities to monitor the interests of employees, and ensure that the employer correctly applies laws, regulations and agreements. To that end, Trade Union Representatives Act contains both specific rules on employment protection for the union representatives, and rules regarding leave for performing trade union activities.³⁸

Under the Act, a trade union representative is a person appointed by the established union to represent the employees in the representative's own workplace. The Act does not apply until the union has notified the employer that the representative has been appointed. There may be more than one trade union representative at the workplace.

Employers must never hinder trade union representatives from fulfilling their duties. A union representative is protected against deterioration in working conditions or

³⁴ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 19.

³⁵ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 19 a. This provision was introduced as part of the implementation of the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, cf. Government White Paper SOU 2004:85 and Government Bill Prop 2004/05:148

³⁶ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. Cf. Nyström 2011.

³⁷ The Employment (Co-Determination in the Workplace) Act (1976:580), Section 15.

³⁸ The Trade Union Representatives (Status in the Workplace) Act (1974:358).

employment that might result from his position as union representative. This protection applies not only during the time the trade union tasks are performed, but also after the employee has resigned from his position as a trade union representative. The determining factor is whether the employee has suffered deterioration in employment because of his union assignments. This means that the law does not prevent an employer from making changes in a trade union representative's employment and working conditions, if this is done for other reasons. In these cases, however, the employer must give notice to both the union and union representative at least two weeks in advance. The union may then request consultations with the employer. The employment conditions of the union representative shall remain unchanged until the consultation has been held.³⁹

In cases of redundancy in the workplace, a union representative shall be given priority for future work – notwithstanding the rules of seniority in employment protection law – if this is of particular importance to the trade union activities in the workplace. However, this preferential right applies only if the union representative is sufficiently qualified for the work provided the by employer.⁴⁰

In addition to the important function of strengthening employment protection for trade union representatives, a central purpose of the Trade Union Representatives Act is to create real opportunities for trade union representatives to perform trade union activities in the workplace. Since the Act specifies the costs the employer must bear in this area, it is also relevant to the question of financing of employee representation in the workplace. The employer is thus required to make an area available in the workplace, where the union representative can conduct trade union work. A union representative is also entitled to leave of absence required for a trade union mission. The extent and timing of the leave is determined after consultation between the employer and the local union, and amount of time on leave must correspond with what is reasonable for the nature of the workplace.⁴¹ When a union representative takes time off to conduct trade union activities in his own workplace, the union representative is entitled to retain his employment benefits during the leave. This means that the trade union activities are managed during working hours. If union activities relating to the representative's own workplace are performed outside normal working hours, and if this is owing to employer requirements, the union representative is entitled to overtime pay. The employer is also required to pay additional costs such as travel and subsistence allowance, if the employer has caused those costs.

As we have seen, the Co-determination Act and the Trade Union Representatives Act aim to create conditions for effective cooperation between employers and employee representatives. Regarding issues on health and safety at the workplace, the Swedish labour market has a long history of precisely this kind of effective cooperation, and the work environment legislation is thus of central importance as regards employee representation in the workplace.

³⁹ The Trade Union Representatives (Status in the Workplace) Act (1974:358), Sections 4 and 5.

⁴⁰ The Trade Union Representatives (Status in the Workplace) Act (1974:358), Section 8. Cf. Government Bill Prop. 1974 No 88, p. 47.

⁴¹ The Trade Union Representatives (Status in the Workplace) Act (1974:358), Section 6.

d) Employee representation as regards health and safety matters

i) Safety committees

The Work Environment Act builds on the premise that employers and employees should cooperate at the local level on issues concerning the working environment.⁴² Though health and safety is primarily the responsibility of the employer, the Act makes clear that employers and employees together should achieve a healthy work environment.⁴³ The individual employee must demonstrate the caution needed in the work, and warn of any hazards that are discovered in the workplace.⁴⁴ However, the most visible element in the employees' participation in work environment issues is the influence exercised by the workers' representatives – the safety committee members and the local safety delegate.

A safety committee shall be appointed at every work site where at least fifty persons are regularly employed. A safety committee may also be appointed at worksites with fewer employees, if that is requested by the employees.⁴⁵ The safety committee is composed of representatives from the employer and from the employees on the work site. If possible, one of the employer's representatives shall have a managerial or comparable position, and thus possess the power to make decisions that are binding for the employer.⁴⁶ Employee representatives are appointed from among the employees by the established union in the workplace. If no such organization exists, the representatives are appointed by the employees. The Committee shall be determined taking into account the number of employees, nature of work and working conditions at the worksite. Thus, the exact number of members is not specified by law. In addition, there is no legal provision for how long the members shall remain in office.

The unit of representation of the safety committee is the work site – that is the place where the work is performed (cf. section 2 d) ii). In a larger company, the parties may split the company in protection areas and give each area a safety committee. It is also possible to set up a central consultation body over the individual protection committees.⁴⁷

The role of the safety committees is, first, to be proactive and to contribute to policy making in general questions about the work environment, and second, to participate in the planning and control of work environment. Thus, the Committee deals with questions about work environment at the workplace on a comprehensive and general level. This includes planning of the work environment in broad terms, and preparation of action plans. The Committee considers issues of occupational health, use of hazardous substances, and safety and health training. In addition, the committee discusses possible changes in the premises, working practices and in the business organization.⁴⁸ This means that some of the issues addressed within the safety committee are also covered by the Co-determination Act regulations on the established union's right to negotiate and to obtain information.⁴⁹ To avoid the inconvenience of having to address the same issues between the same parties in two different procedures, the parties in many workplaces have decided that instead of the safety committee, they will set up special so-called collaboration groups,

⁴² Government Bill Prop. 1976/77:149

⁴³ The Work Environment Act (1977:1160), Chapter 3 Section 1.

⁴⁴ The Work Environment Act (1977:1160), Chapter 3 Section 4.

⁴⁵ The Work Environment Act (1977:1160), Chapter 6 Section 8.

⁴⁶ Work Environment Ordinance (Arbetsmiljöförordningen, SFS 1977: 1166), Section 8.

⁴⁷ Government Bill Prop. 1976/77:149 p. 416 and Government Bill Prop. 1973:130 p. 162–164 and 203.

⁴⁸ Cf. Fahlbeck 2008 pp 33 and Adlercreutz & Mulder 2007, pp. 283.

⁴⁹ Cf. Swedish Labour Court judgement, AD 1980 No 63.

samverkansgrupper.⁵⁰ In these groups, health and safety issues are dealt with together with other matters relating to the business. The disadvantage of this solution was previously that a collaboration group lacked the status of the safety committee in the sense of the Work Environment Act. This meant, among other things, that the employees' representatives were outside the scope of the rules that apply to members of such a committee. As a result, the Work Environment Act was amended in 2011. The local parties now have the possibility – through collective agreement – to appoint another body that counts as the safety committee, though it is called something else and though it also deals with questions other than those related to the work environment.⁵¹

A safety committee has no formal decision-making authority. The Committee is a consultative body with the intention that the members, after discussion, shall agree on the decisions made. Since the employer's representative on the committee is a person with decision-making powers, the Committee's decision becomes nevertheless binding for the employer.⁵² In order to emphasize that the decisions of the safety committee shall be enforced, these decisions are usually accompanied by a statement indicating the period within which the measure is to be implemented. In the event that the members of the safety committee are divided over a decision, a member may request that the matter be referred to Work Environment Authority, which may act on the matter. It is very rare that this happens.⁵³

ii) Safety delegates

In a safety committee, at least one of the employee representatives must have the status of safety delegate. However, a safety delegate is required not only in the larger workplaces. Every worksite in which at least five employees are employed must have at least one safety delegate.⁵⁴ In smaller workplaces, the safety delegate is the only representative of the employees in matters specifically relating to the work environment. The work site may have more than one safety delegate. The reason may be that there may be more than one collective agreement in force at the work site, but it may also be that more than one safety delegate is needed because of the size of the work site. If there is more than one safety delegate at a particular worksite, one of the delegates shall be appointed senior safety delegate, with the task of co-ordinating the safety delegates' activities.⁵⁵

If there is a collective agreement in the workplace, a safety delegate will be selected as a representative of the union that has negotiated the collective agreement. A safety delegate is elected in the same way as other union trustees, for example, at the union's annual meeting or membership meeting. If there is no union in the workplace, employees may still choose a safety delegate. This can be done by agreement between workers, but it can also be done by elections with ballots. There are no legal rules that specify how this should be done.

When it comes to determining the unit of representation regarding health and safety issues, the crucial term is work site, which is used in the Work Environment Act. The term

⁵⁰ It is common that industry-wide agreements submit to the local parties to resolve the issue of collaboration according to the needs in the individual workplaces, cf. Government White Paper, SOU 2006:44, p. 67.

⁵¹ The Work Environment Act (1977:1160), Chapter 6 Section 9 a, c.f. Government Bill Prop. 2010/11:89 p.

⁵² Gullberg & Rundqvist 2004, p. 209.

⁵³ Fahlbeck 2008, p. 34.

⁵⁴ The Work Environment Act 1977:1160, Chapter 6 Section 2.

⁵⁵ The Work Environment Act 1977:1160, Chapter 6 Section 3.

is not defined by law, but it has a fairly solid meaning as the local, confined area in which an employer's business is conducted. In the large number of cases, this means that the worksite is the same as the workplace. It is primarily in temporary or mobile work units that the worksite must be distinguished from the workplace. In these cases, the scope of the worksite must be defined in a more precise manner, and this is done in agreement between the employer and the established union. For the determination of what is considered to be a confined worksite, the deciding factors will be the type of activity undertaken on the site, and whether the presence of a safety delegate is required to create a well-functioning local security organization at the work unit.⁵⁶

As with safety committees, a safety delegate shall participate in the planning of all matters relating to the physical and psychosocial work environment – issues such as rebuilding of premises, reorganization, introduction of new working methods or tools, and questions about stress at work. However, in addition, the duties also encompass active supervision of protection against illness and accidents in the area for which the safety delegate is responsible. This includes pointing out deficiencies in the work environment to the employer. The Work Environment Act requires that every employer shall systematically plan, direct and control their activities in a manner conducive to the working environment, and which meets the requirements prescribed by law. If the safety delegate notices that the employer does not comply with the legal stipulations in this respect, the safety delegate may require the employer to rectify the situation. The same applies in cases where the safety delegate discovers that the employer has not followed the rules of the Working Time Act. If the employer fails to comply with the request of the safety delegate, the representative may apply to the supervisory authority in matters relating to health and safety at work: the Work Environment Authority.

In addition, a safety delegate has extensive powers to intervene in the area of the employer's discretion, by way of the right to suspend work. The right to suspend work means that the safety delegate can interrupt work in progress. This right arises in two cases. First, a safety delegate can suspend work if he believes the work implies immediate and serious danger to an employee's life or health, and if it is not possible to avert the danger by appealing to the employer. Second, the safety delegate can always stop solitary work if that is called for from a safety viewpoint, and if the conditions for the work cannot be immediately improved by contact with the employer. The right to suspend work applies equally to work performed by agency staff.

The employer may request that the Work Environment Authority reviews a safety delegate's decision to suspend work. If so, the interrupted work is nevertheless to be suspended until the matter is finally determined.

iii) Protection for activities of the representatives, and financial matters

Both safety delegates as members of safety committees fall under the Trade Union Representatives Act, (cf. above Section 2 c) v). By this Act, and by specific provisions of the Work Environment Act, safety delegates and safety committee members enjoy a reinforced protection of employment and working conditions, as well as a more secure position in the event of redundancy. The Work Environment Act provides a more generous entitlement to leave for safety delegates and members of the safety committee than the rules on trade union representatives. Employee representatives of work environment issues are entitled to the leave needed for the assignment. Unless the employer and the

⁵⁶ Government Bill Prop 1976/77:149, p 379-381.

established union have agreed otherwise, the safety delegate determines independently how much time the safety work requires. Leave for the assignment as safety delegate or safety committee member is always associated with full employment benefits.

e) European Works Councils

Though Sweden has no national system of works councils, this form of employee representation also exists in the Swedish labour market in the form of the European Works Council established within the EU.⁵⁷ A European Works Council shall be provided in all undertakings or groups of undertakings that have a total of over 1,000 employees and at least 150 employees in each of at least two countries within the EU or EEA.⁵⁸ The central management shall, on its own initiative (or at the request of the employees) enter into negotiations on the establishment of a European Works Council, or the establishment of other procedures for information and consultation. The Works Council is established by agreement between the central management of the undertaking or group of undertakings, and a special negotiating body for the workers. The employee representatives in the negotiating body are appointed by each country's rules and practices, which in the Swedish context means that they are appointed by the established unions in the workplace. If there is no collective agreement in the workplace, the representatives are appointed by the local union with the most members in the undertaking or the group of undertakings.⁵⁹

A European Works Council has a right to information and consultation on transnational matters of importance for the workforce in terms of the scope of their potential effects, or matters that involve transfers of activities between Member States. To be transnational, the matter must concern employees in least two Member States.⁶⁰ The right to information and consultation relates in particular to the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.⁶¹ In the consultation, the employees' representatives must be allowed to meet with the central management and discuss in a way that provides them with clear and reasonable responses to their questions.⁶² In the consultations, the European Works Council and the employer can discuss common decisions or actions, but these must comply with laws and collective agreements.

The operating expenses of the European Works Council shall be borne by the central management. This includes costs connected with organizing meetings, such as the cost for interpretation facilities and the accommodation and travelling expenses of members of the

⁵⁷ European Works Council Act (2011:427), previously European Works Council Act (1996:359).

⁵⁸ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council. The Swedish rules in European Works Council Act (2011:427) apply also to European Companies and European Cooperative Societies as defined in Council Regulation on the Statute for a European Company 2157/2001 (c.f. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees) and in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (cf. Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees). Provisions on employee participation in cross-border activities can also be found in Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as implemented in Swedish law through the Act on Employee Participation in Cross-border mergers.

⁵⁹ Government Bill Prop. 2010/11:60, p. 58.

⁶⁰ European Works Council Act (2011:427) Section 1.

⁶¹ European Works Council Act (2011:427) Section 44, cf. Directive 2009/38/EC on European Works Councils.

⁶² European Works Council Act (2011:427) Section 46.

European Works Council.⁶³ The rules in the Trade Union Representatives Act on employment protection and entitlement to leave (cf. above Section 2 c) v) also apply to Swedish employee representatives in European Works Councils.

f) Employee representation on boards

If a company is bound by collective agreements, the employees are also entitled to representation on the board, provided that the company has at least 25 employees. Employees are normally entitled to two employee representatives on the board and one alternate for each such member.⁶⁴ In the case of corporations, all companies within a group are counted as one company in calculation of the number of employees. This means that a person employed in a small subsidiary with only a few employees has the right to participate and nominate representatives to the board of directors, as long as the entire group employs at least 25 workers. In addition, if the subsidiary has 25 or more employees, the employees have the right to be represented in that company's board as well.

The employee board members are appointed by the trade unions that have a collective agreement in the workplace.⁶⁵ The members must be employees of the company or the group. If multiple trade unions have collective agreements in the workplace, and they cannot agree on how the seats on the board shall be apportioned to them, there are statutory rules for allocation, based on the number of company employees who are members of each organization.⁶⁶ The office of an employee shall not exceed four years, but the trade union that has appointed the board member determines the exact scope of the legislative period.⁶⁷

In board work, employee representatives are equivalent to other members. However, there are rules regarding conflict of interest. These rules prevent employee representatives from participating when the board shall deal with matters on collective agreements, strikes or other matters where the union has a material interest that may conflict with the employer's interest. Like other members, employee representatives are entitled to receive the relevant meeting documents in a reasonable time before the meeting.⁶⁸ Rules applying to board members regarding confidentiality also apply to employee representatives, and this can cause problems when workers' representatives need to discuss matters with the employees within the company.⁶⁹

An employee representative is entitled to time off for board work and entitled to pay during such leave. Training for the task may be on paid time to some extent. Normally, the unions are responsible for this training.

3. Relationship with the collective bargaining system

In Sweden, employers and employees' representatives meet in collective bargaining and negotiations on three levels – the national level, the industry level and the local (workplace) level. On the national level, the public employers are organized in the Swedish

⁶³ European Works Council Act (2011:427) Section 32.

⁶⁴ Board Representation (Private Sector Employees) Act (SFS 1987:1245), Section 4. If the company conducts business in different branches and if it has, in the most recent financial year, in Sweden, employed an average of at least 1,000 employees, the employees shall be entitled to three representatives on the board of directors (board representation) and one alternate for each such member.

⁶⁵ Board Representation (Private Sector Employees) Act (SFS 1987:1245), Section 7.

⁶⁶ Board Representation (Private Sector Employees) Act (SFS 1987:1245), Section 8.

⁶⁷ Board Representation (Private Sector Employees) Act (SFS 1987:1245), Section 10.

⁶⁸ Board Representation (Private Sector Employees) Act (SFS 1987:1245), Section 11-13.

⁶⁹ Government Bill Prop 1987/88:10 pp. 65.

Agency for Government Employers (SAGE), and in the private sector most of the industry-wide organizations belong to the national employer federation Svenskt Näringsliv (formerly SAF, which merged in 2001 with Federation of Swedish Industries). On the employee side, most unions are included in one of three trade union confederations: the blue-collar confederation LO (Landsorganisationen), the white-collar confederation TCO (Tjänstemännens centralorganisation), and the confederation SACO (Sveriges akademikers centralorganisation), to which the industry-wide organizations' academics belong. Collective bargaining *can* take place on the national level, and does so on rare occasions, but it is primarily the industrial level that has been the focus for collective bargaining activity that sets the framework for the negotiations on the workplace level.⁷⁰ Today, industry-level collective agreements cover all sectors in the Swedish economy.⁷¹

Although collective agreements in Sweden are not legally extended to apply *erga omnes*, virtually the entire labour market is regulated by collective agreements. Even in workplaces with no collective agreement, terms in the industry agreement may still be applied, as the expression of established custom and practice.⁷²

However, these workplaces are relatively few. Approximately 91 percent of Swedish employees are employed by an employer who has signed a collective agreement.⁷³ About 71 percent of all employees are members of a union, but employers bound by a collective agreement are obliged to apply the collective agreement for all employees, regardless of whether or not they are union members.⁷⁴

The question of whether the employee representative system can supersede functions of collective bargaining is not relevant in the Swedish context. As we have seen, employees' representatives in the workplace are appointed by the union with which the employer has entered into collective agreements. This is true for both union representatives and for safety delegates and employee representatives on the local safety committee. The union representative who has been delegated to manage negotiations in the workplace has a mandate from the union to negotiate. The scope of this mandate may vary and is determined by the respective trade union.⁷⁵ Thus, in the Swedish context, employees' representation in the workplace and collective bargaining are parts of the same system. Therefore, there is no real tension in this area.

4. Function and dysfunction of the employee representative system

a) Function of the employee representative system

The main function of the employee representative with a mandate to negotiate in the workplace is to engage in negotiations. Among the most important subjects for negotiation are co-determination, wage-setting, deviations from rules on seniority and qualifications in cases of redundancies, and conflict resolutions arising from employment relations.

⁷⁰ Malmberg 2002.

⁷¹ Fahlbeck 2008, p. 14.

⁷² Bergqvist, Lunning & Toijer 1997, pp. 310 ff., Malmberg 1997, pp 144 ff, and Fahlbeck 2002.

⁷³ Medlingsinstitutet 2011.

⁷⁴ This obligation stems from the collective agreement, which means that only the union can require the employer to comply with it. The non-unionized employee himself cannot require to be covered by the collective agreement.

⁷⁵ Cf. for example Labour Court judgement AD 1993 No 88.

Co-determination, which is the subject of many negotiations, has been discussed above. These days, in terms of wage-setting, local representatives have come to play an important role.⁷⁶ Previously, in international comparison, Sweden had a highly centralized system of wage negotiations.⁷⁷ From the political side, this was a strategy to keep wage increases at a low level. Nevertheless, the Swedish trade unions were also in favor of the centralized system, because made it easier for the unions to maintain the so-called solidarity wage policy.⁷⁸ Employers also supported central negotiations, which they saw as a protection against wage inflation and labour disputes.⁷⁹ The fact is that Swedish employers were already pushing for the first central negotiations in early 1950s. The system worked with only minor changes until the 1980s, when profit shares, convertible loans to employees and other financial products in addition to the regular salary were introduced in some sectors of the labour market. This development undermined the solidarity wage policy.⁸⁰ Today, industry-wide wage negotiations still play a major role in wage formation. At the industry level, it is common that the parties conclude a framework agreement on how large the total salary increase should be. These agreements often also include instructions on a certain guaranteed increase in salary for every individual. However, many wage agreements have additional provisions requiring that the local parties agree on the actual wage increases for different groups and individuals. Thus, a very large proportion of the wage formation takes place through negotiation at the workplace level, and in these negotiations, employee representatives fill an important function.

Another area in which employee representatives can have significant influence concerns cases of redundancy. In these situations, the parties may establish a special collective agreement, whereby the employees in question for dismissal are arranged in order of priority. By entering into such a collective agreement, the employer is released from the obligation to comply with the rules of the Employment Protection Act on seniority and qualifications in case of redundancies.⁸¹ Subject to the prohibition of discrimination, the employer and the union are in principle free to decide the order of persons in such a list.⁸²

Finally, the local employee representatives also have an important role in conflict resolutions arising from employment relations. It is not always possible to solve a conflict at the local level. If the parties fail to agree, the matter goes to central negotiations, and the employer must then negotiate with representatives from the industry association. Ultimately, the dispute may be tried in the Labour Court. However, in the delicate initial phase, every conflict must be handled at the local level. In this situation, the support from an employee's representative may make a big difference to the employee who is in conflict with the employer.

⁷⁶ Cf. Kjellberg 1998 and Fahlbeck 2002 and K. Ahlberg & N. Bruun 1996.

⁷⁷ Cf. Lundh 2002.

⁷⁸ The solidarity wage policy is often attributed to the Swedish economist Rudolf Meidner. Briefly, the idea of solidarity wage policy implies that wages in general should be set at a level where high-productivity firms are making good profits, while low-productivity companies are eliminated. The idea is that this should lead to higher wages in the long run. Cf. Erixon 2003.

⁷⁹ During the time that the collective agreement is in force (normally between 1 and 3 years) the parties are bound by peace obligation, and are thus generally unable to use industrial action.

⁸⁰ Ahlén 1989 p. 343.

⁸¹ The Employment Protection Act (1982:80), Section 22.

⁸² Cf. Christensen 1983.

In addition, in everyday business, local representatives generally have an essential function as guardian of the interests of employees through information gathering and as protectors of health and safety matters.

b) Dysfunctions of the employee representative system

In the Swedish system, as we have seen, the established union has an overwhelmingly dominant position when it comes to representing employees in the workplace. The advantage of this system is that the collective agreements' interests coincide with the employee representatives' interests, making the system flexible and powerful. However, there are also problematic areas.

The privileged position that the established unions are ensured within the Swedish system rests, firstly, on an assumption that employees are members of a union – not just any union, but precisely in the union that has the collective agreement in their workplace. Secondly, the privileged position of the established unions rests on the assumption that workplaces have collective agreements. In cases where one or both of these two assumptions are not met, employment representation can by no means be described in terms of flexibility or powerfulness. Non-unionized employees and employees who are members of an organization other than the one that has a collective agreement enjoy little or no representation in the workplace. In addition, if the employer has no collective agreement, in most cases there is no one in the workplace who has legal capacity to represent the employees. From this, one can conclude that the employee's representation in a system like the Swedish one is vulnerable to employees' attitudes to union membership, and to employers' attitudes to collective bargaining. This vulnerability can be seen as problematic.

The fact that the Swedish system for employee's representation puts the established union in such a favourable position also seems to be problematic in view of the EU directive on information and consultation.⁸³ Bruun and Malmberg state that the requirements for information and consultation according to the directive have not necessarily been interpreted correctly by the Swedish legislator. They argue that in workplaces without collective agreement, and in order for Sweden to definitely comply with this directive, the employers' duty to initiate negotiation on matters within their own power of decision according to the Co-determination Act should have been extended to apply in relation to all trade unions.⁸⁴ This interpretation of the directive may not be the most probable, as the authors in fact acknowledge themselves, but it is nevertheless completely reasonable. It is also particularly interesting in the light of the fact that the right to information and consultation are recognized as human rights.⁸⁵

5. Evaluation and trend

As stated by Rönmar, the elements of the Swedish social dialogue – mechanisms and institutions, such as information, consultation and negotiation, co-determination and collective bargaining – are mutually reinforcing and can best be evaluated and analyzed in

⁸³ Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

⁸⁴ Bruun and Malmberg 2005.

⁸⁵ Article 27 of the EU Charter of Fundamental Rights, the Community Charter of Fundamental Social Rights of 1989 and the European Social Charter 1996 of the Council of Europe. Cf. Rönmar 2009, Hertzfeld Olsson 2003.

their own entity.⁸⁶ The Swedish industrial relations system is truly an intricate web of different mechanisms through which the importance of collective bargaining and the privileged position of the established trade unions are continuously stressed.

As we have seen, the importance of the collective agreement and the enhancement of the established union are evident not least in issues regarding employee representation on enterprise and workplace levels. To conclude, it is only the union with which the employer has signed a collective agreement – the established union – that may invoke the rules on priority right of interpretation, right to veto and the rules on collective agreement on an extended right to co-determination. The same applies to the rules on board representation. This means that non-unionized employees and employees who are members of an organization other than the one that has a collective agreement are not represented in these cases. It also means that all these provisions – on priority right of interpretation, right to veto, agreed extended right to co-determination and on board representation – lack impact in workplaces where there is no collective agreement. The established union has almost the same unique position when it comes to the employer's obligation to initiate negotiation on matters where the employer has the exclusive power of decision. Only in exceptional cases does this obligation apply in relation to a union with which the employer does not have a collective agreement – the case where the matter specifically relates to the working or employment conditions of an employee who belongs to the organization in question, and the case where an employer who is not bound by any collective agreement plans to make a decision relating to redundancies or the transfer of an undertaking (cf. Section 2 c) i). Thus, what remains are the issues of the appointment of health and safety representatives and of representatives of the negotiating bodies for European Works Councils. Apart from the particular case of negotiation concerning redundancies or transfers of undertakings, these are the sole issues, as regards employee representation, for which the Swedish legislation provides provisions also for workplaces without collective agreement. In workplaces where there are collective agreements, the established union also has an exclusive right to appoint the persons representing the employees.

This is what employee representation has looked like in Sweden for a very long time. However, at the moment, three elements of employee representation make it especially interesting to highlight the not uncomplicated nature of the established union's privileged position. The first factor is the declining percentage of unionized workers – with the current system, the fewer employees who are union members, the fewer employees who can be represented in the workplace.⁸⁷ The second factor is the developments that may follow the EU's judgments in *Laval* and subsequent cases, which ultimately could make it more difficult to achieve a collective agreement; with the current system, without collective bargaining, there is no employee representation.⁸⁸ The third factor is also a result

⁸⁶ Rönmmar 2009.

⁸⁷ This said, however, it should be recognized that the decline in union membership rate witnessed in recent years seems to have halted, at least temporarily. Medlingsinstitutet 2011, p. 35. It is also worth recalling that the unionization rate in Sweden is at 71 percent, which from an international perspective is still a very high figure.

⁸⁸ C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 and Labour Court judgement AD 2005:49. In *Laval* the ECJ, while recognising the right to take industrial action as a fundamental right, concluded that in some cases – like the *Laval* case – it can also constitute a restriction on the free movement of services provided for in Article 49 EC. In *Viking*, case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779, the right to take industrial action likewise was considered to illegitimately affect the freedom of establishment provided for in Article 43 EC. Subsequent cases are C-346/06 *Rüffert v land Niedersachsen* [2008] ECR I-1989 and C-319/06 *Commission v Luxembourg*. Cf. Marnberg & Sigeman 2008, Eklund 2008, Rönmmar 2008 a, Rönmmar 2008 b, Van Peijpe 2009.

of legal developments in Europe, and is a question of whether the right to information and consultation that the Swedish system really gives all workers is required under EU law. All these questions require further discussion.

Finally, it can be said that even if there can be reason to discuss some matters concerning the Swedish system of employee representation in the workplace, today there is no indication that the system is about to change. Even if the unionization rate in Sweden has declined, it is currently at 71 percent, which from the international perspective is still a very high figure. In addition, the proportion of workers covered by a collective agreement is unchanged at a high 91 percent.⁸⁹ Furthermore, Swedish politicians are fairly unanimous about the benefits of the existing system, and at the time of the *Laval* case in the European Court of Justice, representatives from the centre-right parties, which were previously critical of the union's strong position, also expressed support for the Swedish model and emphasized the importance of effective industrial relations and strong collective agreement.

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⁸⁹ Medlingsinstitutet 2011, p. 34. Cf. Kjellberg 2007.

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Systems of Employee Representation at the Enterprise UK Report

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1. Employee Representation at Enterprise Level

(i) Introduction

In the case of the UK, there is no straightforward answer to the question of the existence of a legal framework for employee representation at enterprise level. For much of the twentieth century, worker representation was regulated in accordance with the principle of voluntarism or *collective laissez-faire*: successive governments supported the creation and maintenance of trade unions and collective bargaining machinery as the preferred means of regulating industrial relations, but, as a general rule, they did not attempt to regulate employment relations directly by means of legislation.¹ Consequently, workers had no legal right to be represented collectively, and employers had no legal duty to recognise trade unions, or to bargain with, consult or inform trade unions or any other worker representatives. The institution and organisation of enterprise worker representation was a matter for employers, trade unions and workers to decide without legal compulsion, and without the guidance of a comprehensive legal framework. Today the picture is rather more complicated. A number of different laws exist which require employers to inform and consult the workforce at enterprise or workplace level in respect of specified subject matter (e.g. health and safety), or on the occurrence of certain events (e.g. the sale of the business). A further law facilitates, but does not require, the institution of a works council or other arrangement for the periodic information and consultation of employees within undertakings.² Much of this ‘information and consultation’ (henceforth ‘I&C’) legislation was introduced in implementation of European Union Directives. Quite separately from that legislation, statutory provisions exist which, in defined circumstances, can require an employer to recognise a trade union at enterprise level for the purposes of collective bargaining. The application of these I&C and union recognition laws is not comprehensive, however, nor do the laws seek to regulate worker representation at enterprise level comprehensively. As a consequence, employers, trade unions and workers retain a significant measure of freedom to organise worker representation without legal restraint, unilaterally or through collective or other workplace agreements.³

It has never been attempted in the UK to legislate for a single, coherent system of

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¹ R Dukes, ‘Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?’ 72(2) *Modern Law Review* 220-246.

² The Information and Consultation of Employees (‘ICE’) Regulations 2004 (SI 2004/3426) adopted in implementation of the European Directive 2002/14 (the ‘ICE Directive’).

³ By ‘workplace agreement’ is meant any agreement reached at workplace level between an employer and employee representatives (as opposed to a collective agreement reached between an employer and trade union or unions: Trade Union and Labour Relations Consolidation Act (‘TULRCA’) 1992, s. 178.).

worker representation. Separate, and in many respects different, provision has been made in the case of each of the European Directives dealing with I&C: the collective redundancies Directive, the transfers of undertakings Directive, the health and safety Directive, and the information and consultation of employees (ICE) Directive.⁴ Different provision, again, has been made for existing domestic law requirements to inform and/or consult with regard to collective bargaining,⁵ to offshore safety,⁶ and to occupational pension schemes.⁷ The end result is a confusion of legislative provisions requiring the information and consultation of employee representatives for a range of different purposes. Some of the legislation applies to all employers, some only to employers with a specified minimum number of employees. Some of the legislation requires to be ‘triggered’ before its provisions have application to a particular employer. Even where the legislation does apply, it does not always make detailed provision regarding the obligation to inform and consult, leaving some matters to be decided instead by the employer, acting unilaterally or in negotiation with employee representatives. Some of the legislation allows representatives to be appointed or elected on an ad hoc basis only; in other cases, the appointment or election of a standing representative body may be required. In some cases, the representatives of recognised trade unions have the right to act as the representatives of the employees for the purposes of I&C, in others they do not. And alongside this tangled web of I&C legislation sits the statutory procedure introduced in 2000 to facilitate the recognition of trade unions for the purposes of collective bargaining.

In light of the piecemeal nature of the UK legislation, it may be difficult, in what follows, to provide succinct answers and explanations to all of the questions raised. In the interests of clarity, trade union recognition at enterprise level is not referred to again in the remainder of part 1 of the report. The focus of part 1 lies instead with the I&C legislation and, in particular, with the statutory obligations to inform and consult that arise (i) in respect of health and safety, collective redundancies, and transfers of undertakings, and (ii) under the terms of the ICE Regulations.⁸ (The ICE Regulations, adopted in 2004 in implementation of the European ICE Directive, facilitate, but do not require, the institution of a works council or other arrangement for the periodic information and consultation of employees within undertakings.)

(ii) Historical development

Trade unions first emerged in the UK as local organisations.⁹ Many of the earliest unions were workplace-based: associations of workers employed in the same enterprise. As the unions grew, and became consolidated into national bodies, collective bargaining mechanisms were centralized. From the beginning of the twentieth century, negotiations

⁴ European Council Directives 98/59 (collective redundancies), 2001/23 (transfer of undertakings), 89/931 (health and safety) and 2002/14 (information and consultation of employees).

⁵ Contained originally in the Employment Protection Act 1975, ss. 17-21; now TULRCA 1992 ss. 181-185: provision of information to a recognised independent trade union for the purposes of collective bargaining.

⁶ Offshore Installations Safety Regulations 1989, SI 1989/971: consultation of elected employee representatives in all cases regardless of union presence.

⁷ Pension Schemes Act 1993 and the Occupational Pension Schemes (Contracting Out) Regulations 1996: consultation of union representatives where a union is recognised, and otherwise no consultation.

⁸ In other words, detailed explanations of the law are *not* provided in the case of the legal duties to provide information in respect of collective bargaining, and to inform and consult in respect of occupational pensions and offshore health and safety (see notes 4-6 above).

⁹ On the historical development of worker representation at enterprise level, see further R Dukes, ‘Voluntarism and the Single Channel: the Development of Single Channel Worker Representation in the UK’, (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87.

between unions and employers or employers' associations took place increasingly at sectoral level. Following this development, few trade unions preserved any special organisation at workplace or enterprise level. Where trade unions made provision for the appointment of representatives at the workplace – shop stewards – prior to 1914, it seems that the vast majority of these had only very minor administrative functions, and no authority to bargain with the employer.¹⁰

During both the First and the Second World Wars, there was a huge increase in the number of shop stewards in existence, and in the importance of the stewards' role in industry. In many cases, stewards were routinely involved in consultations with the employer over, for example, production and discipline matters, and even in negotiations over pay and working conditions, and in the organization of industrial action. Because collective bargaining tended, throughout the first part of the twentieth century, to proceed primarily at industry level, this meant the existence of two levels of union organization in industry and two loci for collective bargaining, industrial action and other union/management communications.¹¹ In line with the British voluntarist approach to the regulation of industrial relations, however, it was never attempted to regulate workplace representative bodies by means of statute, or to legislate, more positively, for the institution of a 'second channel' of representation. The representation of workers at all levels of organization remained a matter for individual trade unions and employers to regulate, unilaterally or in negotiation with each other. It was unusual, too, for trade unions and employers' associations to regulate the stewards' role formally within trade union rules or industry-wide collective agreements.¹² As a result of the lack of any centralized regulation of shop stewards, their exact role, and their relationship with union officials, varied across time, and from union to union and enterprise to enterprise.

After the Second World War, workplace organization continued to be a very important feature of UK industrial relations. At the end of the war, the first majority Labour Party Government, headed by Clement Attlee, considered the possibility of legislating to make workplace worker representation mandatory. The Government's efforts, at that time, were concentrated on nationalizing industry, and questions of worker representation were discussed primarily within the context of the nationalization plans. Ultimately, the Government decided not to legislate in this area, preferring to leave the matter of workplace consultation to be decided by trade unions and employers on an industry-to-industry or site-to-site basis.¹³ Viewed within a comparative context, it is striking that with its advocacy of joint consultation at the workplace and its continued support of voluntary collective bargaining, the Attlee Government promoted a system of industrial relations which was rather similar to the 'dual channel' systems that emerged in other European countries during the same period. The crucial difference between the UK and these other countries was, of course, the lack of any regulatory framework underpinning the workplace

¹⁰ G D H Cole, *Workshop Organisation* (London, 1973). 6- 9.

¹¹ H A Clegg, A Fox, A F Thompson, *A History of British Trade Unions since 1889, Vol.2, 1911-1933*, (Oxford, 1985). 16-20, 550-552; B. C. Roberts *Trade Union Government and Administration in Great Britain*. (London 1956)

¹² Engineering was unusual in this respect: in 1917 and 1919, the Engineering and National Employers' Federation concluded 'shop steward and works committee agreements' with a number of trade unions. Even these agreements, however, contained only very minimal provisions: A Marsh and E Coker, 'Shop Steward Organization in Engineering' (1963) 1 *British Journal of Industrial Relations* 170.

¹³ Provision was made in the nationalization legislation for consultation between management boards and trade unions as to the conclusion of agreements providing for the establishment and maintenance of joint machinery for collective bargaining regarding terms and conditions of employment, and consultation on *inter alia* safety, health and welfare issues. But the conclusion of such agreements was not rendered mandatory. Coal Industry Nationalisation Act 1946 s. 46; Civil Aviation Act 1946 s. 19; Transport Act 1947 s. 95; Electricity Act 1947 s. 53; Gas Act 1948 s. 57; Iron and Steel Act 1949 s. 39.

consultative committees.

In the period following the end of the War, an ‘unofficial’ shop steward system continued to grow on an ad hoc basis, without legal or other formal circumscription.¹⁴ By the mid-1960s, there was a growing perception in the UK that the economy was in crisis and that undisciplined shop stewards were at least partly to blame. In particular, there was concern regarding rising levels of unofficial strikes (strikes organized by shop stewards), wage inflation and reports of economically damaging ‘restrictive practices’. In 1965, the Government set up a Royal Commission under Lord Donovan (the ‘Donovan Commission’) ‘to consider relations between managements and employees and the role of trade unions and employers’ associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the Law affecting the activities of these bodies’.¹⁵ The recommendations of the Donovan Commission for the improvement of industrial relations involved, in essence, the endorsement of a move from sectoral to single-enterprise collective bargaining. Advocating, at the same time, a continued role for industry level collective agreements, laying down procedural rules and substantive minima, the Donovan Commission envisaged that trade unions should continue to operate at industry *and* at enterprise level. Importantly, however, it did not recommend that legislation should be used to regulate the relation between industry level and single-enterprise bargaining. This should continue to develop, within each industry and enterprise, as the parties wished, and the circumstances dictated.

In the years following the Report of the Donovan Commission, legislation and government policy reflected the Commission’s recommendations for an increased role for single-enterprise collective bargaining combined with a continued role for sectoral level negotiation. No attempt was made by government to regulate the relationship between the different levels of worker representation – for example, to establish a hierarchy between the industry, enterprise and workplace levels, or to demarcate the type of subject matter that should be negotiated at each level.

Beginning in the 1970s, legal duties to consult with representatives of the workforce in connection with specific matters were introduced in the UK, both pursuant to European Community legislation and in implementation of domestic policy.¹⁶ From 1978, British employers were required to consult workplace ‘health and safety’ representatives, appointed by a recognised trade-union,¹⁷ on arrangements for promoting and developing health and safety measures.¹⁸ From 1975, employers had to inform and consult trade union representatives in the event of collective redundancies, and from 1980, they had also to inform and consult such representatives wherever an undertaking or part thereof was transferred.¹⁹ In 1992, a decision of the European Court of Justice (CJEU) required amendments to the UK legislation which transposed the European Directives, so that in cases where no trade union was recognised by an employer, provision was made for the

¹⁴ ‘Unofficial’ because not sanctioned or regulated by ‘sector-level collective agreement.

¹⁵ Report of the Royal Commission on Trade Unions and Employers’ Associations 1965-1968.

¹⁶ Council Directives 75/129 (collective redundancies) and 77/187 (transfers of undertakings). The health and safety provisions were not, originally, the result of European legislation.

¹⁷ i.e. a trade union which has been recognised by the employer for the purposes of collective bargaining.

¹⁸ Provisions contained originally in the Health and Safety at Work etc Act (‘HSWA’) 1974 and the Safety Representatives and Safety Committees (‘Safety Reps’) Regulations, SI 1977/500; amended following the adoption of the European Council Directive 89/391: the Health and Safety Regulations, SI 1996/1513,

¹⁹ Employment Protection Act 1975 (now TULRCA 1992); Transfer of Undertakings (Protection of Employment) (‘TUPE’) Regulations 1980 (now TUPE Regulations 2006, SI 2006/246).

appointment or election of alternative employee representatives.²⁰ For the first time ever in the UK, legislation existed from 1995 which provided for employee representatives to be elected by the workforce.²¹ In accordance with that legislation, it was possible for representatives to be elected on an ad hoc basis, as and when the obligation to inform and consult arose. In other words, there was no obligation on the employer to organize the election of a works council or other standing body and no right, on the part of the employees, to demand the creation of such a body.²²

In 2002, a further European Directive was adopted (EC Directive 2002/14), which sought to encourage the institution of standing mechanisms or arrangements for the information and consultation of the workforce. The Directive was implemented in the UK in the form of the ICE Regulations 2004. Notwithstanding the terms of the Directive, the Regulations do *not* serve to introduce a comprehensive system of enterprise level worker representation in the UK. Though they apply, on the face of them, to all enterprises ('undertakings') with at least 50 employees, the Regulations have a number of features which render the creation of standing I&C mechanisms or arrangements in all or even the majority of such enterprises highly unlikely. Chief among these features is the requirement that the Regulations be 'triggered' either by the employer itself or at the request of a high percentage (between 10% and 30%) of employees. Unless and until the application of the Regulations is triggered, the employer is not required to do *anything*. If there is a successful trigger, the employer comes under an obligation to make arrangements for employees to appoint or elect representatives who must then negotiate, with the employer, an agreement to establish an I&C procedure. Only if there is a successful trigger, followed by a failure to appoint representatives, or to reach agreement, will 'standard provisions', prescribed within the Regulations, apply. The standard provisions regulate in some detail the election of employee representatives for the purposes of information and consultation, the manner in which those representatives must be informed and consulted, and the question of *what* they must be informed and consulted about.²³

An exception to the general scheme of the regulations is made for businesses in which a 'pre-existing agreement' (PEA) on I&C is in place on the date when a trigger occurs. According to the terms of the Regulations, a PEA may be instituted unilaterally by the employer, without the agreement of union or employee representatives, provided it is later 'endorsed' by the employees.²⁴ Nonetheless, the Regulations provide that the existence of a PEA may defeat a trigger: the PEA may be allowed to continue in existence without the bilateral negotiation of a new I&C agreement.

(iii) Unit of representation

With regard to the unit of representation, there is little consistency across the various I&C provisions. I&C is required in some circumstances at workplace level and in others at enterprise level. The health and safety provisions refer to health and safety within the

²⁰ *Commission of the European Community v UK* Cases C-382/92 and C-383/92 [1994] ICR 664.

²¹ The legislation was amended in 1995 (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI 1995/2587) and again in 1999 (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations, SI 1999/1925).

²² A limited exception to this general rule existed in respect of the health and safety legislation: if at least two health and safety representatives so requested, employers were obliged to establish a 'safety committee' with the function of 'keeping under review the measures taken to ensure the health and safety at work of [the] employees and such other functions as may be prescribed'. HSWA 1974, s2(7); Safety Repts Regulations, reg 9.

²³ ICE Regulations, regs 19 and 20.

²⁴ ICE Regulations, regs 2 and 8.

‘workplace’ and to the election of representatives by ‘groups’ of employees.²⁵ ‘Workplace’ is defined as: ‘in relation to an employee, any place or places where that employee is likely to work or which he is likely to frequent in the course of his employment or incidentally to it...’.²⁶ The collective redundancies legislation refers to redundancies within ‘establishments’ and to the election of representatives by the ‘affected employees’.²⁷ The term ‘establishment’ is taken from European Union law and has been defined by the Court of Justice to mean, broadly speaking, a workplace rather than an enterprise.²⁸ The transfer of undertakings legislation refers to the transfer of ‘an undertaking, business or part of an undertaking’, and again to the election of representatives by the ‘affected employees’.²⁹ ‘Undertaking’ is, again, a European law term, defined by the CJEU to mean, broadly, enterprise rather than workplace.³⁰ The ICE Regulations refer to the negotiation of information and consultation agreements within ‘undertakings’ and require that any negotiated agreement cover all employees in the undertaking.³¹

(iv) Role and power of the representative body

The I&C legislation makes provision for the information and consultation of employees directly and/or through their representatives. Employee representatives elected or appointed under the legislation have rights to be informed and consulted in respect of specified subject matters or on the occurrence of a specified event. Under the health and safety legislation, employers are legally required to consult representatives on specified matters including the introduction of measures which may substantially affect the health and safety of employees.³² Under the transfer of undertakings legislation, employers must inform and consult the representatives of any affected employees whenever an undertaking is transferred, on *inter alia* the measures which they intend to take in connection with the transfer.³³ Under the collective redundancies legislation, employers must inform and consult the representatives of any affected employees whenever they propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.³⁴ They must consult, in such cases, on *inter alia* the possibility of avoiding dismissals or mitigating the consequences of the dismissals.³⁵

Where an employer implements some standing mechanism for the information and consultation of employees, either voluntarily, or under the terms of the ICE Regulations, provision may be made for information and consultation regarding a wide – or narrow – range of subjects. Where a mechanism is introduced voluntarily, or pursuant to a ‘negotiated agreement’ reached under the ICE Regulations, there are no legal restrictions as

²⁵ Health and Safety Regulations.

²⁶ Health and Safety Regulations, reg 2.

²⁷ TULRCA 1992, ss. 188 and 188A.

²⁸ The term ‘establishment’ is taken in this context from Directive 98/59. It has been defined by the CJEU as follows: ‘the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an establishment, for the unit in question to be endowed with a management which can independently effect collective redundancies.’ *Rockfon*: Case C-449/93 (1995).

²⁹ TUPE Regulations 2006 2006, regs 3, 13.

³⁰ See eg *Dr Sophie Redmond Stichting v Bartol* Case C-29/91 (1992); *Henke v Gemeinde Schierke und Verwaltungsgemeinschaft ‘Brocken’* Case C-298/94 (1996).

³¹ ICE Regulations 2004, reg 16. ‘Undertaking’ is defined in reg 2 as: ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain’.

³² Health and Safety Regulations.

³³ TUPE Regulations 2006, reg 13.

³⁴ TULRCA s. 188 (1).

³⁵ TULRCA s. 188 (2).

to the subject matter which can or must be covered.³⁶ Where a mechanism is introduced under the ‘standard provisions’ of the ICE Regulations, provision is made for a minimum range of subjects which information and consultation must cover.³⁷ Under the terms of the standard provisions, an employer must provide the employee representatives with information on the recent and probable development of the undertaking’s activities and economic situation. It must inform and consult the representatives regarding the situation, structure and probable development of employment within the undertaking, and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking. It must also inform and consult on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in the collective redundancies and transfer of undertakings regulations.

Neither ‘information’ nor ‘consultation’ are terms of art in the UK. It follows that unless otherwise defined within the legislation or in case law, they can be understood to have their normal dictionary meaning. Generally speaking, ‘information’ is used in the legislation to refer to the one-way transmission of data by the employer to the employees or employee representatives.³⁸ ‘Consultation’ is used to imply a two-way process, whereby the employer not only transmits data but also considers responses to that data. In some circumstances, employers are required by the legislation to ‘consult with a view to reaching agreement’.³⁹ Use of this phrase is intended to emphasise that consultation should entail an effort on the part of the employer to take account of employee concerns. It should mean more, in other words, than simply giving notice of certain information and listening to the responses of the employee representatives. ‘Consultation with a view to reaching agreement’ does not amount to a right to negotiation. It differs from a right to negotiation in that it leaves managerial prerogative intact – decision making power lies ultimately with the employer and is not shared with the employee representatives.⁴⁰

(v) Formation of the representative body

In the case of *collective redundancies* and *transfers of undertakings*, the obligation to inform and consult is mandatory. It does not follow, however, that the creation of a workers’ representative body is mandatory. If the relevant employees are employees in respect of whom the employer recognises a trade union for the purposes of collective bargaining, the employer is required to inform and consult ‘representative of the trade union’.⁴¹ No special workplace representatives need be designated. If there is no such recognised trade union, the employer can choose to inform and consult either: (a) any existing employee representatives; or (b) employee representatives elected especially. In the latter case, the employer comes under an obligation to arrange for the election of employee representatives by the relevant employees for the purposes of information and consultation.⁴² The election may proceed in an ad hoc manner, as and when the obligation to inform and consult arises. Where the employer invites the employees to elect representatives and the employees fail, within a ‘reasonable time’, to do so, the legislation

³⁶ ICE Regulations 2004, reg. 16.

³⁷ ICE Regulations 2004, reg 20.

³⁸ ‘Information’ is defined in reg 2, ICE Regulations 2004, as: data transmitted by the employer to the representatives or directly to the employees.

³⁹ TULRCA 1992, s. 188(2); TUPE Regulations 2006, reg 13(6); ICE Regulations 2004, reg 20(4)(d).

⁴⁰ M. Hall and M. Edwards, ‘Reforming the Statutory Redundancy Consultation Procedure’ (1999) 28 *Industrial Law Journal* 299.

⁴¹ TULRCA 1992, s. 188 (1B); TUPE Regulations 2006, reg 13(3).

⁴² TULRCA 1992 s.188A, TUPE Regulations 2006, reg 14.

also makes provision for the direct information of individual employees.⁴³

In respect of the *health and safety* legislation, the obligation to consult is mandatory.⁴⁴ If the employer recognises a trade union for the purposes of collective bargaining, the ‘recognised trade union’ has a right to appoint ‘safety representatives from amongst the employees’ for the purposes of consultation.⁴⁵ If at least two safety representatives so request, the employer is then obliged to establish a ‘safety committee’ with the function of ‘keeping under review the measures taken to ensure the health and safety at work of [the] employees and such other functions as may be prescribed’.⁴⁶ If the employer does not recognise a trade union, it can choose either to consult employees directly, or, to consult any representatives of the group of employees ‘who were elected, by the employees in that group at the time of the election, to represent that group for the purposes of [health and safety] consultation’.⁴⁷ In the case of health and safety, then, application of the information and consultation provisions might result in the formation of a standing ‘safety committee’ or, alternatively, in the institution of mechanisms for the direct information and consultation of employees, without the appointment or election of employee representatives.

The ICE Regulations work rather differently. No obligations fall to an employer under the Regulations unless and until their application is triggered.⁴⁸ Following a successful trigger, the employer comes under two obligations: first, to arrange the appointment or election of employee representatives, and second, to enter into negotiations with those representatives regarding the institution of a mechanism for informing and consulting employees.⁴⁹ (Note that employee representatives must be appointed or elected in this context regardless of whether or not a trade union is recognised for the purposes of collective bargaining.) In deciding on the nature and detail of such a mechanism, the employer and employees representatives enjoy a very large measure of freedom.⁵⁰ They are free, for example, to agree that information and consultation should proceed directly i.e. without employee representatives.⁵¹ While it may become necessary, then, following a successful trigger, to arrange the appointment or election of employee representatives to undertake the task of negotiating an agreement on the institution of a new I&C procedure, it may not be necessary, according to the terms of that new procedure, to designate employee representatives to be informed and consulted. In other words, the employee representatives are free to negotiate themselves out of a job! ‘Pre-Existing Agreements’ may also provide for direct information and consultation only, without the need for employee representatives.

(vi) Election of the representatives

Health and safety: Under the health and safety legislation, safety representatives may be appointed by a recognised trade union⁵² or, where there is no recognised union, they may be elected by the employees.⁵³ No procedures are stipulated for the appointment

⁴³ TULRCA 1992, s. 188 (7B); TUPE Regulations 2006, reg 13(11).

⁴⁴ HSWA 1974, s. 2(6); Health and Safety Regulations, regs 3 and 4.

⁴⁵ HSWA 1974, s. 2(4); Safety Reps Regulations, reg 3.

⁴⁶ HSWA 1974, s2(7); Safety Reps Regulations, reg 9.

⁴⁷ Health and Safety Regulations, reg 4(1)(b).

⁴⁸ ICE Regulations 2004, reg 7.

⁴⁹ ICE Regulations 2004, regs 7 and 14.

⁵⁰ ICE Regulations 2004, reg 16.

⁵¹ ICE Regulations 2004, reg 16(1)(f)(ii).

⁵² HSWA 1974, s. 2(4); Safety Reps Regulations, reg 3.

⁵³ Health and Safety Regulations, reg 4(1)(b).

of representatives by trade unions, though the legislation does direct that any such representative ought ‘so far as is reasonably practicable either [to] have been employed by his employer throughout the preceding two years or [to] have had at least two years experience in similar employment’.⁵⁴ No procedures are stipulated for the election of representatives by the employees. Where the representatives are appointed by a recognised trade union, the question of the duration of mandate is left to the union.⁵⁵ Where representatives are elected, the legislation does not stipulate a particular period of mandate but does provide that a person shall cease to be a representative where either: she notifies the employer that she does not intend to represent the employees; she ceases to be employed in the group of employees which she represents; or the period for which she was elected has expired without that person being re-elected.⁵⁶

Collective redundancies and transfers of undertakings: Under the collective redundancies and transfers of undertakings legislation, an employer may choose to consult representatives elected especially for that purpose. The legislation makes fairly detailed provision regarding the election of such representatives. It stipulates that candidates for election must be ‘affected employees’ and, further, that no affected employee may be ‘unreasonably excluded’ from standing.⁵⁷ It directs that the employer must determine the number of representatives, so that there are sufficient representatives to represent the interests of all affected employees having regard to their number and class.⁵⁸ It gives the employer a right to choose whether employees should be represented by representatives of all affected employees or of particular classes.⁵⁹ It rules that all affected employees must be entitled to vote in the election, and that the election must be conducted so as to secure that those voting do so in secret, and that the votes are accurately counted.⁶⁰ Finally, it places the employer under a general duty to ‘make such arrangements as are reasonably practical to ensure that the election is fair’.⁶¹ As for the elected representatives’ duration of mandate, the collective redundancies and transfer of undertakings legislation provides that, prior to the election, the employer must prescribe the employee representatives’ term of office, ensuring that it is of sufficient length to enable the consultative process to be completed.⁶²

ICE Regulations: The ICE Regulations refer to the appointment or election of two different types of employee representative: those who represent the employees during the course of the negotiation of an I&C agreement (the ‘negotiating representatives’); and those who are informed and consulted on behalf of the employees under the terms of a negotiated agreement, or, alternatively, as provided for in the standard provisions (the ‘information and consultation representatives’). Different provision is made within the Regulations regarding each type of representative.

It is the duty of the employer to arrange the appointment or election of ‘negotiating representatives’. The manner of appointment or election is not specified within the Regulations, except insofar as it is provided that, ‘all employees of the undertaking must be entitled to take part in the appointment or election of the representatives’ and that ‘the

⁵⁴ Safety Repts Regulations, reg 3(4).

⁵⁵ Safety Repts Regulations, reg 3(3).

⁵⁶ Health and Safety Regulations, reg 4.

⁵⁷ TULRCA 1992, s 188A(1)(e) and (f); TUPE Regulations 2006, reg 14(1)(e) and (f).

⁵⁸ TULRCA 1992, s. 188A(1)(b); TUPE Regulations 2006, reg 14(1)(b).

⁵⁹ TULRCA 1992, s. 188A(1)(c); TUPE Regulations 2006, reg 14(1)(c).

⁶⁰ TULRCA 1992, s. 188A(1)(g), (h), (i); TUPE Regulations 2006 2006.

⁶¹ TULRCA 1992, s. 188A(1)(a); TUPE Regulations 2006 2006, reg 14(1)(a).

⁶² TULRCA 1992, s. 188A(1)(d); TUPE Regulations 2006 2006, reg 14(1)(d).

election or appointment of the representatives must be arranged in such a way that, following their election or appointment, all employees of the undertaking are represented by a representative'.⁶³ It follows that all union members and union representatives who are also employees of the undertaking are entitled to stand for election, while union members and officials who are not employees of the undertaking have no right to stand for election. With the agreement of the employer, it is possible that union representatives could act as the negotiating representatives for unionized sections of the workforce, however, since the legislation does not guarantee this as a right, it is essentially at the discretion of the employer. No provision is made for trade union involvement in the appointment or election of the representatives – for example, there is no union right to access the workplace in the period before the election for the purposes of campaigning, and no right to influence the choice of candidates. As for the duration of mandate of negotiating representatives, the Regulations appear to envisage that they shall continue to act as negotiating representatives until an agreement has been negotiated.⁶⁴

'Information and consultation representatives' may be appointed or elected in two ways: (a) under the terms of a negotiated agreement; or (b) where the 'standard provisions' apply, according to terms set out in the Regulations.⁶⁵ Where an employer and negotiating representatives agree the manner of appointment or election of I&C representatives as part of a 'negotiated agreement', they are entirely unrestricted as to the provision they make.⁶⁶ Again, they may agree that union representatives should act as I&C representatives, but they are under no obligation to do so, even where a union is recognised within the undertaking. Under the standard provisions, the 'relevant number' of I&C representatives must be elected in a ballot of the employees, the relevant number being one representative per fifty employees, up to a maximum of 25 representatives. The ballot must be arranged by the employer in accordance with Schedule 2 to the Regulations, which requires the employer to appoint an independent ballot supervisor and, having formulated proposals as to the ballot arrangements, to consult on those proposals, insofar as is reasonably practicable, with the employees' representatives, or the employees themselves. Under Schedule 2, all 'employees of the undertaking' are entitled to stand for election. The wording of the Schedule appears to leave open the possibility that union and other employee representatives who are not themselves employees might also stand, with the agreement of the employer.⁶⁷

As to the duration of mandate of information and consultation representatives, the legislation is silent. Where such representatives are elected under the terms of a negotiated I&C agreement, the duration of mandate will be decided in accordance with that agreement. Where they are elected in conformity with the standard provisions, the question of the duration of mandate will be for the employer and employees' representatives to decide.

Protection against employer interference in election process?

In the case of elections held in connection with *collective redundancies* and *transfers of undertakings*, employers have a general duty to 'make such arrangements as are

⁶³ ICE Regulations 2004, reg 14. 'Negotiating representative' is defined under Regulation 2 as 'a person appointed or elected under regulation 14'.

⁶⁴ ICE Regulations 2004, reg 14.

⁶⁵ ICE Regulations 2004, regs 2, 19.

⁶⁶ ICE Regulations 2004, regs 16.

⁶⁷ ICE Regulations 2004, Schedule 2, 2 (d): 'any employee who is an employee of the undertaking at the latest time at which a person may become a candidate in the ballot is entitled to stand in the ballot as a candidate as an information and consultation representative'.

reasonably practical to ensure that the election is fair'.⁶⁸ There is no requirement in the case of such elections for employers to employ an independent person to conduct the election, and there is no rule to prohibit the employer or third parties attempting to put pressure on employees to vote in a certain way. It is unclear whether conduct of this nature (ie conduct aimed at pressuring the employees to vote in a certain way) would violate the duty to make 'arrangements' to ensure that the election is fair.

Under the *health and safety* legislation, as noted above, no procedures are stipulated for the appointment of representatives by unions or for the election of representatives by the employees.

Where an election is held under the standard provisions of the *ICE Regulations*, the employer falls under an obligation to appoint an independent ballot supervisor and, having formulated proposals as to the ballot arrangements, to consult on those proposals, insofar as is reasonably practicable, with the employees' representatives, or the employees themselves.⁶⁹ Again, there is no rule which expressly prohibits the employer or third parties from attempting to put pressure on employees to vote in a certain way.

Involvement of non-standard employees?

The I&C legislation varies, again, in respect of the provision made for the involvement of non-standard employees in the election procedures. All of the legislation refers to 'employees'. Since 'employee' is then defined as someone who works under a contract of employment,⁷⁰ the term must be taken to exclude many types of 'atypical' worker, including apprentices.⁷¹ It does not exclude workers on probation unless they are undergoing training to the extent that they do not qualify as employees.⁷² As a general rule, part-time employees are not excluded and are counted in the same way as full-time employees. The exception to this rule is contained in the *ICE Regulations* which direct that part-time employees should be counted as half persons for the purposes of calculating the total number of employees of the employer.⁷³ In respect of collective redundancies, fixed-term employees working under a contract for a fixed term of three months or less (or under a contract made in contemplation of the performance of a specific task which is not expected to last for more than three months) are expressly excluded from the application of the provisions.⁷⁴

The health and safety, collective redundancies and transfer of undertakings legislation does not explicitly require that employees involved in elections should be employed by any particular employer. This would seem to leave open the possibility that dispatched temporary workers and workers of contractors etc might be appointed or elected as representatives and might be allowed to vote in an election of representatives, provided that they fell under the definition of 'employees'. The wording of the *ICE Regulations* is rather narrower. With regard to the election of 'negotiating representatives', it is provided that, 'all employees of the undertaking must be entitled to take part in the appointment or election of the representatives' and that 'the election or appointment of the representatives must be arranged in such a way that, following their election or appointment, all employees of the undertaking are represented by a representative'.⁷⁵ Reference to 'employees of the

⁶⁸ TULRCA 1992, s. 188A (1)(a); TUPE Regulations, reg 14 (1)(a).

⁶⁹ *ICE Regulations*, reg 19 and Schedule 2.

⁷⁰ TULRCA 1992, s. 295; HSWA 1974 s 53 (1); TUPE Regulations 2006 2006 reg 2; *ICE Regulations*, reg 2.

⁷¹ See e.g. *Dunk v George Waller & Sons Ltd* [1970] 2 QB 163.

⁷² *Daley v Allies Suppliers Ltd* [1983] IRLR 14.

⁷³ *ICE Regulations*, reg 4(3).

⁷⁴ TULRCA 1992, s. 282(1).

⁷⁵ *ICE Regulations* 2004, reg 14.

undertaking' would seem to exclude dispatched temporary workers (employees) and employees of contractors etc. It is possible that with the agreement of the employer, such workers could nonetheless take part in the election of employee representatives. With regard to the election of information and consultation representatives under the standard provisions, the ICE Regulations refer to 'a ballot of [the employer's] employees'⁷⁶ and direct that any employee 'of the undertaking' may stand as a candidate.⁷⁷ Again, this would seem to exclude dispatched temporary workers and workers of contractors etc.

(vii) *Deliberation and decision-making of the representative body*

The manner of deliberation and decision-making of the representative body tends not to be regulated within the legislation but is left to the employee representatives to decide among themselves, or in negotiation with the employer.

(viii) *Protection for activities of the representatives*

Employee representatives (whether officials of a trade union or not) have the right not to be unfairly dismissed, selected for redundancy, or subjected to any 'detriment' by reason either of their participation in an election, or their performance of the functions and activities of such representatives.⁷⁸

(ix) *Bearer of the cost*

As a general rule, employers bear the cost of information and consultation. They must finance elections, allow employee representatives time off with pay,⁷⁹ and provide facilities such as office space.⁸⁰ The ICE Regulations constitute a partial exception in this respect since they do not confer any obligation upon the employer to provide facilities or accommodation to the employee representatives.

(x) *Rate of adoption in reality*

The best information regarding information and consultation in practice dates from the 2004 Workplace Employment Relations Survey.⁸¹ According to that information, the legislation dealing with health and safety, collective redundancies and transfers of undertakings appears to have a pretty high success rate in terms of the number of employers who inform and consult their employees. That said, consultation appears to proceed in a high number of cases *directly* with employees rather than through a representative. In 2004, employers consulted with employees or their representatives about proposed redundancies in 75% of all enterprises where redundancies had been proposed.⁸² Consultation was less likely where no union was recognised.⁸³ Where

⁷⁶ ICE Regulations, reg 19.

⁷⁷ Schedule 2, para 2(d).

⁷⁸ Employment Rights Act 1996, ss 103, 105, 128, 120, 47; ICE Regulations, regs 30-33.

⁷⁹ ERA 1996, s 61; Health and Safety Regulations, reg 7; ICE Regulations, regs 27 and 28.

⁸⁰ TULRCA 1992, s 188 (5A); Health and Safety Regulations, reg 7.

⁸¹ B. Kersely, C. Alpin, J. Forth, A. Bryson, H. Bewley, G. Dix, S. Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (London and New York 2006) ('WERS 2004'). The Workplace Employment Relations Study is the flagship survey of employment relations in Britain. It collects data from employers, employee representatives and employees in a representative sample of workplaces. It has been undertaken five times in 1980, 1984, 1990, 1998 and 2004. Fieldwork for the sixth WERS is now underway and is scheduled to be completed by mid 2012.

⁸² *Ibid.* 202.

⁸³ In workplaces without a recognized union there was consultation in 74% of workplaces; in workplaces with a

consultation did occur in non-unionized workplaces, it was usually direct with the employees concerned, rather than through elected representatives.⁸⁴ In the case of *health and safety*, only 1% of workplaces had no arrangement for consultation regarding health and safety in 2004.⁸⁵ Since the health and safety legislation was amended in 1996 to allow for direct consultation with employees, however, consultation through representative channels has declined markedly, while direct consultation has become much more prevalent.⁸⁶

In terms of the incidence of information and consultation, it seems that the ICE Regulations have not been as successful. As yet, no evidence has been collated regarding the total number of agreements negotiated and implemented pursuant to the legislation.⁸⁷ The limited data available suggests that the Regulations have prompted some increase in the incidence of I&C mechanisms within UK companies. But it also suggests that the creation of such mechanisms has been almost wholly employer-led: there is very little evidence of employees or trade unions acting to pull the ‘trigger’ in order to require the bi-partite negotiation of an I&C agreement. Moreover, a recent qualitative study has found that I&C mechanisms in the UK tend to be used almost exclusively for one-way communication (information) rather than for the meaningful consultation of employee representatives.⁸⁸

(xi) Employee representation on corporate boards

There is no legal provision for employee representation on the corporate boards of UK companies. Provision is made, in implementation of European law, for employee representation on the boards of European Companies.⁸⁹

2. Relationship with Collective Bargaining

(i) Unionization and collective bargaining today

Since the 1980s, trade union membership levels have decreased very significantly and the coverage of collective agreements has contracted.⁹⁰ In 1980 65% of workers were union members; by 2010 that figure had fallen to 26.6%. In 1980 about 70% of employees’ wages were determined by collective agreement; by 2010 this had fallen to around 30%. These overall figures obscure a clear division between the private sector of the economy, where unionisation is at a remarkably low ebb, and the (now reduced) public sector where unionisation has declined more slowly. In 2005, it was argued in an influential article that trade unions have changed not only in terms of their size and

recognized union, there was consultation in 86% of workplaces.

⁸⁴ In workplaces without a recognized union, consultation took place through a union rep in 4% of cases, a joint committee in 7% of cases, an alternative non-union rep in 6 % of cases and directly in 71% of cases.

⁸⁵ WERS 2004, 203-5.

⁸⁶ In 2004, employers consulted directly with employees regarding health and safety in 57% of workplaces, and with joint committees or individual representatives in only 42% of cases. In workplaces with a recognised trade union, consultation proceeded through a representative in 63% of cases, and directly in 37% of workplaces.

⁸⁷ M Hall, ‘EU Regulation and the UK Employee Consultation Framework’ (2010) 31(4) *Economic and Industrial Democracy* 55-69.

⁸⁸ M Hall, S Hutchinson, J Purcell, M Terry and J Parker, ‘Promoting Effective Consultation? Assessing the Impact of the ICE Regulations’ *British Journal of Industrial Relations* (published online 28.06.2011).

⁸⁹ EU Council Directive 2001/86; SI 2004/2326. See P Davies, ‘Workers on the Board of the European Company?’ (2003) 32 *Industrial Law Journal* 75-96.

⁹⁰ WERS 2004; Department for Business, Innovation and Skills, Trade Union Membership 2010 (National Statistics 2010).

strength but also in terms of their *function*.⁹¹ Increasingly, since the 1980s, trade unions are characterised less by their engagement in representation and regulation and more by their provision of services to union members: legal services, commercial services, social services. Where collective bargaining does still occur, it is often a rather impoverished version of its former self, with employers and unions meeting only infrequently to agree a narrow core of terms and conditions of employment which may *not* include rates of pay.

(ii) Trade unions and non-union employee representatives

It is perfectly possible in the UK for trade unions to be recognised for the purposes of collective bargaining at the level of the enterprise, and for workers to be represented at the enterprise by the trade union engaging in collective bargaining.⁹² Sectoral collective agreements are unusual but still exist in the public sector and in a few isolated pockets of the private sector.⁹³ It is much more common for collective bargaining arrangements to be instituted between single employers and trade unions. Under the statutory recognition procedure introduced in 2000, a legal obligation to recognise a trade union may be imposed upon a single employer in certain specified situations.⁹⁴ It is perfectly possible, therefore, for employees in the UK to be represented at enterprise level by a trade union *and* by non-union employee representatives elected for the purposes of information and consultation. Where that is the case, relations between the two are not regulated by law. There is no legislative provision which seeks to ensure that I&C and collective bargaining proceed at separate levels of industry, and no rule which establishes a regulatory hierarchy between the two. Where dealt with in statute, collective bargaining and consultation are divided with respect to the appropriate subject matter of each and regulated in separation.

Notwithstanding the passing of a whole range of information and consultation legislation in past decades, it remains perfectly possible for trade unions and employers to regulate aspects of enterprise level worker representation within a collective agreement. For example, a collective agreement could be reached which provided for the institution of works councils or shop stewards committees within a particular organisation. As mentioned above, it is also quite possible for a trade union to be recognised by an employer in relation to a single enterprise and, thus, for workers to be represented at that enterprise by the trade union engaging in collective bargaining. Less formally, trade unions that are recognised at an organizational level higher than the individual enterprise might have unofficial, lay representatives (shop stewards) within the enterprise.⁹⁵ Such workplace representatives might perform a variety of roles including bargaining collectively in respect of terms and conditions of employment and representing individual workers in disputes with the employer.⁹⁶ The role of the shop steward is purely a matter for the relevant trade union and employer to decide and is not regulated by law.⁹⁷ Alternatively, or indeed additionally, an employer might act unilaterally to institute some mechanism for employee representation at work, be it through the appointment of a non-union employee representative or the creation of some kind of representative committee.⁹⁸

⁹¹ KD Ewing, 'The Function of Trade Unions' (2005) 34 Industrial Law Journal 1-22.

⁹² This is much more likely in the case of large workplaces: WERS 2004, 118.

⁹³ e.g. in the printing, clothing, and motor vehicle retail and repair sectors.

⁹⁴ TULRCA 1992, Schedule A1. The Schedule came into force in June 2000.

⁹⁵ WERS 2004, 123-4.

⁹⁶ WERS 2004, 150.

⁹⁷ Though shop stewards do have legal rights to paid time off for carrying out union duties and for training: TULRCA 1992 ss. 168-169.

⁹⁸ WERS 2004, 125-132.

Again, these non-union representatives and representative committees might perform a variety of roles within the workplace, and again the nature of the roles performed is not regulated by law.⁹⁹ In cases where representative committees are created, some allowance might be made for a measure of trade union involvement in the committee.¹⁰⁰

Only a trade union can bargain collectively with an employer,¹⁰¹ and only an independent trade union can make an application for recognition under the statutory recognition procedure.¹⁰²

In some cases, the representatives of recognised trade unions have the right to act as the representatives of the employees for the purposes of I&C, in others they do not. (Specifically: the *collective redundancies* and *transfer of undertakings* legislation provides that in cases where the relevant employees are employees in respect of whom the employer recognises a trade union for the purposes of collective bargaining, the employer *must* inform and consult ‘representative of the trade union’. The *health and safety* legislation provides that where the employer recognises a trade union for the purposes of collective bargaining, the ‘recognised trade union’ has a right to appoint ‘safety representatives’ for the purposes of consultation.) No rights are accorded, in any of the legislation, to trade unions which have a presence in the enterprise but are not recognised for the purposes of collective bargaining. Where employee representatives are to be elected by the workforce, no attempt is made to link the elected representatives to union-based structures. Trade unions are not accorded any right, for example, to select the candidates for elections, or to enter the workplace for the purposes of campaigning, or to attend meetings of the elected representatives.

3. Function and Dysfunction of the Employee Representation System

(i) *Main Functions of the Representatives*

As should be clear from the foregoing, employees in the UK may be represented at enterprise level by a variety of individuals and office holders: by trade union officials and by union shop stewards; by ‘representatives’ elected or appointed for the purposes of information and consultation in connection with collective redundancies, transfers of undertakings or health and safety; by ‘representatives’ elected or appointed under the ICE Regulations to be informed and consulted regularly by the employer in connection with a range of matters; by uni-partite or bi-partite staff committees instituted unilaterally by the employer. The main functions of the representatives vary in accordance with their identity. Trade union officials and shop stewards might perform a variety of roles including bargaining collectively in respect of terms and conditions of employment, being consulted in respect of work organisation and the management of the enterprise, and representing individual workers in disputes with the employer (see further below). Employee representatives elected or appointed for the purposes of information and consultation will act principally to be informed and consulted under the terms of the relevant legislation.

⁹⁹ WERS 2004, 150.

¹⁰⁰ WERS 2004, 126.

¹⁰¹ TULRCA 1992, s. 178.

¹⁰² TULRCA 1992, Sch A1, para 6. ‘Independent union’ is defined *ibid.* s. 2.

(ii) Dismissals

Trade unions and other employee representatives have no legal rights to be informed or consulted in respect of the dismissal of employees, except in the case of collective redundancies as outlined above. Dismissal is thus a matter which falls squarely within the managerial prerogative, except insofar as that prerogative is limited by the employees' individual rights not to be unfairly dismissed.

In disciplinary meetings between employers and individual workers, including meetings held in contemplation of the dismissal of the worker, workers have a right to be accompanied.¹⁰³ Specifically, a worker has the right to be accompanied by a trade union official employed by the union itself; by any official of the union (including lay officials or shop stewards) whom the union has reasonably certified as having experience of or training in acting as a worker's companion for these purposes; or by any other worker of the employer. During the course of the disciplinary meeting, the union official or other companion of the worker must be permitted to speak in order to put the worker's case, to sum up that case, and to respond on the worker's behalf to any view expressed at the meeting. The companion must also be permitted to confer with the worker during the meeting.

(iii) Defects of the Current Employee Representation System

Two principal criticisms may be made of the current system of employee representation in the UK. The first is that the legal framework is complex and not unitary, making different provision for I&C in a variety of contexts and different provision again for trade union recognition, with no legal regulation of the interaction or integration of different types of representation and representative. The second criticism is that the current system leaves a very significant percentage of British employees without any means of collective representation at work whatsoever. Each of these criticisms is returned to in part 4 below.

With respect more specifically to the I&C legislation, the legal regulation of employee representation in the enterprise can be criticised along three lines. First, the legislation provides only for rights to information and consultation, and not to negotiation or codetermination. Second, except in those cases where a trade union is recognised for the purposes of collective bargaining, the legislation does little to ensure the involvement of trade unions in I&C procedures. In many instances, it allows for I&C to proceed with representatives appointed or elected on an ad hoc basis specifically for that purpose. This raises concerns regarding the fitness of such representatives to represent their colleagues effectively: they may have little or no training and experience, and little access to financial and other resources including legal advice.

The third main criticism of the I&C legislation arises in respect of the sanctions that may be applied to employers who fail to comply with their legal obligations. (This criticism does not extend to the health and safety legislation, where non-compliance with the duty to consult may constitute a criminal offence.¹⁰⁴) In the case of the *collective redundancies* and *transfers of undertakings* legislation, the sanction takes the form of a payment to each individual employee who is dismissed without proper information and consultation of her representatives.¹⁰⁵ The key difficulty here is that such payment is

¹⁰³ Employment Relations Act 1999, ss 10-5.

¹⁰⁴ Health and Safety at Work Act 1974.

¹⁰⁵ TULRCA 1992, ss. 188 and 9.

dependent upon the employee representatives, who must first take the matter of non-information or consultation to an employment tribunal. There is no mechanism whereby an individual employee can force a representative to make a claim before the tribunal. In the case of the ICE Regulations, non-compliance by the employer may result in a claim before the Employment Appeals Tribunal and the imposition of a financial penalty up to £75,000, depending on the seriousness of the breach.¹⁰⁶ As a financial penalty, any such sum will be paid to the UK Treasury and not to the affected employees. That being the case, the question arises whether employees or employees' representatives will always feel motivated to raise a claim before the Tribunal, since they will have nothing to gain in material terms from doing so. The question arises too, whether the threat of a fine of even £75,000 will be sufficient to persuade a large employer that it must comply with the terms of the Regulations.

4. Evaluation and Trends

With respect to the evolution of the regulation of worker representation at enterprise level in the UK over the past two or three decades, there are a number of trends to note. The first of these is falling trade union membership and falling coverage of collective agreements. In 2010, as we have seen, 26.6% of UK workers were union members, down from 65 % in 1980. In 2010, around 30% of employees had their pay and conditions determined by collective agreement, down from around 70% of the workforce in 1980. The second trend is a decline in recent years in the incidence of worker representation at workplace or enterprise level. In 1998, 20% of workplaces had a consultative committee, while in 2004, only 14% of workplaces had such a committee. In 1998, 55% of workplaces with recognized trade unions had an on-site representative (shop steward) from at least one of those unions; in 2004, the equivalent figure was 45%. Moreover, in 2004, only 5% of workplaces had a 'stand-alone' non-union worker representative (i.e. an individual representative as opposed to a consultative committee). It may be concluded from these figures that a high percentage of UK employees are *not* represented collectively at work, either by a trade union, a consultative committee or a stand-alone non-union representative. Whether the ICE Regulations have the potential to buck this trend is far from clear.

In terms of the legislative regulation of workplace worker representation, there has been a general trend, since the 1970s, to ever more legislation. Much of the legislation has its origins in the European Union and represents the transposition, in the UK, of European Directives. Because of the continued reticence of successive UK governments to legislate for a single, coherent system of employee information and consultation, the transposition of each European Directive has meant the addition of a further layer of complexity to the law in this area. Amendments to the original Directives or decisions of the CJEU have from time to time necessitated amendment of the UK legislation in a way that has resulted – inadvertently – in further complexity.

As to the nature of the legislation in question, there has been a clear trend in recent years towards keeping legislation 'light' and encouraging businesses and employees to negotiate arrangements of their own – or, at least, to decide much of the detail of information and consultation arrangements on their own. With the adoption of the European Works Council Directive in 1992, there was a decisive change of tactic within

¹⁰⁶ ICE Regulations, regs 22 and 23.

the European Union in respect of regulating information and consultation. In the 1970s and 1980s, efforts were focused on the harmonization of laws in the different Member States through the application, throughout the Union, of detailed rights to be informed and consulted. By reason of resistance to such harmonizing legislation on the part of some Member States (notably the UK), it proved, however, very difficult to have legislation of this type adopted. From the 1990s, legislative innovations in this area have been directed at creating 'frameworks' rather than detailed rules. The idea behind the creation of regulatory frameworks is that different Member States should be free to make different provision for rights to information and consultation in line with their existing laws and practices. The ICE Directive 2002/14 provides a clear example of this framework approach.

The change of approach within the European Union to legislating for information and consultation rights has coincided with a growing preference, on the part of UK governments, for keeping regulation light with the aim of maximizing flexibility. Since the time of the Thatcher administration, but also under John Major and Tony Blair, UK legislation in the area of information and consultation has been characterized by the 'minimalist approach' taken to transposition of the European Directives. In an effort to appear business-friendly, governments have tended to do the very least that they understand themselves to be required to do in order to comply with the terms of the Directives. The result, arguably, has been the passing of complicated pieces of legislation that don't always provide very effective or useful rights for workers. Ironically, the legislation taken as a whole is not even particularly business-friendly: reticence to legislate for a single, coherent system of information and consultation, combined with a minimalist approach to transposition of the EC Directives has meant very frequent amendments to the law in this area, piecemeal change, and a great deal of complexity of legislative provisions.

A further important factor that has impacted on the nature of the I&C legislation and its impact in practice has been the attitude of trade unions thereto. Dating back to the time of the First World War, any discussion of the merits of using legislation to regulate worker representation has tended to be strongly influenced by the suggestion that such legislation might support the institution and bargaining position of *non-union* worker representatives.¹⁰⁷ Generally speaking, trade unionists have tended to be hostile to the idea of legislating to regulate workplace worker representation for that very reason. A partially defensive approach to the use of legislation in this area was discernible in the unions' reaction to the adoption of the ICE Directive in 2002. There would appear to be concern, still, among trade unionists that the introduction of workforce-wide information and consultation arrangements might undermine or marginalise union recognition. In contrast to these views, some commentators have highlighted the potential of information and consultation legislation to act as a support to trade union organization, providing them with a 'foot in the door' of non-unionized workplaces, and allowing them the opportunity to show their worth as worker representatives. Reference has been made to German experience, which shows that the successful operation of a works council can stimulate trade union organisation, and to British experience during and after the Second World War, when the existence of consultative committees appears to have prompted workers in some cases to join trade unions.

Whether trade union organisation has, in practice, benefited from or been hindered by the I&C legislation is not altogether clear. Evidence collected prior to 2004 does not

¹⁰⁷ R. Dukes, 'Voluntarism and the Single Channel: the Development of Single Channel Worker Representation in the UK', (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87.

support the idea of information and consultation machinery acting as a springboard for union recognition, insofar as union membership and influence in British workplaces has continued to decline despite the increase in the range of I&C legislation.¹⁰⁸ Nor does it show unambiguously that non-union representation methods are replacing union representation and bargaining structures. Consultative committees have been found to exist both as a complement to, and as a substitute for, union representation. The proportion of workplaces with a recognized trade union which have a consultative committee is notable higher than the proportion of workplaces without a recognized union which have a consultative committee. That said, consultative committees also constitute the most common form of representative body in workplaces where there are no union members.¹⁰⁹ Overall, both non-union and union representation are in decline.¹¹⁰ What has increased, particularly during the 1990s, is the prevalence of direct methods of communication, such as regular meetings between senior management and the workforce, or between junior management and the workers for which they are responsible.¹¹¹ This suggests a growing employer preference for direct methods of communication over representative methods.

As for the ICE Regulations, it is still too early to tell whether they have been and will be used to marginalize trade unions. By reason of the way that the Regulations have been drafted (with no guarantee of union participation in I&C arrangements, and many decisions left in the hands of employers), they certainly have the potential to be used in that way. And there is some very limited evidence that they have been so used in the seven years since the Regulations came into force.¹¹² That said, the ICE Regulations also have the potential to be used more positively by trade unions. For example, a union which was recognised with regard to only a very narrow range of matters might be able to use the ICE Regulations to secure rights to be informed and consulted over additional matters. Where a trade union wished to be recognised but did not yet have the support of a majority of the relevant employees, it might be in a position to arrange an employee trigger and have its representatives elected as negotiating and/or I&C representatives. That done, the union may find itself better placed to recruit new members and to make a successful bid for recognition.¹¹³ Of course, the likelihood that union involvement in I&C procedures might facilitate recruitment will be undermined where those procedures amount to only infrequent meetings about a limited range of issues.¹¹⁴ To date, existing evidence suggests that, with some few exceptions, trade unions have *not* actively sought to use the Regulations in positive ways.¹¹⁵

¹⁰⁸ WERS 2004, chapter 5.

¹⁰⁹ WERS 2004, 126.

¹¹⁰ See above, part 3.1.2.

¹¹¹ J. Forth and N. Millward, *The Growth of Direct Communication* (London, 2002); WERS 2004, 134-9

¹¹² M. Hall, 'A cool response to the ICE Regulations? Employer and trade union approaches to the new legal framework for information and consultation' (2006) 37 *Industrial Relations Journal* 456, 466.

¹¹³ These opportunities have been recognised by the TUC: S. Veale 'Your Voice at Work' (2005)

¹¹⁴ K. Ewing and G. Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626, 641.

¹¹⁵ M. Hall, 'EU regulation and the UK employee consultation framework'. Unpublished paper given at the LSE workshop on economic democracy, 22-23 May 2008.

System of Employee Representation at the Enterprise in Korea

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I. Introduction

Korea is a rare example in Asia where economic development and political democracy was achieved simultaneously in a relatively short time. At the core of such a rapid development lies contribution of labor law and labor relations. The nationwide labor campaign, which was initiated by the pro-democracy protest in June 1987, has brought about both quantitative and qualitative changes in the labor movement of Korea. The changes in labor law this period substantially removed influences from the authoritarian regime (the Fifth Republic). In 1997, further amendments in labor law reflected globalization of economy and changing working environment. Presidential committees were set up to encourage social dialogue between the labor and management; examples include Presidential Commission on Industrial Relations Reform (PCIRR) and The Tripartite Commission.

Employee representation system has gone through many changes with the dynamic process of labor law development. Today, three kinds of representative systems coexist at the enterprise level under current Korean labor law: Trade Union, Labor-Management Committee and the Employee Representative under Labor Standard Act ("LSA"). Trade union, based on freedom of organization, has been the primary representative body that enjoyed constitutional protection of collective rights. On the other hand, Employee Representative under LSA is a temporary representing system for certain limited items prescribed by the law that requires majority consent of the employees. Labor-Management Committee is a statutory body that promotes consultation between the workers and the management. These systems are regulated under its own respective legislation.

The primary purpose of this article is to introduce the current law and status regarding the three representative systems. Chapter II describes main features of the legislation and current usage of each system. Chapter III focuses on a critical analysis of the three systems, pointing out legal issues and problems that arise from the relationship of the systems. Lastly, Chapter IV concludes with suggestion for an alternative model that corrects and improves the problems of current system which better suits Korean labor law scheme and workplace realities.

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II. Three kinds of employee representative system in Korea: Trade Union, Labor-Management Committee, and Employee Representative under LSA

A. Trade Union

1. General framework of Korean labor law

To begin with, a general understanding of Korean labor law structure would be necessary before moving on to the details of trade union. The labor law of Korea consists of two categories: individual labor laws and collective labor laws. Individual labor laws have their constitutional basis in Article 32, Section 3 of the Constitution of Korea, which provides that the standards of working conditions shall be determined by law in such a way as to guarantee human dignity. Individual labor laws are concerned mainly with the particulars of the employment contract: the rights and duties of the parties concerned, wages, working hours, leave, holidays, annual vacation, the safety and welfare of employees, accident compensation, employment security, protection against discrimination, vocational training, and labor inspection.

Collective labor laws have their constitutional basis in Article 33 of the Constitution which provides that to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action. Since these workers' rights are regarded as an element of fundamental human rights, they cannot be violated or infringed upon by the state or by employers. Any laws or orders which deny this constitutional guarantee would be deemed unconstitutional and declared null and void by the courts. Collective labor laws reinforce individual labor laws with the same purpose of improving workers social and economic welfare. However in achieving their goals, the former uses the organized power of workers while the latter modifies the traditional principles of the civil law. Thus, the collective labor law is a body of rules governing the collective relationship between employers and workers (or representative organizations, typically trade unions), such Labor Relations Commission Act, the Trade Union and Labor Relations Adjustment Act, etc.

More precisely, the collective labor law is concerned mainly with trade unions' freedom or right to organize, relationships between trade unions and workers or their associations at workplace and at industrial and national level, collective bargaining, labor disputes, and the settlement of labor disputes. These two categories of the labor law are closely related not only legally but also in practice. Collective agreements made under the collective labor law take precedence over labor contracts and conditions agreed on under the individual labor law. Thus the activities of labor unions and the outcome of such activities do affect the working conditions of individual workers.

Furthermore, a new area of labor law deserves attention. A statutory body called the Labor-Management Committee was introduced so as to relieve aggressiveness of collective bargaining and to promote employee's participation in the management. The Act on Promotion of Worker Participation and Cooperation (hereinafter, "APWPC") regulates the Committee's composition and its main functions.

2. Basic concepts of the trade union in Korea

Art. 33. Sec. 1 of the Constitution declares that "to enhance working conditions,

workers shall have the right to independent association, collective bargaining, and collective action.” As the subject of collective labor rights, trade union in Korea is supposed to enjoy constitutional protection. Legislation or practices that unduly limit or infringes upon the rights of the trade union is likely to be ruled unconstitutional.

Trade union is regulated under the Trade Union and Labor Relations Adjustment Act (“TULRAA”). Art. 5 of TULRAA clearly states that workers have the freedom to form or join a union, but in the past authoritarian regimes, the government has made various attempts to suppress the unionization of workers through the amendment of the law and with the labor policy. The oppressive policies are now abolished through amendments.

To establish a labor union, the union must meet procedural and substantive requirements under the law. TULRAA specifies the following situations as conditions for disqualification, based on which the Ministry of Employment and Labor examines each application: when participation in unions by the employer or persons who always act for the benefit of the employer is allowed; when a union receives assistance mainly from the employer in the payment of the expenses thereof; when the purpose of union is only to promote mutual benefits, moral culture, and welfare undertakings; when membership of union is granted to those who are not workers; and when the aims of the organization are mainly directed at political movements (Article 2. Sec. 4 of TULRAA).

Before the 1997 amendment, a second union that represents the same category or unit of workers with the existing union was forbidden (namely, the prohibition of multiple unions). The 1997 amendment has made it possible to organize multiple unions at above the enterprise level, but due to a heated debate of pros and cons, grace period was given so that multiple unions would be implemented as of July 2011.

3. Collective bargaining and collective agreement

A trade union may demand that an employer meet at reasonable times and confer in good faith about pending problems concerning working conditions. If the right to bargain is exercised fairly, the trade union is exempted from civil and criminal liability. The employer cannot reject reasonable demands of the trade union. If he refuses to bargain with the trade union without justifiable reasons, the employer is subject to punishment under unfair labor practice provision (Art. 81. Sec. 2 of TULRAA).

A collective agreement shall be in writing and both parties concerned shall sign and affix their seals thereto, and the parties to a collective agreement shall report to the administrative authority within fifteen days from the date of execution of a collective agreement. The administrative authority may order changes to or cancellation of the Labor Relations Commission if they are illegal or unjustifiable (Art. 31 of TULRAA). No collective agreement shall provide for a valid term exceeding two years (Art. 32 of TULRAA).

In Korea, collective agreements are given “normative effect” – i.e. an overarching legal binding force that overrules other kinds of workplace agreements. If any portion of a works agreement or a labor contract violates standards concerning conditions of employment and other treatment of workers specified in a collective agreement, such a portion is null and void. In this case, invalidated matters shall be presided over by the standards set in a collective agreement (Art. 33 of TULRAA). Collective agreements are also given “general binding force.” Where a collective agreement applies to at least half of the ordinary number of workers performing the same kind of job and employed in a single business or a workplace, it shall also apply to other workers performing the same

kind of job and employed in the same business or workplace (Art. 35 of TULRAA).

According to a survey, collective agreement coverage is estimated at approximately 12% (which slightly exceeds union density: 10%).¹ Taking into consideration the usual practice of Korean trade unions to negotiate at enterprise-level, and the effect of general binding force which impacts unorganized employees as well, actual coverage would amount to 30% of Korean enterprises.²

4. Recent trend in trade union density

The size and organization rate of labor unions has multiplied rapidly between the 1987 major labor campaign and 1989, reaching a peak in 1990, after which it began to decrease to current 9.8% as of 2010. Table 1 shows steady decrease of union density from 2002 to 2010.

Table 1. Union density and union membership (Ministry of Employment and labor, 2010)

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Union Density (%)	11.6	11	10.6	10.3	10.3	10.8	10.5	10.1	9.8
Number of Unions	6,506	6,257	6,017	5,971	5,889	5,099	4,886	4,689	4,420
Number of Union Members (*1,000)	1,606	1,550	1,537	1,506	1,559	1,688	1,666	1,640	1,643
Total workforce	13,839	14,144	14,538	14,692	15,072	15,651	15,847	16,196	16,804

5. Transition of trade unions from enterprise-level to industry-level

During the last decade, trade unions have gone through a dynamic transition from company-based unions to industry-based union. The economic crisis in the late 90's with the IMF bailout was a catalyst that exposed the weaknesses of company unions (or enterprise-level unions).

Before the change, over 90% of Korean labor unions were enterprise-level unions. The enterprise-level union in Korea was not a voluntary choice made by workers, but either advocated (under President Park's administration before 1979) or forced (under the Fifth Republic, 1980-1987) upon workers. During this era, enterprise-level union structure resulted in differences of wages and working conditions based on the size of business establishments; the coalition of trade unions was discouraged.

However, after the crisis, the labor side initiated far-reaching reform towards industry based unions. The reform is often referred to as "The Second-Round Transition Movement" by union activists; "Second-Round" transition as opposed to the previous "First-Round" transition to enterprise-level unions, forced by the authoritarian government policies. The most remarkable aspect of this transition is that, the transition was initiated by a strategic, intentional choice of the unions. The labor side recognized that the government, rather than individual employers, will play a more substantial role in stabilizing current job insecurity. To induce the Korean government to implement Active

¹ Danielle Venn (2009), *Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators*, www.oecd.org/els/workingpapers.

² Park Ji-Soon (2010), *A Comparative Review on Collective Agreement Coverage*, Working Paper for the Ministry of Employment and Labor.

Labor Market Policy (ALMP), the union activists believe that a transition from enterprise to industry level is indispensable so that trade union will gain more leverage and the enhance professional ability of its staffs.

Recent trends show that unions and federations are merging to form a larger entity. Within large confederations, the merging of craft unions and small federations is taking place concurrently. According to statistics from Ministry of Employment and Labor, industry-based union membership amounts to 52.9% of the total union members as of 2009 – showing a considerable growth in a relatively short time span.³

The transition has brought about substantial changes in and out of the union; i.e. the shift of representing authority in terms of collective bargaining, changes in the financing structure, human resource management of the union staffs, the change in the title of the union, and a qualitative change in the system, etc. In light of these changes, various legal issues need to be revisited to effectively cope with new kinds of disputes arising out of such changes. What deserves special attention here is that the relationship between such industry-level unions and the employee representative systems within a workplace (company union, Labor-Management Committee and Employee Representative under LSA) requires clarification.⁴

B. Labor-Management Committee under APWPC

1. Introduction

In Korea, enterprises with over 30 employees are legally obligated to establish a statutory body called the Labor-Management Committee (hereinafter, the “Committee”).⁵ The Committee is established and regulated according to the Act on the Promotion of Worker Participation and Cooperation (hereinafter, “APWPC”). It is a consultative body formed to promote the welfare of workers and seek the sound development of the business through the participation and cooperation of workers and employers (Art. 3. Sec. 1. of APWPC).

The Committee was first introduced in 1980’s during the Fifth Republic. The original intent of the authoritative government was to oppress the collective voice of the workers. By mandating the companies to implement a statutory body which on its face promotes “cooperation” between the labor and management, the government expected a chilling effect on the activities of existing trade union. In other words, the Committee was largely intended as a substitute for trade unions. For these reasons, the labor side demanded abolition or amendment of the law.

During the period of major labor law amendment in late 90’s, the title of the law was changed to “Act on the Promotion of Worker Participation and Cooperation”, which is the current law.⁶ The Act was amended in a way that the Committee would indeed function as a body that encourages employee participation. For example, the law obligates the

³ See Cheol Soo Lee (2011), *Transition to Industry-based Labor Union System and Revisiting the Legal Issues*, Labor Law Review Vol.30, SNU Society of Labor Law.

⁴ For more detailed analysis on this topic, see Cheol Soo Lee (2011), *Transition to Industry-based Labor Union System and Revisiting the Legal Issues*, Labor Law Review Vol.30, SNU Society of Labor Law.

⁵ According to the official English version of the APWPC from the Korean Ministry of Legislation, the terminology for Labor-Management Committee is “Labor-Management Council.” However, looking more closely into the purpose, role and function of this statutory body, the term “council” is inaccurate; especially when considering that the Committee has the authority to pass resolution in its workplace. “Committee” better conveys the legal characteristics of the body as intended by APWPC. Hence, the author will use the term “Labor-Management Committee” instead of “Council.”

⁶ Note that the title of the initial legislation in 1980 was “Labor Management Council Act.”

employer to seek resolution in certain matters prescribed by the law (Art.21. of APWPC). Today, the Labor-Management Committee is expected to play a supplementary role to represent employee interests, especially in unorganized workplace.

2. The Committee's relationship with Trade Union

Under Korean labor law scheme, the legal characteristic of the Committee fundamentally differs from that of a trade union. Trade union is a voluntary organization which enjoys constitutional protection; the Committee is a statutory body. The Committee's authority is contoured in APWPC, limited to the extent of what is prescribed in the law. To ensure that the activities of the Committee will not infringe on constitutional rights of trade union, Art. 5. of APWPC states that "collective bargaining or any other activity of a trade union shall not be affected by this Act."

In addition, the Act grants trade union an exclusive right to appoint employee side of the members of the Committee. Art. 6. Sec. 2. provides that if there is a trade union composed of majority of workers, the representative of the trade union and persons appointed by the trade union shall be the employee's members. For this reason, although the trade union and the Labor-Management Committee is a separate entity regulated under different law, in practice trade unions tend to take control of the Committee.

3. Composition and main functions of the Committee

1) Composition of the Committee

The Committee shall be composed of equal numbers of members representing the employer and members representing the employee. The number of each side shall not be less than three, but not exceed ten (Art. 6. Sec. 1). As for the method of election, members representing the employees shall be elected by direct, secret and unsigned ballot (Art. 3. Sec. 1. of Enforcement Decree of APWPC). If a majority union exists, the union's representatives and persons appointed by the union shall be the members for the Committee.

Regarding the election of the members, the Enforcement Decree of APWPC allows indirect ballot when it is deemed unavoidable due to a "special characteristic" of the workplace (Art.3. Dec.1. 2nd para. of Enforcement Decree of APWCW). The law is silent on what are the special characteristics so as to exempt direct ballot; whether the indirect ballot was lawful is left to case-by-case decision.

2) Main functions of the Committee

The Committee's primary purpose is to promote the common interests of labor and management through the participation and cooperation of both employees and employers (Art.1). For this purpose, employers and employees are expected to consult with each other in good faith and on the basis of mutual trust (Art.2). The Committee is legally obligated to hold regular meetings every three month (Art.12. Sec.1). Specifically, following items are subject to consultation at the Committee meeting (Art. 20. Sec. 1.):

- Productivity improvement and gain sharing;
- Recruitment, placement, education and training of workers;
- Handling of workers' grievances;
- Improvement of occupational safety and health and other work environments and promotion of workers' health;
- Improvement of personnel and labor management systems;

- General rules for employment adjustment, such as assignment and transfer, retraining and dismissal of workers for managerial or technological reasons, etc.;
 - Administration of working hours and recess hours;
 - Improvement of wage payment methods, wage structure, wage system, etc;
 - Introduction of new machines and technologies or improvement of work processes;
 - Establishment or revision of work rules;
 - Employees' stock ownership plans and other supports for the creation of workers' wealth;
 - Matters concerning rewards given to workers for their work-related inventions, etc.
13. Promotion of workers' welfare;
- Installation of employee surveillance equipment within a workplace;
 - Matters concerning the maternity protection of female workers and support for reconciliation between work and family life;
 - Other matters concerning labor-management cooperation.

In addition to consultation, the employer is obligated to seek resolution of the Committee in certain matters (Art. 21). For this purpose, the employer shall report or explain matters concerning overall management plans and results, quarterly production plans and results, the company's financial condition, etc. In case the employer fails to report or explain these matters, the Committee members representing the employees may request the employer to provide information in writing (Art.22).

Once a resolution is passed by the Committee, the members must promptly notify it to the employees (Art. 23). Following is the matters prescribed in Art. 21. that requires resolution:

- Establishment of basic plans for the education and training and skills development of workers;
- Setting up and management of welfare facilities;
- Establishment of an employee welfare fund ;
- Matters not resolved by the grievance handling committee;
- Establishment of various labor-management cooperative committees.

Interpretations vary on the scope and legal effect of a resolution passed by the Committee. Art. 24 states that both employees and employers shall implement the resolution of the Committee in good faith, but the law is silent on how to enforce the resolution. Art. 25 does provide dispute resolution mechanism by voluntary arbitration but, whether the parties will have a cause of action to enforce the resolution in court is unclear.⁷

4. Current usage of the Labor-Management Committee

According to statistics, the total number of the workplace which established the Committee shows a steady grow. As shown in Figure 1 below, the total number of the Committee has almost doubled during the last decade. (29,626 Committees in 2001; 46,702 as of 2010.) Table 2 shows that at least 70% of workplace that are mandated to

⁷ Specifically, when the contents of collective agreement and the Committee's resolution is in conflict, the resolution is likely to be stricken when considering the "normative effect" of collective agreement under Korean labor law. Thus, in terms of interpreting the resolution's legal effect, scholars suggest that under current legal scheme the resolution is likely to be a mere gentleman's agreement.

establish the Committee (over 30 employees) have complied to the regulation; in enterprises with over 500 employees, 95.1% have established the workplace.

Figure 1. Total number of enterprises that established the Labor-Management Committee (Ministry of Employment and Labor, 2001-2010)

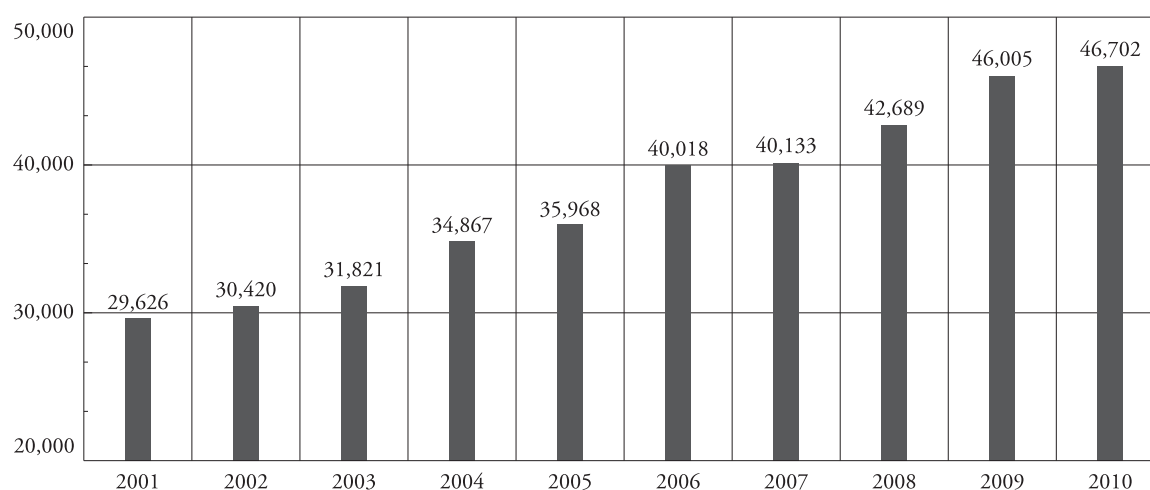


Table 2. Percentage of unorganized enterprises that established the Labor-Management Committee (KLI, 2008)

	Categories	Total number of employees & Service sector	Percentage of Enterprise that established the Committee (%)
Unorganized workplaces	Size of the enterprise	30 – 99	70.3
		100 – 299	89.3
		300 – 499	94.5
		Over 500	95.1
	Industry	Manufacturing	78.0
		Construction	49.2
		Service sector	68.4
Average: 72.0			
Organized workplaces	Average: 92.4		

However, according to more in-depth surveys, election procedures of the Committee members proved problematic in many unorganized enterprises. Among the enterprises that answered the questionnaire, only 45.0% were complying with the legal requirement of direct, secret and unsigned ballot. In 24.8% of the enterprises, candidates of the Committee member were being appointed by the employers. 15.7% were conducting indirect ballot; in the remaining 14.1% enterprises, employers appointed the Committee

members. Moreover, according to other item in the same survey, 20% of the Committees did not hold the consultation meetings over three times a year.⁸

The results from these surveys suggest that while the number of Labor-Management Committee has steadily increased in recent years, its operation in reality (esp. in unorganized enterprises) may not be as effective as the APWCP has intended. The legitimacy of the Committee members leaves room for doubt, influenced by the employer side in many instances; the meetings for consultation are a mere formality in some workplace.

C. Employee Representative under the Labor Standard Act

1. Introduction

In addition to the Labor-Management Committee, another non-union mechanism that represent employee's interest in certain matters exist under individual labor law scheme; namely, the Employee Representative under the Labor Standard Act (hereinafter, "LSA"). The Employee Representative under LSA was introduced in the late 90's during the period of major labor law revision. Its main intention is to protect the interests of the employees in matters relating to managerial dismissal and flexible working hour; to make sure that a works agreement (in writing)⁹ was entered into between the employer and the Employee Representative.

The most unique aspect of the Employee Representative under LSA is that, unlike the Labor-Management Committee, this is not a permanent body with members, rules and procedures. The Employee Representative is "triggered" only when the event prescribed by the law occurs (the events include managerial dismissal and working hour system under the LSA). In other words, Employee Representative under LSA is a temporary body; its concept is rather evasive.

2. Composition of the Employee Representative under LSA

As to how the Employee Representative is composed, the law does not provide a clear-cut answer. Art. 24. Sec. 3. of LSA states that "with regard to the possible methods for avoiding dismissal and the criteria for dismissal, an employer shall give a notice to a trade union which is formed by the consent of the majority of all employees in the business or workplace (or to a person representing the majority of all employees if such a trade union does not exist, hereinafter "the Employee Representative") and have good faith consultation." From this provision, it is inferred that (1) a majority union may play the role of the Employee Representative under LSA, or (2) if such a majority union does not exist, the person who represents a majority of all employees will act as the Employee Representative.

Since the law is silent on how to select the Employee Representative, i.e. adequate procedure to elect the person who will represent a majority of employees, the legitimacy of the Representative is questioned. Without a safeguard measure that enables the employees to elect in a democratic way, confusion on as to who is eligible as the

⁸ Survey conducted by Korean Labor Institute, 2008.

⁹ According to the official English version of the Labor Standard Act (translation provided by Ministry of Legislation), the terminology for the agreement between the employer and the Employee Representative is "written agreement." This seems to be an inaccurate translation, since other kinds of written agreement exist in the workplaces (e.g. collective agreement). Hence, the author will instead use the term "works agreement" rather than written agreement.

Representative is destined to arise. The Employee Representative is subject to employer intervention – even worse, for the purpose of signing the works agreement, the employer may appoint one of the employees as the Representative without the rest of the employees' consent. Consequently, this results in raising doubt as to whether the written works agreement is an authentic one which truly reflects the employee's interests.

In practice, dispute arises on the validity and legal effect of the works agreement, and also in determination of the eligible Representative. In a Supreme Court decision in 2004, where managerial dismissal became an issue, it was held that the works agreement entered into by the Labor-Management Committee on behalf of the “majority of all workers” under LSA was valid.¹⁰ However, the decision shows lack of precise understanding of the two systems; it seems like even the court is confused on the purpose and functions of the Employee Representative under LSA. An Employee Representative may not be substituted by the Committee member of the Labor-Management Committee; the Committee is not a mechanism where majority support is guaranteed. The legislative intent of the LSA is to guarantee that where majority trade union does not exist, an alternative representative must make sure that a majority of all employees within the workplace has agreed to the items of the works agreement.

3. Main functions of the Employee Representative under LSA

1) Consultative function

In matters relating to dismissal for managerial reasons, the employer must consult in good faith with the Employee Representative under LSA. With regard to the possible methods for avoiding dismissal and the criteria for dismissal, employer shall give notice to the Employee Representative and have good faith consultation (Art. 24. Sec. 3. of LSA). In matters relating to night and holiday work for pregnant female employee, the employer shall consult in good faith with Employee Representative as to whether there will be night work or holiday work, and its implementation methods for workers' health and maternity protection (Art. 70. Sec. 3 of LSA).

2) Party to the written works agreement

In addition, the employer shall reach an agreement in writing with the Employee Representative in the following matters: when the employer operates flexible working hour system (Art. 51. Sec. 2), selective working hour system (Art. 52), using leave as a compensation for extended, night and holiday work (Art. 57), special computation of working hours (Art. 58), excess work hours and change of recess hours in certain enumerated business (transportation, goods sale, movie production, medical, hotel, beauty parlor, etc; Art. 59), and Substitution of paid leave (Art. 62).

3) Functions in other legislations

Employee Representative system is adopted in a few other legislations besides the Labor Standard Act. If an employer intends to set up or change a retirement benefit scheme, s/he shall receive consent from the Employee Representative (Art. 4. Sec. 3. of the Employee Retirement Benefit Security Act). In case an employer intends to use a dispatched worker, the employer must conduct a sincere consultation in advance with the Employee Representative (Art.5.Sec.4 of Act on the Protection of Dispatched Workers).

¹⁰ Supreme Court of Korea, 2001-DU-1154 (Oct 15, 2004).

In matters relating to workplace safety and health, the Employee's Representative may request relevant information to the employer (Art. 11 of Occupational Safety and Health Act).

4. Usage in of the Employee Representative in reality

Due to its temporary and evasive nature, no comprehensive data is found as to the usage of Employee Representative under LSA in the workplace. Assuming that the employers who adopted flexible, selective or discretionary working hour system has complied with the legal requirement of LSA (i.e. written consent from the Employee Representative), it can be inferred that the usage of Employee Representative not widespread. As shown in Table 3 below, the usage of flexible hour working system remains at a relatively low percentage.

Table 3. Rate of adoption for flexible, selective and discretionary working hour system (Ministry of Employment and Labor, 2004)

		Flexible working hour (%)	Selective working hour (%)	Discretionary working hour (%)
Size (number of employees)	100-299	11.76	2.15	2.64
	300-999	12.73	3.70	-
	Over 1,000	9.23	3.13	-
Industry	Manufacturing	13.38	1.94	0.64
	Utility	-	-	-
	Construction	14.81	3.7	-
	Hotels and restaurants	30.00	-	-
	Transportation	5.41	2.7	5.88
	Telecommunication	7.14	7.14	13.33
	Finance	7.41	-	-
	Education	8.33	-	8.33
Social service	7.14	-	-	

D. Summary – Comparison of the three systems in a glance

To summarize, the table below compares the main characteristics of the three systems of employee representation described above.

Table 4. Comparison between Trade Union, Labor-Management Committee, and Employee Representative under LSA

	Trade Union	Labor-Management Committee under APWPC	Employee Representative under LSA
Purpose	Maintaining and improving the terms of employment; Improving the social and economic conditions of the workers.	Promoting the welfare of workers and seek the sound development of the business through the participation and cooperation of labor and the management.	If the event prescribed by the law occurs, and majority union does not exist, Employee Representative is formed temporarily.
Relevant law	The Constitution and the Trade Union and Labor Relations Adjustment Act (TULRAA)	Act on the Promotion of Worker Participation and Cooperation (APWPC)	Labor Standard Act (and other laws, i.e. Occupational Safety and Health Act, Employment Insurance Act, etc.)
Main functions	Collective bargaining and collective agreement	Mainly consultative functions; the consultation may lead to a resolution. (Art. 19, 20, 21)	Enter into written works agreement with the employer regarding some matters prescribed by law.
Election Procedure	Freedom to organize/ join the union is guaranteed under TULRAA. Should meet prescribed conditions/ receive certificate issued from competent authorities. (Art.5)	Composed of same numbers of Committee members from each side; the workers elect their own members. In case a majority union exists, the union shall appoint the Committee members.	No regulation exists regarding election.

III. A critical analysis on the current employee representation system

Employee representative system in Korea is in need of a comprehensive review. In the past, during the era of Fordism, workers shared similar concerns and issues and it were natural that trade union was the main representative body of the workplace. Today's labor is being diversified, individualized and segmented; union density shows constant decrease. Against this background, a system that reflects diverse employee voice is needed. As described above current Korean labor law provides three kinds of representative system: Trade Union, the Labor-Management Committee and Employee Representative under LSA. The legal characteristics of the two non-union bodies are rather ambiguous. The co-existence of the three systems causes confusion in many workplaces. In certain points where the trade union and other bodies intersect, the constitutional rights of trade union are sometimes infringed upon. With these realities in mind, a critical analysis on the systems is required.

1. Problems of the two non-union representative system – Employee Representative under LSA and the Labor-Management Committee

1) Ambiguities of the Employee Representative under LSA

Employee Representative under LSA was first introduced in late 1990's amendments of the Labor Standards Act, and then was transplanted to various other work related legislations. (e.g. Employee Retirement Benefit Security Act, Act on the Protection of Dispatched Workers, Occupational Safety and Health Act, Act on Prohibition of Age Discrimination in Employment and Promotion, etc.) However, the Employee Representative under LSA did not smoothly integrate to existing Korean labor law. Due to the lack of specific provisions regarding its precise legal concept or election procedure, many legal issues remain unresolved.

Basically, the primary purpose of the Employee Representative under LSA is to obtain written agreement from the representative for specific items (items that are not covered by collective agreement or rules of employment; for details, see Chapter II, Section C) prescribed in the LSA. However, the LSA is silent on the exact definition of the representative, its legal elements, procedure for election, its main function, and ways to protect its activities, etc. From this deficiency arise the following issues: What is the appropriate scope of employees that falls within the definition of a 'majority'? What is the legal characteristic of 'written agreement' by the representative, and how to determine priority in case of conflict with existing collective agreement or work rules? How to ensure that the representative under LSA was fairly elected through a democratic measure? Since answers to these legal issues are not found from the provisions of LSA, confusion arises as to the operation of the representative system.

2) Effectiveness of the Labor-Management Committee

Meanwhile, the Act on the Promotion of Worker Participation and Cooperation (APWPC) mandates that workplace with over 30 employees shall establish the Labor-Management Committee ("the Committee").

The main role of the Committee is to encourage consultation between the labor and the management within the workplace through "participation and cooperation of both workers and employers (Art.1. of APWPC)." Since multiple unions within a workplace are now allowed as of 2011, much confusion will arise regarding its operation. In this time of confusion, the Committee, which is a legally mandated consultative body, is expected to contribute in resolving workplace disputes and grievances in an effective manner.

Unfortunately in many cases, the Committee in reality is no more than a formality, established by reluctant employers to merely avoid violating the requirements of the Act. Looking at the realities of the Committee, these issues deserve attention: Is it appropriate at all, in the first place, to allow the majority union to monopolize selection of the Committee members? What are the ways to actually enforce the Committee's resolution? Unless these questions are answered, the Committee is likely to remain impotent in many workplaces.

2. Trade union today – the challenges and changes to its role

Meanwhile, trade union today finds itself in crisis. First, union density in Korea is very low. Due to the fact that public servants and school teachers – the groups that could not enjoy freedom to organize in past authoritarian regimes – are now organizing union,

the total number of union members did not went through much change. However, in terms of union density, the percentage peaked 25.4% in 1977; and then showed a continuous decrease to 10% as of 2010.

Second, trade unions are not able to provide adequate protection to irregular workers (temporary, part-time workers). Traditionally, trade unions represent full-time workers mainly. Union membership does not extend to irregular workers; no appropriate mechanism exists that represents the irregular workers. The union density of the irregular worker is estimated at a very low level – approximately 2%.¹¹ While irregular workers continue increasing in the total working population, trade union cannot protect their rights and interests in the workplace.

Third, the terms of employment are being individualized today. Rather than insisting on the conventional seniority principle, performance-based payment system is prevalent in many workplaces. With this trend, the *raison d'être* of the trade union – i.e. reflecting the collective voice of the workers and negotiating a uniform terms of employment – is being shaken from its root.

Fourth, low economic growth rate is another factor in weakening the bargaining power of trade union. Rather than demanding increased wage or shortened work hours, trade unions are content with securing the job itself. The legality of a concession bargaining has been recognized under Korean labor law.

3. Confusion arising from relationship between the three representative systems

The confusion caused by coexistence of the three representative systems within a workplace and legal issues arising out of such confusion awaits clarification.

If there is a trade union composed of a majority of the workers in the workplace, such a majority union is given vast authority over the employee representation. In addition to exercising its original function as a trade union, the union is not only granted with the power to appoint employee side members of the Labor-Management Committee (Art. 6. Sec. 2. of APWPC), but also acts as the Employee Representative under LSA. On the contrary, if the number of trade union members do not reach a majority of the workplace (i.e. minority union), the union may neither appoint the members for the Committee nor become the Employee Representative under LSA. In other words, the minority union has no chance to participate in the course of determination in the level of enterprise. Here, a constitutional question arises: while Korean Constitution ensures strong protection for the trade union, which is supposed to take priority over non-union entities, in reality the status of the minority union is even weaker than that of the Employee representative under LSA or the Committee members.

While the laws relating to the non-union representative system (the LSA and APWPC) intended separate purpose and functions for the Employee Representative under LSA and the Committee under APWPC, it seems like the legislator failed to foresee its legal consequence. In short, the laws were not designed elaborate enough to clearly define the system's appropriate relationship with the trade union. As long as the three decision-making bodies continue existing in the same workplace under current legislation, such confusion will remain unresolved.

¹¹ Dongwon Kim (2005), *A study on Irregular Worker's Union Membership Status and Labor-Management Relationship*, Working Paper for the Ministry of Employment and Labor.

4. Minority union in a deadlock in the era of union pluralism

Besides the ‘stifling’ effect on the minority union by the two non-union representative bodies, there is one more factor which further threatens trade unions today. Under previous Korean labor law, plural unions within a business or workplace were prohibited as illegal. When there is a pre-existing trade union, the administrative authority would not issue a certificate to a newly organized union. Such trade union could not enjoy legal protections for its activities.

After much heated debate, the relevant provisions of Trade Union and Labor Relations Amendment Adjustment Act (TULRAA) were amended in a way that allows multiple unions. Free organization of trade union is allowed as of July 2011 regardless of existence of pre-existing unions. As an exchange for this freedom, multiple unions coexisting within a workplace are now obligated to appoint a bargaining representative. To demand a collective bargaining, the unions must first choose which one of them will be the “single channel” that will sit for the bargaining table. The newly inserted Art. 29-2. Sec. 1 of TULRAA provides that “If there are two trade unions or more which are established or joined by workers in a business or workplace regardless of the type of organization, the trade unions shall determine the bargaining representative union (including the bargaining representative body composed of members of two different trade unions or more; hereinafter the same shall apply) and then demand bargaining.”

This leads to the conclusion that the minority union (i.e. a union that falls short of the majority support of the whole union members)’s constitutional right to collective bargaining will be significantly limited. It means that the single channel bargaining system could possibly be struck in the near future as unconstitutional. Moreover, under current laws relating to Employee Representative of LSA and the Labor-Management Committee, the minority union has no channel at all to raise its voice in the workplace decision-making process.

In the meantime, the majority union obtains not only an exclusive right to collective bargaining, but also monopolizes representative right of Employee Representative and the Committee as well. This is an excessive limitation to the constitutional rights of minority unions. In the end, workers may be discouraged from establishing unions; unless it obtains majority support, the union will be powerless anyway.

5. Solution: The need for a permanent non-union representative system

In light of the above mentioned problems of current Employee Representative System, two track approaches could be considered to address this problem. The first track is to rely on court decisions as dispute arises regarding the relationship between these representative bodies. This bears the risk of adding up even more confusion, since different courts may opine differently on the same question. The second track is to amend existing labor law legislations. This is more desirable when considering that Korean legal system follows civil law tradition.

Following the second track, an underlying question must be addressed first: Why do we need a non-union representative body in the first place? What are the fundamental reasons that amendment of existing legislation or perhaps a new one is needed for a new employee representative body?

Even though the constitutional protection for trade union stands firm, very unlikely to be shaken unless an overall constitutional amendment occurs, looking at the above mentioned realities of workplace one cannot deny the dire need for a permanent

representing body which really works to reflect employee voice. Detailed reasons are as follows.

First, trade union is not a statutory body. As long as unionization is left at the hands of the free will of the workers, trade union exposes its intrinsic weakness; it cannot represent diverse voices within the workplace. As shown above, more than 90% of the Korean enterprises remain unorganized. With the allowing of multiple unions in a workplace and the exclusive right of the majority union to bargain as the single channel, small unions are even more likely to get stifled in raising their voice. In addition, the recent trend toward transition to industry-level unionization adds up to the crisis of unions at enterprise level.

Second, even where trade union exists, the union puts priority in representing its own members; unorganized workers, usually the irregular, part-time employees, fall outside the realm of union protection. Under current Korean labor law, no adequate system or mechanism exists to represent these groups of employees.

Third, in matters which require uniform regulation to all workers within the workplace, there is a need for a body that represents the interest of all workers regardless of their union membership status. Under current labor law, trade union is not a mechanism that could ensure a fair representation of all employees in the workplace.

In light of this view, the conclusion is rather straightforward. The need for a permanent representative body which protects all employees is indisputable. Such a body must ensure that the representatives are elected through a fair and democratic election. The policymaker must bear in mind that once a body is mandated by legislation, and the employees are 'automatically' included as its members, the legitimacy of its representative will always be subject to question. (cf. whereas, in case of trade union, the union leader's legitimacy is guaranteed by direct ballot.) Therefore, the new legislation must ensure that while the body itself is mandated by law, its representatives are elected in a democratic way by the employees.

6. The basis for a non-union representative system: ILO Labor Standards

For a more concrete basis for a non-union representative system, international norms on these issues would be worth reviewing. International Labor Organization (ILO) allows much room for openness and flexibility on the concept of employee representative system. In its conventions, ILO makes clear distinction between the usage of "trade union" and "labor organization"; the latter is a broader concept which encompasses trade union.¹² The term "trade union" is used in a more specific, limited sense. In addition, "worker's representative" is a broad concept which includes both union leader and other representatives who are elected by unorganized employees. Convention No. 135 distinguishes the role and function of union leader and other kinds of workers' representatives.¹³

Convention No.154 on collective bargaining makes it clear that the concept of "organization" is not limited to trade unions; it includes non-union employee representative may participate in collective bargaining. Art. 5. Sec. 2. of the Convention provides that "collective bargaining should be made possible for all employers and all

¹² C87 Convention concerning Freedom of Association and Protection of the Right to Organize, International Labor Organization (1948).

¹³ C135 Workers' Representatives Convention, International Labor Organization (1971).

groups of workers in the branches of activity covered by this Convention.”¹⁴ In addition, the ILO Digest on Freedom of Association points out that the workers have the right to establish more than one “worker’s organizations of their own choosing.”¹⁵ From this provision, it leaves room for interpretation that not only trade unions but also a consultative body such as the Labor-Management Committee may participate in the collective bargaining process.

To conclude, it could be inferred from the norms of international labor standard that collective bargaining is not an exclusive activity of trade union. Various conventions and ILO Digest on freedom of association provide that “labor organization” or “workers organization” could include diverse groups of employees within the workplace.

IV. Conclusion: Toward a Uniform System of Employee Representation

From the discussions above, the imperative need for a permanent non-union employee representative system cannot be denied. The body should be one that supplements the defects of the Labor-Management Committee and Employee Representative under LSA, contributing to a uniform decision-making in the workplace. The attitude of ILO conventions reinforces the idea that employee representative mechanism must not be necessarily limited to trade union.

A detailed description of the new system would be beyond the scope of this paper but, a draft blueprint could be proposed here. Below are several essential elements of the new representative system:

- The representative must obtain support from a majority of the employees.
- Election must be conducted in a democratic manner.
- All employees should be fairly represented, regardless of their unit and position within the workplace.
- A procedure must exist which enables employees to raise objection to the legitimacy of the elected representative.
- Undue influence from the employer must be prevented through adequate mechanism.

In addition to these requirements, the legislator must make sure that the authorities given to this new body shall not infringe on the collective rights of trade union. Again, constitutional protection on trade union cannot be denied unless a constitutional revision occurs. The relationship between trade union and the new permanent body should be well harmonized within the Korean labor law scheme so that conflicts and confusions would be minimized. With the trend of transition to industry-based unions, the union leaders must make sure that authorities of the union should be coordinated with the non-union bodies, so that the rights and interests of all employees will be fairly represented.

¹⁴ C154 Collective Bargaining Convention, International Labor Organization (1981).

¹⁵ The right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create - if the workers so choose - more than one workers’ organization per enterprise. See *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, International Labour Office, 2006, para. 315.

The Labor-Management Council System in Taiwan

Chin-Chin Cheng*

I. Introduction

Implementing the Labor-Management Council is one of the ways to enforce “labor participation” in Taiwan. One of the goals of “labor participation” is to allow the workers to participate in the decision-making process in the enterprises. Currently, there are six kinds of labor participation systems¹ in Taiwan. However, implementation of these systems is not effective due to some reasons. There is no doubt that an effective labor participation system could achieve the best interests of both employers and employees. It has been an established government policy in Taiwan to promote the labor participation system, especially the Labor-Management Council system. The government has declared relevant policies and enacted related laws to promote the Labor-Management Council system. Nevertheless, the outcome is still dissatisfactory. This paper discusses the Labor-Management Council system in Taiwan by covering historical background, current situation, governing laws, effect and impact, recommendations for future development of the system. Hopefully, it would provide a comprehensive profile, find the ways to fix the flaws, and improve efficiency of the Labor-Management Council system in Taiwan.

II. The Historical Background and Current Situation of The Labor-Management Council System

A. HISTORICAL REVIEW

The Labor-Management Council system can trace its history back to 1929, the year that the *Factory Act* was enacted. Under the *Factory Act*, the Factory Councils were established to promote collective bargaining. However, the Factory Councils were not effective at the first beginning because of political turmoil. In 1950, Taiwan government announced the “Current Political Policy” which comprised two labor parts. One was to promote labor-management cooperation based on mutual interests of employees and employers. The other was to allow employees to participate in decision-making process and to provide suggestions concerning labor welfare. The Factory Councils did not operate formally until the government set up a “Supervision Committee to Promote the Factory Council” in 1955. Given that implementation of the Factory Council system was fair under

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¹ The current labor participation systems in Taiwan include the following schemes:(1)The Labor-Management Council system; (2)The collective bargaining system; (3) The Employee Welfare Committee system; (4) The Labor Safety and Health Institute system; (5) The Labor Retirement Fund Supervisory Committee system; (6)The proposal for quality control circle system.

the supervision of the aforementioned Committee, the government laid down the *Factory Council Enforcement Regulation* in 1956. The *Regulation* provides rules for election of the Factory Council representatives, scope matters of the Factory Council, and presentation of council agenda. The government amended the *Regulation* to improve the labor-management relations in 1981. Although it has been a firm policy for the government to promote and support the Factory Council system, the system did not work well. There are two main reasons for the Factory Council system's failure.² One is employers' old-fashioned attitude. Many employers were against the idea of workers' participation. Those employers were therefore unwilling to establish or support the Factory Council system. The other reason is workers' lack of sense. For most workers at that time, wage raise was something they cared the most at the workplace. As a result, most workers were not aggressive to participate in employers' management matters. Moreover, many workers had a belief that workers' welfare shall be fought by unions, rather than the workers themselves. In other words, many workers expected that unions would improve labor welfare by involving in the Factory Councils' activities. The fact is that unions never played an aggressive role in the Factory Council system, and the system by no means performed pervasively or effectively in Taiwan.³

Given that the Factory Council system did not work well, a new system was created as the *Labor Standards Act* was enacted. The *Labor Standards Act* was implemented in 1984. According to the *Act*, a business entity shall hold a Labor-Management Council to coordinate labor-management relations, promote labor-management cooperation and increase work efficiency. The rules for calling such meetings shall be drawn up by the Council of Labor Affairs in concert with the Ministry of Economic Affairs, and then reported to the Executive Yuan for approval.⁴ Under this provision, it shall be mandatory for all the business entities regulated by the *Labor Standards Act* to hold Labor-Management Councils. With the authorization provided by section 83 of the *Labor Standards Act*, the government laid down the *Regulations for Implementing the Labor-Management Council* which provides regulations for holding the Labor-Management Council in 1985. The labor participation system in Taiwan is therefore transformed from the Factory Council era⁵ to the Labor-Management Council era⁶ after the enforcement of the *Regulations for Implementing the Labor-Management Council*.

B. CURRENT SITUATION

The Labor-Management Council has become an important channel for employers and employees to negotiate and cooperate with each other since the enforcement of the *Labor Standards Act*. The current structure of the Labor-Management Council is to enable employers and employees to discuss various subjects related to the labor-management relations, to reach a resolution based on majority consent, and to improve working conditions. According to government statistics, 28,953 business entities had established their Labor-Management Councils at the end of 2010. Of these entities, 505 were public

² Chen-Kung Huang, Jen-Chun Wong, and Chia-Ho Lin, *A Study on the Improvement of the Labor-Management Council System in Taiwan from the Perspective of the Labor-Management Council System in Germany*, the Council of Labor Affairs of the Executive Yuan, p.6, 2010.

³ Kuang-Hao Fang, *A Comparative Study of the Labor-Management Council System in the US and Taiwan*, p.64, 2009.

⁴ Section 83 of the *Labor Standards Act*.

⁵ The scope of the Factory Council System is confined to factories only.

⁶ The scope of the Labor-Management Council system covers all the business entities regulated by the *Labor Standards Act*.

and 28,448 were private (see Table 1).

Table 1: The Growth of Labor-Management Council in Taiwan from 1986 to 2010

	Public sector	Private sector	Grand total	Growth rate
End of 1986	464	—	464	—
End of 1987	460	—	460	—
End of 1988	700	—	700	—
End of 1989	835	—	835	—
End of 1990	806	—	806	-3.47%
End of 1991	851	—	851	+5.58%
End of 1992	430	484	914	+7.40%
End of 1993	440	492	932	+1.97%
End of 1994	473	497	970	+4.08%
End of 1995	457	523	980	+1.03%
End of 1996	458	536	994	+1.43%
End of 1997	451	562	1,013	+1.91%
End of 1998	491	561	1,052	+3.85%
End of 1999	547	749	1,296	+23.19%
End of 2000	646	1,297	1,943	+49.92%
End of 2001	684	1,933	2,617	+34.69%
End of 2002	630	2,071	2,701	+3.21%
End of 2003	552	2,364	2,916	+7.96%
End of 2004	1,260	4,553	5,813	+99.35%
End of 2005	1,446	5,358	6,804	+17.05%
End of 2006	429	7,065	7,494	+10.14%
End of 2007	441	16,166	16,607	+121.60%
End of 2008	466	21,649	22,115	+33.17%
End of 2009	492	23,672	24,164	+9.27%
End of 2010	505	28,448	28,953	+19.82%

Source: Labor Statistics Databank of the Council of Labor Affairs of the Executive Yuan, <http://statdb.cla.gov.tw/statis/stmain.jsp?sys=210&kind=21&type=1&funid=q05022&rdm=plC0jby9>, last viewed: 01/07/2012.

The statistics above show that only public entities followed the government policy to establish Labor-Management Councils at the beginning stage. Private entities started to organize Labor-Management Councils in 1992. The number of Labor-Management Councils in the private sector has grown significantly since 1990, reaching 7,065 in 2006 and 28,448 in 2010. Nonetheless, the percentage of private business entities that have established Labor-Management Councils was only 6.4%. (see Table 2).

Table 2: The Percentage of the Private Business Entities Which Have Established Labor-Management Councils in Taiwan from 1990 to 2010

	The grand total of private entities which had established the Labor-Management Councils	Total number of the private business entities covered by the <i>Labor Standards Act</i>	Percentage
End of 1991	851	141,848	0.60%
End of 1992	914	156,101	0.59%
End of 1993	932	166,465	0.56%
End of 1994	970	175,921	0.55%
End of 1995	980	171,158	0.57%
End of 1996	994	165,728	0.60%
End of 1997	1,013	167,869	0.60%
End of 1998	1,052	255,144	0.41%
End of 1999	1,296	357,278	0.36%
End of 2000	1,943	362,702	0.54%
End of 2001	2,617	360,800	0.73%
End of 2002	2,701	363,578	0.74%
End of 2003	2,916	377,116	0.77%
End of 2004	5,813	390,896	1.49%
End of 2005	6,804	415,701	1.64%
End of 2006	7,494	425,116	1.76%
End of 2007	16,607	427,907	3.88%
End of 2008	22,115	428,396	5.16%
End of 2009	24,164	436,453	5.54%
End of 2010	28,953	449,385	6.44%

Source: Labor Statistics Databank of the Council of Labor Affairs of the Executive Yuan, <http://statdb.cla.gov.tw/statis/stmain.jsp?sys=210&kind=21&type=1&funid=q05022&rdm=plC0jby9>, last viewed: 01/07/2012.

The statistics of Table 1 and Table 2 show that the growth rate and percentage of private business entities having established Labor-Management Councils have increased notably since 2000. This is because several statutes and regulations require documentation that Labor-Management Councils have been held.⁷ Moreover, the *Labor Standards Act* was amended in 2002 to place new items, such as extended working hours, transformed working hours, and women's working at night, within the scope of Labor-Management Councils. For example, section 30(2) of the *Labor Standards Act* provides, “With the consent of a labor union, or if no labor union exists in a business entity, with the approval of the Labor-Management Council, an employer may distribute the regular working hours, referred to in the proceeding paragraph, of any two workdays within a two-week period, to other workdays, provided that no more than two hours shall be distributed to each of the other workdays. However, the total number of working hours shall not exceed forty-eight hours in any week.” Since the union organization rate in Taiwan has been low, employees in most business entities are not represented by unions. If such business entities plan to adopt the aforesaid “two-week transformed working hours” system, they must establish and operate Labor-Management Councils in accordance with section 30(2) of the *Labor Standards Act*.

If a business entity regulated by the *Labor Standards Act* has a need of extending working hours, it also has to obtain the approval from the Labor-Management Council if there is no union organized in the business entity. Since it is common for business entities to extend working hours in Taiwan, the total of Labor-Management Councils may be expected to grow. There is another important incentive for business entities to establish Labor-Management Councils. In view of the fact that it has been the government's policy to promote the operation of the Labor-Management Council system, Taiwan government has made it a requirement for business entities, which apply for trading on the stock market or over the counter, to establish Labor-Management Councils. As a result, the Labor-Management Council system shall become a common internal communication system for most business entities in Taiwan.

In fact, according to statistics provided by the Council of Labor Affairs, 95.89% of business entities that have held Labor-Management Councils believe that it is essential to continue the implementation of the Labor-Management Council system. The main reasons are “the Labor-Management Council system is beneficial for both employer and employees because employees would have more knowledge of management affairs through this system” (82.01%), “decrease of labor disputes because of implementation of the Labor-Management Council system” (80.72%), and “the employer has more understanding of employees' expectation because of the implementation of the Labor-Management Council system” (77.38%). Only 4.11% of business entities that have held Labor-Management Councils do not support their implementation. The main reason is “the resolutions made by Labor-Management Councils can not be enforced because their binding effect is weak.” (see Table 3).

⁷ For example, some provisions in the *Labor Standards Act*, the *Regulations for Implementing the Labor-Management Council*, and the *Employment Services Act* demands employers to present documents that can prove Labor-Management Councils have been held.

Table 3: The Reasons to Support or Be Against the Implementation of the Labor-Management Council System

<i>Reasons to Support the Implementation of the Labor-Management Council System</i>		<i>Reasons to Be Against the Implementation of the Labor-Management Council System</i>	
Reasons	Percentage	Reasons	Percentage
The Labor-Management Council system is beneficial for both employer and employees because employees would have more knowledge of the management affairs through this system.	82.01%	The resolutions made by Labor-Management Councils can not be enforced because of weak binding effect.	9.94%
Decrease of labor disputes because of implementation of the Labor-Management Council system.	80.72%	Employers refuse to be intervened by Labor-Management Councils by asserting their management rights.	1.54%
Employers have more understanding of employees' expectation because of implementation of the Labor-Management Council system.	77.38%	Employers fail to provide genuine opportunities for the implementation of the Labor-Management Council system.	2.06%
Employees are more willingly to accept and enforce company policies because of implementation of the Labor-Management Council system.	58.87%	The disparity between the union and the employees' representatives of the Labor-Management Council.	1.54%
Company's management becomes more reasonable because of implementation of the Labor-Management Council system.	62.9%	The employees' representatives only consider their own benefits, but disregard the employer's position.	0.77%
Other reasons.	1.29%	Other reasons.	1.26%

Source: Labor Statistics Databank of the Council of Labor Affairs of the Executive Yuan, <https://statdb.cla.gov.tw/html/svy94/9408menu.htm>, last viewed: 01/07/2012.

III. The Laws Governing the Labor-Management Council System

A. ESTABLISHMENT

According to the *Labor Standards Act*, a business entity shall hold a Labor-Management Council to coordinate labor-management relations, to promote labor-management cooperation and to increase work efficiency. The government afterward laid down the *Regulations for Implementing the Labor-Management Council* with the authorization of the aforementioned provision. From the wording of the aforesaid provision of the *Labor Standards Act*, it is mandatory for every business entity to establish the

Labor-Management Council. However, a business entity will not be punished for not setting up the Labor-Management Council under the *Labor Standards Act*. It is therefore *de facto* optional for the business entity to establish the Labor-Management Council. Theoretically, if a business entity determines to establish the Labor-Management Council, it must establish the Council in accordance with the rules provided by the *Regulations for Implementing the Labor-Management Council*. The truth is that a business entity would not be punished for not establishing the Labor-Management Council, it would not be penalized either if it fails to organize and operate the Council in accordance with the *Regulations for Implementing the Labor-Management Council*.

Basically, a business entity shall establish only one Labor-Management Council. But if a business entity has branch offices, and the total of employees hired by the branch office exceed thirty, a separate Labor-Management Council may be convened by the branch office.⁸

B. STRUCTURE

The structure of the Labor-Management Council is governed by the *Regulations for Implementing the Labor-Management Council*. According to the *Regulations*, the Labor-Management Council shall have an equal number of representatives from the employees and the employer. There shall be a number of two to fifteen representatives from each side in accordance with a total of workers employed by the business entity. If a total of employees hired by the business entity reach one hundred or more, the number of representatives from each side shall be no less than five.⁹

C. ELECTION AND DESIGNATION OF REPRESENTATIVES

Employer's representatives of the Labor-Management Council shall be selected by the business entity from those who are familiar with business matters and well-versed in labor affairs in the business entity.¹⁰ On the other hand, employees' representatives of the Labor-Management Council shall be elected by union members or union assembly if a labor union is organized in the business entity. Members of the general council as well as members of the supervisory council of a labor union in the business entity may be elected as the workers' representatives at the Labor-Management Council, provided that the number of such representatives does not exceed two thirds of the total of the employees' representatives.¹¹ If there is no labor union in the business entity, employees' representatives shall be elected directly by all the employees employed in the business entity.

Where the employees are represented by a union in a business entity, the election for employees' representative shall be conducted by the labor union. If no union is organized in a business entity, the business entity shall notify or request the employees to assign their representatives to conduct the election for employees' representatives.

A worker who has attained 16 years of age has the right to vote for employees' representatives.¹² A worker, who has attained 20 years of age and has continuously worked in the same business entity for one year or more, may be elected as an employees' representative in the Labor-Management Council. However, the first-level managers or

⁸ See section 2 of the *Regulations for Implementing the Labor-Management Council*.

⁹ See section 3 of the *Regulations for Implementing the Labor-Management Council*.

¹⁰ See section 4 of the *Regulations for Implementing the Labor-Management Council*.

¹¹ See section 6(1) of the *Regulations for Implementing the Labor-Management Council*.

¹² See section 7 of the *Regulations for Implementing the Labor-Management Council*.

supervisors who are authorized to oversee the employees on behalf of the employer are not eligible to be elected as employees' representatives.¹³ Although there is no qualification restriction for the representatives, the individual's enthusiasm and experience generally would be considered when the representatives are elected or designated.¹⁴

Expenses incurred by the aforesaid election shall be borne by the business entity. The voting date for the aforementioned election shall be announced 10 days in advance. The government may assign personnel to provide necessary assistance.¹⁵

In case that a business entity has hired a vast number of employees, or the employees are employed in different departments which are distant from each other, the number of representatives for each department may be divided and elected respectively in accordance with the number of employees employed in each department.¹⁶

Where the number of female or male workers accounts for more than one half of the total number of workers employed in the business entity, the number of representatives elected from the female or male workers shall be no less than one third of the total number of employees' representatives in the Labor-Management Council.¹⁷ As to employees who are not covered by *the Labor Standards Act*,¹⁸ such employees still have the rights to elect representatives and to be elected as representatives.¹⁹

Not only the employees' representatives need to be elected, the substitutes for employees' representatives also have to be elected. The number of substitutes for employees' representatives shall not exceed the grand total of employees' representatives in the Labor-Management Council. In case that any position of employees' representative is vacant or any of the representatives is unable to perform his/her duty for some reasons, the substitute shall replace the position in due order.²⁰ If no more substitutes are available to fill the vacancy, a by-election shall be conducted.²¹

The substitute issue for employers' representatives is much simpler. In case that any position of employer's representative is vacant or any of the representatives is unable to perform his/her duty because of job reassignment, the employer shall appoint the substitute to replace the position.²²

After all the representatives of Labor-Management Council have been elected or appointed, a report shall be made and delivered to the local government for registration within 15 days after the election or appointment. The same rule applies when replacement of vacant position, by-election, or reappointment occurs.²³

C. OPERATION

The term of office for each representative in the Labor-Management Council is three-year. The employees' representatives may be re-elected and the employer's

¹³ See section 8 of the *Regulations for Implementing the Labor-Management Council*

¹⁴ Kuang-Hao Fang, *supra* note 3, at 72.

¹⁵ See section 9 of the *Regulations for Implementing the Labor-Management Council*.

¹⁶ See section 5 of the *Regulations for Implementing the Labor-Management Council*.

¹⁷ See sections 6(1) and 6(2) of the *Regulations for Implementing the Labor-Management Council*.

¹⁸ An employee who does not fit in the definition of "worker" (a person who is hired by an employer to do a job for which wages are paid) under the *Labor Standards Act*, such employee is not covered by the *Act*, and therefore is not eligible for the rights provided by the *Act*.

¹⁹ See *Taiwan Labor Management 2-0036547 Notice* issued by the Council of Labor Affairs of the Executive Yuan, Aug. 10, 1999.

²⁰ See sections 6(3) and 6(4) of the *Regulations for Implementing the Labor-Management Council*.

²¹ See section 10(3) of the *Regulations for Implementing the Labor-Management Council*.

²² *Id.*

²³ See section 11 of the *Regulations for Implementing the Labor-Management Council*.

representatives may also be re-appointed. The term of office for the representative starts from the next day of the expiration date of the previous term. If the representatives fail to finish their term, the term of office of the new-elected representatives shall start from the next day of the election date.²⁴

In order to strengthen labor-management relations and to protect workers' rights and interests, all the representatives of Labor-Management Council shall do their utmost to exercise the spirit of harmony and cooperation in the council.²⁵ Employer's representatives shall be responsible to the employer, and employees' representatives elected shall be responsible to all the employees for their respective opinions expressed in the council.

The chairman of the Labor-Management Council shall be either an employer's representative or an employees' representative. It takes turns generally. However, one representative from each side may be appointed to act as co-chairmen when it is necessary.²⁶ The Labor-Management Council may set up ad hoc committees to cope with relevant cases or important issues.²⁷ The Labor-Management Council shall be held at least once every three months. An ad hoc meeting may be convened when it is necessary.²⁸ During the meeting of the Labor-Management Council, individuals who are well-versed in the matters under discussion may attend the meeting to answer related questions with the consent of the council²⁹

The meeting notice shall be delivered to all the representatives at least 7 days before the meeting date. The agenda of the meeting shall be delivered to all the representatives at least 3 days prior to the meeting date.³⁰ A meeting of the Labor-Management Council must be attended by a majority of the representatives from the employees' side as well as the employer's side. A resolution must be made after a consensus on certain issues is reached. If the representatives of Labor-Management Council fail to reach a consensus, a resolution may be passed with the approval from more than three fourths of the representatives present at the meeting. The representative who is unable to attend the meeting may provide written opinions.³¹

The minutes of the Labor-Management Council shall record the following items:³²

1. the serial number of the meeting.
2. The time of the meeting.
3. The place of the meeting.
4. The names of the representatives and other participants.
5. The subjects to be announced.
6. The issues to be discussed and the resolutions to be made.
7. Suggestions.

The resolutions made by the Labor-Management Council shall be forwarded by the business entity to the labor union or to the relevant departments for implementation. If the

²⁴ See sections 10(1) and 10(2) of the *Regulations for Implementing the Labor-Management Council*.

²⁵ See section 12 of the *Regulations for Implementing the Labor-Management Council*.

²⁶ See section 16 of the *Regulations for Implementing the Labor-Management Council*.

²⁷ See section 15 of the *Regulations for Implementing the Labor-Management Council*.

²⁸ See section 18 of the *Regulations for Implementing the Labor-Management Council*.

²⁹ See section 14 of the *Regulations for Implementing the Labor-Management Council*.

³⁰ See section 20 of the *Regulations for Implementing the Labor-Management Council*.

³¹ See section 19 of the *Regulations for Implementing the Labor-Management Council*.

³² See section 21 of the *Regulations for Implementing the Labor-Management Council*.

resolutions can not be enforced, they may be proposed in the next meeting for further discussion.³³

As to the regular council affairs, the business entity shall appoint staffs to take charge of relevant matters.³⁴ The expenses incurred by the Labor-Management Council also have to be borne by the business entity.³⁵

D. SCOPE OF MATTERS

The scope of matters for the Labor-Management Council is initially regulated by the *Regulations for Implementing the Labor-Management Council*. According to the *Regulations*, the matters that the Labor-Management Council is allowed to deal with include the following items:³⁶

1. Declaration matters

- (1) On the enforcement of the resolutions made in the previous meeting.
- (2) On the labor movement.
- (3) On the production plans and the business profile.
- (4) On other relevant matters.

2. Discussion matters

- (1) On issues pertaining to promotion of the labor-management relations and labor-management cooperation.
- (2) On issues relating to working conditions.
- (3) On issues concerning labor welfare plans.
- (4) On issues regarding improvement of productivity and efficiency.

3. Suggestion matters

When the matters discussed in the meeting of the Labor-Management Council are regarded as “suggestion matters”, such matters are not required to be resolved during the meeting. The representatives may bring up issues such as working environment, manufacture problems, workplace safety, and provide suggestions to resolve these issues in the meeting. There is no limitation on the nature of suggestion matters. As long as the matters can enhance the employees’ participation, and the suggestions offered by the representatives can become reference resources for employer’s policy-making, any matter may be discussed.³⁷

The management subjects of the business entity are also regarded as suggestion matters. If the management subject is regarded as discussion matter, such subject shall not only be discussed, but also be resolved. In other words, resolutions must be made for such matters. If that is the case, the management autonomy of the business entity will be unduly intervened. In order to guarantee the employer’s management autonomy, the management subjects of the business entity are regarded as suggestion matters. Nevertheless, the line of management subjects is not utterly clear in practice. For example, when an employer decides to bring in new manufacture equipments, introduce new human resource system, transfer personnel, or discharge employees, these decisions look like business subjects from the appearance. The employer is thus not obligated to discuss these matters with the representatives in the meeting of the Labor-Management Council. The employer only has

³³ See section 22 of the *Regulations for Implementing the Labor-Management Council*.

³⁴ See section 17 of the *Regulations for Implementing the Labor-Management Council*.

³⁵ See section 23 of the *Regulations for Implementing the Labor-Management Council*.

³⁶ See section 13 of the *Regulations for Implementing the Labor-Management Council*.

³⁷ Kung-Hao Fang, *supra* note 3 at 73.

to declare these decisions in the meeting of the Council. Nonetheless, employees' cooperation still may be needed in some cases when the employer intends to enforce his/her management policy. In case that the employees' collaboration is needed, the employer's management decisions very likely will be regarded as the matters pertaining to the promotion of the labor-management relations and labor-management cooperation, and therefore still need to be discussed and resolved in the meeting of the Labor-Management Council. As a result, it can be said that the room for employees to participate in the policy-making process of a business entity is reserved under the design of the Labor-Management Council system.³⁸

In order to intensify the function of the Labor-Management Council, Taiwan government has broadened the scope of matters for the Labor-Management Council by amending the relevant statutes and utilizing administrative regulations. Currently, holding the Labor-Management Council becomes an essential requirement for the following matters:

1. Working hours arrangements and adjustments

The *Labor Standards Act* was amended in 2002. According to this amendment, the stipulation of regular working hours is shortened³⁹; the provisions of deformed working hours are added⁴⁰; The regulations regarding extending working hours⁴¹ and the rules governing female employees' working at night are modified.⁴² Under the aforesaid provisions, an employer shall not adjust or extend the working hours or demand his/her female employees to work between ten o'clock in the evening and six o'clock in the following morning unless the decision is made with the consent of a labor union. If no labor union is organized in the business entity, then the aforementioned decision must be made with the approval of the Labor-Management Council. Employers' violation of the provisions mentioned above shall be punished by an administrative fine of not less than NTDS\$20,000 but not exceeding NTDS\$300,000.⁴³ Since unions are not organized in most business entities covered by the *Labor Standards Act*, such employers have to establish and manage the Labor-Management Council in order to have more flexibility in working-hour

³⁸ Chia-Lin Wu, Corporate Governance and Labor Participation---An Examination of the Labor-Management Bargaining System, Thesis of Graduate Institute of Financial and Economic Law of Feng Chia University, p.71, 2009.

³⁹ Section 30(1) of the *Labor Standards Act* provides "A worker shall not have regular working time in excess of eight hours a day and eighty-four hours every two weeks."

⁴⁰ Sections 30(2) and 30(3) of the *Labor Standards Act* provide "With the consent of a labor union, or if there is no labor union exists in a business entity, with the approval of a Labor-Management Council, an employer may distribute the regular working hours, referred to in the preceding paragraph, of any two workdays in every two weeks, to other workdays, provided that no more than two hours shall be distributed to each of the other workdays. However, the total number of working hours shall not exceed forty-eight hours every week. With the prior consent of the labor union, or if there is no labor union exists in a business entity, with the agreement of a Labor-Management Council, an employer may distribute the regular working hours, referred to in the first paragraph, in every eight weeks, provided that the regular working time shall not in excess of eight hours a day and the total number of working hours shall not exceed forty-eight hours every week."

⁴¹ Section 32(1) of the *Labor Standards Act* provides "When an employer has a necessity to have his /her employee to perform the work besides regular working hours, he/she, with the consent of a labor union, or if there is no labor union exists in a business entity, with the approval of a Labor-Management Council, may extend the working hours."

⁴² Section 49(1) of the *Labor Standards Act* provides "An employer shall not make his / her female worker perform her work between ten o'clock in the evening and six o'clock in the following morning. However, with the consent of a labor union, or if there is no labor union exists in a business entity, with the approval of a Labor-Management Council, and the following requirements in each item are met, the preceding restrictions are not applied: 1. The necessary safety and health facilities are provided. 2. When there is no public transportation facilities available, transportation facilities are provided or dormitories for female workers are arranged."

⁴³ See section 79 of the *Labor Standards Act*.

arrangement.

2. Employment of foreign workers

Section 16 of the *Regulations on the Permission and Administration of the Employment of Foreign Worker* provides “In applying for a permit to recruit Class B Foreign Worker(s), an applicant employer shall submit the following documents: 1. Application form(s)...5. Certificates issued by the municipal city government or the counties/cities governments with respect to the following matters...(1) That reserve of employees’ pension has been transmitted to Workers’ Retirement Preparation Fund and the Workers’ Retirement Pension has been appropriated in accordance with the relevant laws and regulations... (5) That the Labor-Management Council has been held in accordance with the relevant laws and regulations...” Under the aforesaid provision, the employer who intends to recruit Class B foreign workers must provide the government document to prove that the Labor-Management Council has been held in the business entity. Without providing such document, employment of Class B foreign workers is impossible. Since employment of Class B foreign workers is very important for certain industries in Taiwan, holding the Labor-Management Council is therefore inevitable for such business entities.

3. Massive redundancy

According to section 4 of the *Protective Act for Massive Redundancy of Employees*, to implement massive redundancy of employees, the business entity shall, at least sixty days prior to the occurrence of any of the conditions in accordance with section 2 of the *Act*, inform the relevant officials of the government and other relevant agencies of its redundancy plan by a written notice. The written notice must be given to the union to which employees to be laid off belong in the sector or unit that is involved in massive redundancy in the business entity. If there is no union, then the written notice shall be given to the employees’ representatives of the Labor-Management Council. The business entity shall be fined for an amount of not less than NT\$ 100,000 but no more than NT\$ 500,000 for failure to submit the massive redundancy plan to the authority and relevant agencies. The government shall order such business entity to submit the written notice within a given time limit. If such business entity fails to comply with the government order, it shall be fined consecutively on a daily basis until the business entity complies with the law.⁴⁴

Within ten days from the date of submission of the massive redundancy plan in accordance with the aforementioned provision, the employees and the employer shall negotiate in accordance with the spirit of autonomy. In case that the employees and/or the employer refuse to enter into negotiations or are unable to reach an agreement, the government shall, within ten days, invite the employees and the employer to form a Negotiation Committee to negotiate the terms of the massive redundancy plan, and to propose alternatives if appropriate.⁴⁵ The Negotiation Committee shall have five to eleven members, including one representative designated by the government and an even number of representatives designated by both the employees and the employer. The representative designated by the government shall act as the chairman of the Negotiation Committee. Representatives of the employer shall be designated by the employer, and the representatives of the employees shall be designated by the union. If there is no union, the

⁴⁴ See section 17 of the *Protective Act for Mass Redundancy of Employees*.

⁴⁵ See section 5 of the *Protective Act for Mass Redundancy of Employees*.

representatives of the employees shall be designated by the employees' representatives of the Labor-Management Council. If there is neither union nor Labor-Management Council is available, the representatives of the employees shall be elected by all the employees in the sector or unit that is involved in massive redundancy in the business entity.⁴⁶

Since the economy in Taiwan has declined in recent years, massive redundancy is unavoidable for some business entities. For business entities that have no other alternatives but to discharge employees in great numbers, holding a Labor-Management Council is essential in the process of massive redundancy when there is no union organized in the business entity.

4. Labor inspection

The Council of Labor Affairs proclaims the *Labor Inspection Guidelines* with the authorization of section 6 of the *Labor Inspection Act*. Generally, the *Guidelines* are renewed once a year. The items need to be inspected are provided by the *Guidelines*. "Whether the Labor-Management Council has been held in the business entity" is one of the inspected items under the category of "working conditions matters".⁴⁷ Most business entities are extremely concerned for labor inspection in Taiwan. Numerous items need to be inspected during the labor inspection. The more items fail to pass the inspection, the more administrative fines it will be. It is therefore become another incentive for business entities to establish the Labor-Management Council.

5. Application for trading on the stock market or over the counter

Although the Council of Labor Affairs has tried its utmost to promote the Labor-Management Council system, the result is still not satisfactory. Apparently, most business entities do not take this issue seriously. In order to promote the Labor-Management Council system, Taiwan government declared a new policy in 1999. For any business entity which intends to apply for trading on the stock market or over the counter, it must pass the scrutiny of Taiwan Stock Exchange Corporation or GreTai Securities Market. According to the standards set up for the aforesaid scrutiny, the following matters are taken into account for business entities which intend to apply for trading on the stock market or over the counter:

- (1) Whether the business entity has been fined for violation of the *Labor Standards Act* in recent three years.
- (2) Whether the business entity has established the Employees Welfare Committee, sets aside and allocates employees' welfare funds in accordance with the *Employees Welfare Funds Act*.
- (3) Whether the business entity has held the Labor-Management Council.
- (4) Whether the business entity has deducted a certain sum of money every month and has deposited the same amount in a special account as the reserve fund of retirement payment for employees.
- (5) Whether severe occupational accidents have occurred because the business entity fails to provide necessary safety and health installations

⁴⁶ See section 6(1) of the *Protective Act for Mass Redundancy of Employees*.

⁴⁷ See the *Labor Inspection Guidelines of 2012*,

<http://www.cla.gov.tw/site/business/41733649/421ee68b/421ee82f/files/101%A6~%AB%D7%B3%D2%B0%CA%C0%CB%ACd%A4%E8%B0w-%A4%BD%A7i%AA%A9.pdf>, last viewed: 2/2/2012.

- in conformity with the established standards.
- (6) Whether the business entity has failed to make the payment of labor insurance fees on time, and kept refusing to make the payment upon press for payment.

Although not every business entity would apply for trading on the stock market or over the counter, establishing the aforementioned standards is still a reinforcement for the Labor-Management Council system.

IV. The Effect and Impact of the Labor-Management Council System

From the Factory Council to the Labor-Management Council, the development of the Labor-Management Council system has encountered different challenges and problems. In the beginning, the Labor-Management Councils were established only by business entities in the public sector. Since these business entities are controlled by the government, the Labor-Management Councils held by these business entities became models in accordance with government policy. However, those models did not work well. As years went by, most business entities in the private sector were still not interested in setting up Labor-Management Councils. This situation did not change even after the enactment of the *Labor Standards Act*. In order to enforce this policy, Taiwan government brought more laws and regulations into force. The total number of Labor-Management Councils did increase significantly in recent years. Many problems still exist in the Labor-Management Council system though. To gain a deeper understanding of the effects and impact of this system, some issues will be examined as follows.

A. BLURRED DISTINCTION BETWEEN LABOR-MANAGEMENT COUNCIL AND COLLECTIVE BARGAINING

Unions have never been pervasively organized in the business entities in Taiwan. Collective bargaining is therefore not an ordinary channel for employers and employees to communicate with each other. In fact, only 43 business entities had entered into collective bargaining agreements with unions in 2010.⁴⁸ In order to provide an alternative communication channel for both employers and employees, the Labor-Management Council system is created by the *Labor Standards Act*. According to the *Act*, business entities covered by the *Act* shall hold Labor-Management Councils. The members of the Labor-Management Council are composed by the representatives from both sides of the employer and the employees. The purposes of holding the Labor-Management Council are to coordinate labor-management relations, to promote labor-management cooperation and to increase work efficiency. Although most business entities were not interested in holding Labor-Management Councils, the total of Labor-Management Councils by the end of 2010 was 28,953, a number which was much higher than the total of unions in Taiwan. The legislators did not intend to replace unions with Labor-Management Councils when they enacted the provisions related to the Labor-Management Council. However, the co-existence of unions and Labor-Management Councils do create some problems.

It is clear that the functions of Labor-Management Councils are different from those of unions. However, once a business entity establishes a Labor-Management Council, its

⁴⁸ Monthly Bulletin of Labor Statistics, Council of Labor Affairs, Executive Yuan, R.O.C., p. 40, Nov. 2011.

employees may elect their own representatives to discuss with the employer's representatives regarding issues such as working conditions and labor welfare. If the issues employees are most concerned about can be resolved in the meeting of the Labor-Management Council, many employees would lose their incentives to organize a union. Taiwan's union organization rate has been very low, the growth of Labor-Management Councils will certainly worsen the situation. A business entity that has both labor union and Labor-Management Council usually witnesses the reduced role of the union to some extent. As long as matters discussed in the meeting of the Labor-Management Council are not against the law, there are no restrictions on the discussion subjects. In other words, most subjects which are supposed to be handled by the union may be dealt with by the Labor-Management Council instead. Thus disputes often arise regarding whether certain subjects shall be handled by the union or by the Labor-Management Council. Moreover, it is possible that the employer may manipulate the employees' representatives of the Labor-Management Council to overrule the agreement entered into by the employer and the union. Therefore, unless the union has more power, it would be easy for the employer to upset the negotiation process by manipulating the Labor-Management Council.

It is by no means the legislature's intention to make the Labor-Management Council a competitor or a replacement for the union. Nonetheless, the co-existence of unions and Labor-Management Councils still create problems. The Labor-Management Council is composed of representatives from both sides. It may speak for employees but also support the employer's interests. The major function of the Labor-Management Council is to balance both sides' interests as oppose to the union's chief mission of safeguarding the best interests of employees. Therefore, failing to draw a clear line of the natures and functions between unions and Labor-Management Councils will certainly harm the development of unions in Taiwan.

B. LACK OF COMPULSION

Section 83 of the *Labor Standards Act* provides that a business entity shall hold a Labor-Management Council. The *Act* does not provide further provisions to regulate the enforcement of the Labor-Management Council. With the authorization of the *Labor Standards Act*, the government laid down the *Regulations for Implementing the Labor-Management Council* to provide detailed regulations for the implementation of the Labor-Management Council system. The wording of section 83 of the *Labor Standards Act* makes it clear that it is mandatory for business entities to establish and operate Labor-Management Councils. However, there is no penalty provision for violation of section 83 of the *Labor Standards Act*. Without the authorization of the *Act*, the *Regulations for Implementing the Labor-Management Council* is not allowed to impose penalties on business entities which fail to organize Labor-Management Councils. It is therefore *de facto* optional for business entities to establish Labor-Management Councils, despite the wording of section 83 of the *Labor Standards Act* which indicates that it is mandatory for all business entities to organize Labor-Management Councils.

Most private business entities in Taiwan are small and medium enterprises.⁴⁹ For

⁴⁹ There were 1,248,000 small and medium enterprises (97.68% of all the enterprises) in Taiwan. See "White Paper On Small And Medium Enterprises In Taiwan", <http://www.moeasmea.gov.tw/lp.asp?ctNode=307&CtUnit=36&BaseDSD=7&mp=2>, last viewed: 02/01/2012.

most small and medium enterprises,⁵⁰ there is almost no motivation to organize a Labor-Management Council. After all, most small and medium enterprises have no need to hire foreign workers, or to trade stock on the stock market or over the counter. Therefore, most business entities which have convened Labor-Management Councils are either medium or large enterprises. The total number of Labor-Management Councils has increased significantly since the government made it a condition for any business entity which intends to apply for trading on the stock market or over the counter to hold the Labor-Management Council. However, the rapid growth in the number of Labor-Management Councils does not represent genuine progress in the Labor-Management Council system. During the application process for trading on the stock market or over the counter, some business entities have cheated by producing forged meeting records for a non-existent Labor-Management Council, or by passing the Labor Welfare Committee off as the Labor-Management Council, or having employees' representatives selected by the employer rather than employees electing them. In view of the fact that there is no penalty provision for violation of the laws and regulations on the implementation of Labor-Management Councils, it has been very difficult to put the Labor-Management Council system into practice in the workplace.

C. THE FEEBLE EFFECT OF LABOR-MANAGEMENT COUNCIL RESOLUTIONS

According to sections 19 and 22 of the *Regulations for Implementing the Labor-Management Council*, a resolution should be passed after a consensus is reached on the issues. If the representatives on the Labor-Management Council fail to reach a consensus on a resolution, it may be passed with the approval of more than three fourths of the representatives present at the meeting. If a resolution cannot be passed, it may be proposed for further discussion at the next meeting. However, it is not mandatory to propose undecided resolutions at the next meeting, and even if a resolution is raised again at the next meeting, the problem could still be unresolved. For this reason, it can be said that the *Regulations for Implementing the Labor-Management Council* do not provide any rules to promote the effectiveness of the resolutions.

Whether the resolutions reached by the Labor-Management Councils are legally binding has also been a controversial issue. The Council of Labor Affairs has held that a resolution reached by the Labor-Management Council is similar to a gentleman's agreement. The Supreme Court in Taiwan takes a different view. In relevant cases, most

⁵⁰ According to Section 2 of the *Standards for Identifying Small and Medium-sized Enterprises*, "Small and Medium-sized Enterprises"(SMEs) means that an enterprise which has completed company registration or business registration in accordance with the requirements of the laws, and which conforms to the following standards:

1. The enterprise is an enterprise in the manufacturing, construction, mining or quarrying industry with paid-in capital of NT\$80 million or less.

2. The enterprise is an enterprise in the industry other than any of those mentioned in the Sub-paragraph immediately above and had its sales revenue of NT\$100 million or less in the previous year.

For the purpose of business guidance, each of the government agencies may, in relation to such specific business matters, base their standards for identifying a SME on the number of regular employees as noted below, in which case the restrictions noted in the previous Paragraph shall not apply:

1. The enterprise is an enterprise in the manufacturing, construction, mining or quarrying industry and the number of its regular employees is less than 200.

2. The enterprise is an enterprise in the industry other than any of those mentioned in the Sub-paragraph immediately above and the number of its regular employees is less than 100.

Section 3 of the *Standards* further provides the definition of "small-scale enterprise" as a Small and Medium-sized Enterprise with less than 5 regular employees.

decisions made the Supreme Court have held that the effect of a resolution reached by the Labor-Management Council is like that of a contract.⁵¹

The Labor-Management Council is characterized in the *Labor Standards Act* as a body for labor-management coordination and cooperation, and the binding effect of Labor-Management Council resolutions is much weaker than that of the collective bargaining agreement. Thus, it is very difficult for one party (either the employer or the employees) to enforce a resolution when the other party refuses to comply with the resolution.

D. INCOMPATIBLE RELATIONS BETWEEN THE EMPLOYEES' REPRESENTATIVES AND UNION

As mentioned above, to some extent the existence of the Labor-Management Council obstructs unions' development in Taiwan. While the board members and supervisors of the union are allowed to be elected as representatives, it is in fact not easy for the union to have a compatible position with the employees' representatives. From legislative history, it can be observed that the legislators intended to prevent unions from controlling the Labor-Management Council. The logic of the legislators is that unions already have their own channel through which to bargain with the employer. It is inappropriate for unions to have control over the Labor-Management Council. There is no doubt that the nature and functions of the union are very different from that of the Labor-Management Council. Nonetheless, it will cause disharmony if the position of the union often conflicts with that of the employees' representatives. It would give the employer more room to manipulate the employees' representatives. As a result, it would surely harm the employees' rights and interests if the relationship between the union and the employees' representatives was not compatible.

E. HARD TO ACHIEVE PURPOSES OF THE LABOR-MANAGEMENT COUNCIL

Even if the purposes of the Labor-Management Council are stipulated unambiguously under the *Labor Standards Act*, the goals of the Council are still hard to fulfill. The reasons are as follows. First, some employees' representatives do not have full knowledge of their rights and duties. Such employees' representatives rarely propose discussion subjects, let alone having a meaningful debate with the employer's representative. The role the employees' representatives play is only an endorsement, and thus they cannot truly perform their duties. Second, the motivation of some employers to establish the Labor-Management Council is improper. In view of the fact that holding a meeting of the Labor-Management Council is required by law when the employer intends to extend working hours, to demand female workers work at night, or to apply for trading on the stock market or over the counter, the only reason for some employers to establish the Labor-Management Council is to discuss these matters only. Such employers would disregard other duties of the Labor-Management Council. This also harms the functions and development of the Labor-Management Council. Third, the employer's representatives are not elected but designated by the employer. Such representatives do not have as much autonomy as the employees' representatives. Usually the employer's representatives need to obtain sufficient authorization when a certain resolution needs to be made. The employer's representatives would be unable to have a meaningful discussion with the employees' representatives if the employer's representatives are not adequately authorized.

⁵¹ Chen-Kung Huang, Jen-Chun Wong, and Chia-Ho Lin, *supra* note 2, at 35-36.

In many cases, the reason that resolutions could not be made in the meeting of the Labor-Management Council is the employer's representatives were not adequately authorized. Such cases usually would be proposed in the next meeting for further discussion. Sometimes they would go through several meetings before a resolution could be reached. It is time-consuming and lacks efficiency.

V. Conclusion and Recommendations for Future Development of the Labor-Management Council System

The implementation and development of the Labor-Management Council system is regulated by established government policies. However, the enforcement of the system has been dissatisfactory. There is no doubt that a well-established Labor-Management Council may encourage voluntary labor-management negotiation and cooperation, increase communication channels for employers and employees, prevent labor disputes, form consensus regarding management strategies, and raise business competitiveness and efficiency. The role of the Labor-Management Council is especially important, as unions are not strongly organized in most of the Taiwanese enterprises. Thus, it becomes an essential issue as to how to implement an efficient Labor-Management Council system in Taiwan. The following recommendations are provided to solve the issues at stake.

A. STRENGTHEN THE IMPLEMENTATION OF THE LABOR-MANAGEMENT COUNCIL BY AMENDING RELEVANT LAWS AND REGULATIONS

Since the major defects of the Labor-Management Council are related to the inadequate laws and regulations, amending those laws and regulations is imperative. The first step is to raise the level of the regulations which govern the Labor-Management Council. Currently, the *Labor Standards Act* only provides that a business entity shall hold a Labor-Management Council to coordinate labor-management relations, promote labor-management cooperation and improve work efficiency. No further relevant provisions are provided. The Labor-Management Council is mainly governed by the *Regulations for Implementing the Labor-Management Council* laid down by the government as authorized by the *Labor Standards Act*. The *Regulations* is an administrative order with weak binding effect. Therefore, the employer would not be fined for failing to hold the Labor-Management Council or refusing to comply with the resolutions made by the Labor-Management Council. Under such circumstance, it is very difficult to implement the Labor-Management Council system. Despite the government's broadening the functions of the Labor-Management Council through its amendment of the relevant statutes and application of administrative regulations, the effect is still limited. For this reason, the stipulations governing the Labor-Management Council shall be upgraded to statutes. The *Labor Standards Act* should be reinforced in terms of the implementation of the Labor-Management Council. The provisions regarding proper and effective penalty for not holding the Labor-Management Council and not complying with the resolutions made by the Labor-Management Council shall be enacted completely. This will give the employers stronger incentives to hold the Labor-Management Councils and comply with the resolutions made by the Labor-Management Council.

B. THE FUNCTION OF THE LABOR-MANAGEMENT COUNCIL SHALL BE DISTINGUISHED FROM THAT OF THE UNION

Since the matters which the Labor-Management Council is permitted to deal with are not specifically limited, the Council sometimes plays a role similar to a union. Given the fact that the union organization rate is extremely low in Taiwan, it may be positive for employees who are not represented by unions to negotiate with their employers regarding working conditions and labor welfare through the Labor-Management Councils. However, it will undermine unions' development if most employees depend on the Labor-Management Council to deal with these issues.

It is not the legislatures' intent to make the Labor-Management Council a competitor or a substitute of the union. Nonetheless, the relevant laws fail to draw a clear line between the union and the Labor-Management Council. In order to clarify the difference between them, relevant laws and regulations must be amended. In principle, the Labor-Management Council shall not deal with the issues that are supposed to be determined by the union through collective bargaining. The Labor-Management Council's duties shall also be divided in accordance with the nature of issues. If the employees are already represented by a union in a business entity, the Labor-Management Council shall still be allowed to discuss the collective bargaining matters. Yet the discussion process will only be deemed the "pre-bargaining" process. The collective bargaining matters shall be handled by the union only. For example, the Labor-Management Council would be allowed to discuss the issues related to wages. The suggestions or opinions regarding such issues may be considered by the union without binding effect. If there is a need to change the wages, a decision made through collective bargaining is still necessary. On the other hand, in the absence of a union in a business entity, the Labor-Management Council shall have broader power to deal with the issues which are supposed to be handled by the union. The relevant laws shall explicitly provide the subjects that the Labor-Management Council is authorized to deal with. In other words, the Labor-Management Council shall not be allowed to determine the collective bargaining subjects even in the absence of a union. The Labor-Management Council would only be allowed to deal with the statutory matters in accordance with the laws.

The aforesaid amendments to the relevant laws can clearly distinguish the union's role from the Labor-Management Council's role. Each can perform their own functions without interference with each other. The Labor-Management Council's mission would be labor-management cooperation and labor participation in the policy-making process. The union's task would be promotion of workers' rights and welfare. The union has the right to dispute. The Labor-Management Council has no such a right.

C. COORDINATION OF LABOR PARTICIPATION SYSTEM

There are currently six types of labor participation system in Taiwan. The details are described in the follows:

1. The Labor-Management Council system: It is constituted by an equal number of representatives from the employees and the employer. The purposes of holding the Labor-Management Council are to coordinate labor-management relations, promote labor-management cooperation and increase work efficiency.
2. The collective bargaining system: The employees are organized and

represented by the union. The union, representing the employees' interests, bargains and enters into a collective bargaining agreement with the employer through collective bargaining. In general, once the collective bargaining agreement is entered into force, the rights and obligations of the employer and the employees shall be stipulated in the agreement.

3. The Employee Welfare Committee system: All factories, mines in the public and private sectors, or other enterprise organizations shall set aside and allocate employees' welfare funds to process and handle employees' welfare businesses.
4. The Labor Safety and Health Institute system: The purpose of holding the Labor Safety and Health Institute is to prevent occupational accidents and protect labor safety and health through labor participation in the policy-making process.
5. The Labor Retirement Fund Supervisory Committee system: The purpose of holding the Labor Retirement Fund Supervisory Committee is to stabilize the quality of workers' life after retirement through labor participation in supervising the labor retirement fund.
6. The proposal for quality control circle system: The purpose of this system aims to improve techniques and process, promote workers' self-realization and increase productivity through labor participation.

The aforementioned labor participation systems are separate and regulated by different laws and regulations. The implementation of these labor participation systems has been ineffective due to immature designs and incomplete regulations. Although the matters involves with the aforesaid labor participation systems are diverse in nature, they do share something in common—labor participation. Thus, the coordination and regulation of all existing labor participation systems in one specific statute may turn out to be an effective approach.

Chinese Staff Congress System: the Past, Present and Future

Shangyuan Zheng*

1. Before the Reform and Opening-up (before 1978): Chinese Staff Democratic Management System and Relevant Representing System

1.1 The history review of Chinese staff representative system from the early days of national founding to the period of "Cultural Revolution"

1.1.1 The factory managing committee system and the staff representative meeting system during the "national economic recovery period" (1948-1953)

In 1948, the Communist Party of China ("the CPC") had gradually governed the northeast of China. At that time, the northeast district, which had been occupied by Japan and the Former Soviet, had obvious advantages in industry, especially in heavy industry compared with other parts of China, and lead in industries such as steel, coal, metallurgy and machinery manufacturing. Since the scale of those industries is relatively concentrated, enterprises in the northeast had relatively large scale. As the troops of CPC gradually captured the northeast from the Kuomintang Nationalist Party ("the Kuomintang"), all those enterprises had been nationalized. After the Kuomintang retreated from mainland in 1949, most enterprises in large cities of mainland had been regarded as bureaucratic capital or official enterprises, thus had been nationalized. At the same time, the CPC had practiced the "gradual transition policy" upon the national capitalists as well as the private enterprises.

In its party constitution, the CPC clearly states that it is the vanguard of the working class as well as the excellent representative of the working class. In other words, the CPC has stucked for decades to the typical "Labor Party" politics since its foundation. Its political aim is to eliminate exploitation and oppression among people in society, and its theory of "how social wealth increases" is that labor creates the world. Therefore, began from the northeast in 1948, public enterprises established the enterprise staff's democratic management system, of which the factory managing committee system and the staff representative meeting system were the main forms. According to the former leader Liu Shaoqi, the policy of managing factories should be to cooperate with workers by all means and to rely on workers' working enthusiasm. Also, workers should cooperate with the factory by all means. To run a factory well depends on everyone, giving full play to their initiative.¹ In 1948, the sixth National Labor Convention put forward the principles of transforming factories into enterprise and democratizing the management. The Convention

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¹ "Selections from Liu Shaoqi", People's Publishing House, 1981, p305.

also passed the “Resolution Concerning the Current Task of Chinese Staff Movement”. The Resolution pointed out that: “State-owned and public enterprises should effectively improve their operation and management, mainly implement the principles of transforming factories into enterprise and democratizing the management”, “In order to implement management democratization, we need to establish factory or enterprise managing committee under unified leadership in each factory, which is composed of the manager or director of the factory, engineers and other production principals, and representatives elected by the trade union through worker meetings (equivalent to the number of other committee members). The committee, of which the manager or director of the factory is the chairman, works as the unified leading body of the factory or enterprise, and is under the leadership of higher leading bodies of national enterprises. It discusses and decides various kinds of problems about the factory or enterprise’s management and production,” and “Besides, in a large factory that contains over five hundred people, the factory staff representative meeting composed of staff (apprentices included) of all department can be set up, which communicates and discusses the factory’s decision, the producing plan and the experience summary under the leadership of the factory managing committee, so that more advices and criticism from the masses could be absorbed.”² The Resolution acted as the labor law on the eve of national founding. In order to implement the spirit of the Resolution, in May 1949, a staff representative meeting was held in the North China Liberated Area. At that meeting, Liu Shaoqi said that “According to the sixth National Labor Convention, the staff representative meeting system can be established only in factories containing over 500 people, which sets an excessive number limit in my point of view. Factories containing over two hundred or three hundred people can set up the meeting.” According to the practice of the North China Liberated Area at that time, factory managing committee is made up of the factory director (manager), the vice factory director (vice manager), the chief engineer (or main engineers) and other production principals, and worker representatives (the number of them is more than the number of other committee members). The factory director, the vice factory director and the chief engineer are the rightful committee members, and the worker representatives are elected through meetings of all the staff or staff representatives called by the trade union. Factory managing committee has the power to discuss and decide all major issues on production and management. The staff representatives are elected from each production department. They are responsible to the staff they represent, and can be reelected and replaced by the staff. The main functions of the staff representative meeting are: to listen to and discuss managing committee’s report, to check management committee’s management and style of leadership towards the factory, and to put forward criticisms and suggestions accordingly.³

Till 1950, most state-owned enterprises had established factory managing committee and factory staff representatives meeting system. In February, the Finance Committee of Government Administration Council issued the “Instruction of Establishing Factory Managing Committees in State-owned Factories and Public Factories”. The Instruction points out that, since the war of liberation has been over in most areas of China, the central task of the country is to recover and develop production. To accomplish the great task, a series of step-by-step and programmatic reformations have to be carried out in state-owned

² All-China Federation of Trade Unions’ policy research office: “Historical Document of Chinese Enterprise Leadership System”, Economics and Management Publishing House, 1986, p120-p121.

³ Wang Chidong: “A Brief History of Chinese Enterprise Management”, China Workers Publishing House, 1992, p33-p34.

and public factories or enterprises, in order to reform all the unreasonable systems left over from the times of bureaucracy domination. The central part of the reformations is to set up the factory managing committee, and to democratize factory management, which will make workers really find themselves to be the owners of the enterprise, and change their attitudes towards working, thus play their importance and creativity in producing procedure. The Instruction also stipulates that factories or enterprises which have not set up factory management committees should seriously implement the “Enforcement Regulation of Establishing Factory Managing Committee and Staff Representative Meeting in State-owned and Public Enterprises” issued in 1949 by the North China People’s Government.

1.1.2 The “undivided authority system” mode in factory management and the deviation from staff representative meeting system (1953-1956)

From 1953 to 1956, some enterprises in the northeast, north and east China began to introduce the “undivided authority system”, also known as the “factory director responsibility system”, which is the enterprise leadership system learned from the Former Soviet Union. In May 1950, when the Changchun Railway of China was under combined management of China and the Former Soviet Union, the “undivided authority system” was executed, and such system had spread over throughout Chinese railway system later on. In September 1953, the Central Committee of the CPC issued the “Instructions for Party Committees at all Levels Concerning Strengthening the Planned Management and Improving the Responsibility System in State-owned Factories and Mines”, which puts forward to establish and improve the responsibility system, and highlighted to establish the factory director responsibility system and the production scheduling responsibility system. Also, the North China Bureau of the CPC issued the “Decision of Practicing Factory Director Responsibility System in State-owned Industrial and Mining Enterprises”. Learning from the Former Soviet Union the systems and methods in industrial management, and practicing factory director responsibility system in industrial enterprises do help deal with the problem that the management responsibility is not clear in an enterprise, because many people sharing responsibility actually means no one is responsible. However, studying from Former Soviet Union highly concentrated planned economic pattern, so its enterprise management system will inevitably affected by the mode of administrating. “Also, some leaders in the northeast area took a dogmatism attitude in learning from the Soviet Union, they mechanically copy foreign experience regardless of the national conditions and without analysis, and put one-sided emphasis on administrative order and to manage through administrative means instead of scientifically analysis and using the ‘undivided authority system’. So as some enterprises implemented the undivided authority system, authoritarianism, subjectivism and bureaucracy became increasingly popular.”⁴ In this period, the role of the staff representative system gradually eroded. “Due to a lack of institutional support, the content of staff’s democratic participation had some significant changes. The trade union as the organizer of staff’s democratic participation began to focus on advancing working competition and developing the “advanced producer movement”. The great majority of staff were guided to carry on working enthusiasm and to actively learn and master new technology of production. Among them, many heroes and model workers who are hard working or good technology

⁴ Liu Yuanwen: “The Theory and Practice of Worker Democratic Management”, China Labor and Social Security Publishing House, 2007, p96.

learners emerged. Those to some extent had made up for the regret that the system of staff's democratic participation was broken off.”⁵

1.1.3 Chinese staff representative system after the completion of transformation of capitalist industry and commerce (1956-1966)

In September 1956, the Eighth National Congress of the CPC made the decision to implement in all enterprises the system of collective leadership of the Party committee, that is to say, to implement the factory director or manager responsibility system and the staff congress system under the collective leadership of the Party committee. In 1957 the Central Committee of the CPC issued the “Notice of Several Important Points Concerning the Research of Working Class” which says that democracy in enterprise management must be expanded, and that staff masses’ supervisory function upon enterprise administration must be expanded as well. The Notice requires that the current staff representative meeting hosted by the trade union should turn into the staff congress (in smaller enterprises should turn into all staff’s conference) and the power of such congress or conference should be enlarged. Those enterprises established the staff congress system under the leadership of the Party committee, resumed the enterprise staff’s democratic participation, and more importantly established the staff congress as a form of democratic participation. Under the collective leadership of the Party committee, the staff congress system and the factory director responsibility system become two parallel system of enterprise management, and the enterprise administrative management began to separate from the staff democratic management in systematic aspect.

After 1958, since the whole country raised the “Great Leap Forward” movement and the “establishment of people’s commune” movement, left-leaning trend became dominant, and “the atmosphere of eliminating trade unions” blocked the channels of staff’s democratic participation. Actually, in many enterprises staff congress system had been abolished. In 1961, when adjusting and reorganizing national economy, Deng Xiaoping, by then the general secretary of the Central Committee of CPC, hosted to formulate the “Ordinance of State-owned Industrial Enterprise (draft)”, namely the “Seventy Articles of Industry”, which put forward again the policy of playing the role of the staff congress and the enterprise trade union. The Ordinance (draft) points out that in state-owned industrial enterprises, we should promote democracy; carry out the mass line; fully arouse the masses; give full play to enthusiasm and creativity of all the workers, technicians and other staff, and improve their sense of responsibility as owners of the enterprise; and combine centralized management and mass movement in a correct way. We should admit all the staff to participate in the management, and rely on the masses to run a successful enterprise. In an enterprise, staff congress and staff conference of all levels should discuss and solve important problems about enterprise management, and should discuss and solve problems the staff concern most. In July 1965, the Central Committee of the CPC supplemented and modified the “Seventy Articles of Industry”, forming the “Ordinance of State-owned Enterprise Work (Draft)”, which provides the nature of staff congress, namely “the staff congress is the organ of power where staff masses participate in management, supervision of cadres, and exercising three kinds of democratic rights”⁶; it also provides the authority of staff congress.

⁵ Liu Yuanwen: “The Theory and Practice of Worker Democratic Management”, China Labor and Social Security Publishing House, 2007, p97.

⁶ The “three kinds of democratic rights” means political democracy, economic democracy and military democracy.

1.1.4 The staff representative system and the situation of staff democratic management during the “Cultural Revolution” period

In 1966, China’s “Cultural Revolution” political movement happened, social order immediately fell into a state of chaos; factional struggles, even armed struggles happened in enterprises. Since there had been integration of the Party and the management⁷ in enterprises, the Revolutionary Committee was set up in each enterprise, which is generally composed of representatives of the military, the leading cadres and the representatives of the masses, and functioned as the supreme leading body in an enterprise because of the integration of the Party and the management. Due to the masses’ direct participation in the Revolutionary Committee, neither the staff democratic participation nor the staff democratic management system survived. The staff congress system established before the “cultural revolution” also halted because of the political storm.

1.2 Analysis and summary

From the founding of PRC to the end of 1970s, Chinese economy and society was running under a highly planned system. From the aspect of administrative management, the administrative management system was based on division of different industries, which made enterprises become totally appendages of administrative agencies. From the aspect of economy, the early effort the CPC had made to eliminate exploitation and oppression was totally based on the concept of public-owned property system. Under that concept, the “capital” of state-owned enterprises belongs to all the people, the related state departments merely manage and operate the capital for the people, and all the labors share the ownership of our nation. In such a political and economic background, during the 30 years, the barriers between “capital” and “labor” had almost been wiped out. Therefore, the staff representative system of the 30 years can be generalized as several characteristics as follows:

a) Enterprises and enterprise representative system are established under non-market background.

In the New Democracy period, or before 1956, Chinese society had a certain range of private economy, that is to say, small range of problems between labor and capital still existed. However, since the socialist transformation was accomplished in 1956, capitalist industry and commerce had been socialist transformed through foreclosure and other forms of merge. Factories and enterprises in the mainland of China all became public-owned enterprises, including most of the enterprises owned by the whole people and a few collectively-owned enterprises. There is a mixing of “labor and capital” in these public-owned enterprises, that is to say, there is no boundaries between so-called employers and employees, in turn, the employers and employees become “workers” and “cadres” which both belong to “national persons” and are covered by administrative color. Therefore, the representatives of the staff representative system could be either workers or cadres.

⁷ People generally call enterprise manager or director for “GANBU”, actually the enterprise management have some government function in daylife.

b) Staff representative system and the factory director responsibility system coexisted.

Staff representative system is involved in wide-ranging fields, including the field of staff welfare, as well as the field of staff representatives' participation in enterprise management. To some extent, staff representative system was built more to promote democracy, to meet the double considerations of restraining bureaucracy and mobilizing the enthusiasm of the staff masses. From the aspect of restraining bureaucracy, as the "capital" of enterprises belong to the state, managers are "national cadre" who are actually covered by very strong administrative person color. Such administrative management system would easily be infected with bureaucratic habits, so there need to be certain mechanism to restrict the cadres' abuse of power. From the aspect of mobilizing the enthusiasm of the staff masses, as the Constitution and relevant policy established the principle that the working class is the leading class, the workers are the masters of the enterprise, plus, mobilizing workers' enthusiasm should be reflected in the orientation of enterprise management, accordingly, it should be workers' instinct and responsibility to care about all aspects of the enterprise. In some extent, all those system and theory introduced from the Soviet Union are not completely unreasonable, however, such enterprises depart completely from the market and social need, and they only fit in the state administrative plan. Therefore, the staff representative system in this period was a system to balance the power of enterprise management.

c) During the 30 years' planning system, the staff representative system was relying on trade unions as its entity base, and was running independently without the system of collective bargaining.

Making a general observation of countries with continental legal system, typical staff representative system has close connection with collective bargaining system. First of all, the trade union is independent and is apart from the direct restriction and management of the enterprise, and how well the staff representatives functions rests on whether the trade union has enough power to organize them. Under the planning system, Chinese staff representative system was operated on the premise that neither confrontation between labor and capital nor the system of employment existed, that is to say, Chinese staff representative system is a category of enterprise democratic management and participation rather than the result of confrontation between labor and capital.

d) During the 30 years' planning system, the staff representative system, like relevant systems in other areas, is some kind of "policy" system which was formed on the premise that neither the "labor law" nor other relevant laws and regulations existed.

During the 30 years, basic civil and criminal legal system in China didn't have legislative achievements, that is to say, on the premise that China didn't have basic laws such as civil law, criminal law and procedure law, these basic social operation depended on relevant national policies. Such situation held true for labor legislation as well. Chinese operation of enterprise staff representative system relied on a large number of policy documents issued by the CPC and the government. For example, how to elect a staff representative, what a representative's duties and his or her working contents are, and what the relationship between the enterprise administrative leaders and the representatives is like, answering all the above questions depended on relevant policies. These policies themselves

do not have corresponding stability, so the modification of the system cannot be anticipated. Therefore, sometimes the staff representative system worked well while sometimes it worked badly.

During past 30 years, the violent political movements in Chinese society not only affected the domain of social political life, but also affected the domain of economic life. Chinese staff representative system was influenced by the political movements, accumulated some tentative experience, but also learnt a lot of lessons.

2. After the Reform and Opening-up (after 1978): Chinese Staff Democratic Management System and Staff Representative System

2.1 The reconstruction, recovery and development of Chinese enterprise staff representative system (1978-1992)

2.1.1 In April, 1978, the Central Committee of the CPC issued the “Resolution of Some Problems Concerning Speeding Up the Development of Industry (draft)”, which decides to restore the system of the factory director designated to undertake responsibility under the leadership of the communist Party committee among industrial enterprises, to restore the staff congress system or the staff conference system, and to establish the system where the workers can participate in management, and the leading cadres, workers, technicians are combined together. After 1978, the work of restoring of the staff representative system sped up in state-owned enterprise. In July 1981, the Central Committee of the CPC and the State Council transmitted the “Interim Regulations on Staff Representative Conference System in State-owned Industrial Enterprises”, which is the first statute about staff congress system since the founding of the PRC. The Interim Regulation points out that, the staff congress is the basic organizing form to improve staff masses’ responsibility as masters of enterprise, to arouse staff masses’ enthusiasm to be masters, and to operate good socialist enterprises. In the following year, accompanied with the promotion from Party organizations and trade unions, the staff congress system had been constructed and developed in a large area. On December 4, 1982, the Fifth Meeting of the Fifth National People’s Congress passed the Constitution of the People’s Republic of China (which is also called the “82” Constitution). The Constitution stipulates in Section 2, Article 16 that “State-owned enterprises practice democratic management through staff congress and other ways in accordance with the law”. That is the regulation about Chinese staff representative system with highest level of legal authority after the reform and opening-up. The stipulations about staff representative system in the Constitution directly influenced the development of Chinese staff representative system in the new period of Chinese history.

In general, from 1978 to 1984, although Chinese society was exercising the reform and opening-up policy, it remained to be a society of typical planned economy. To some extent, the restoration and the reconstruction of the staff congress system in this period is a rebound from the uncontrolled and disordered democratic life in the “Cultural Revolution”. That is to say, people were looking forward to getting enterprises out of bureaucracy, and to let staff participate in enterprise’s management through their own management methods, in order to reflect their master consciousness. Also, such a rebound formed the corresponding consistency with the political climate after the “Cultural Revolution”.

In October 1984, the Third Plenary Session of the Twelfth Central Committee of the CPC passed the “Decision about Reforming Economic System”. The Decision points out

that to invigorate enterprises, especially big or medium-sized enterprises owned by the whole people, is the central part of the reform which focuses on cities. After the economic system reform strategy of focusing on cities was determined, the leadership system of state-owned enterprises accelerated to develop. On September 15, 1986, the Central Committee of the CPC and the State Council issued the “Regulations of Directors of Industrial Enterprises Owned by the Whole People”, and the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People”. These regulations are administrative regulations which have relatively high legal authority. They require that all enterprise should correctly deal with the relationship between government and enterprises, enterprises and staff, and administrative management and democratic management. The staff congress should give full play the functions in reviewing important decisions of enterprises, in supervising administrative leading cadres, and in maintaining staff’s legal rights and interests. By aid of the implementation of those administrative regulations, Chinese enterprise staff congress system had unprecedented development. By the end of 1987 in China, there had been 364,000 enterprises establishing staff congress system, and 6,110,000 motions proposed by staff representatives, of which 2,790,000 motions were about enterprises’ production and management, accounting for 45.6% of the total number. In enterprises where staff congress system had already been established, the number of those in which cadres were appraised through democratic discussions has reached 195,000, accounting for 53.6%.⁸ In April 1988, the First Meeting of the Seventh National People’s Congress passed the “Law of the People’s Republic of China on Industrial Enterprises Owned by the Whole People”, which implemented on August 1, 1988. That law generally recognized the system established in the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People”, and made some modifications to meet the needs of reforming enterprises.

2.1.2 The main contents of “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People” issued by state council on September 5, 1986 are as follows. This administrative regulation has 7 chapters and 29 articles.

The first chapter provides general provisions. Industrial enterprises owned by the whole people should establish and improve staff congress system and other forms of democratic management at the same time when they are operating the factory director responsibility system. The staff congress is the organ of power by which the staff exercise their democratic management, and the enterprise’s trade union is the operation body of the staff congress which takes charge of the routine of the staff congress. The staff congress should actively support the factory director’s power of making management decisions and giving unified command upon productive activities. The staff congress practices democratic centralism.

The second chapter provides the authority of staff congress, including: firstly, to regularly listen to the working report of the factory director, and to regularly examine the enterprise’s management policies, the long-term and annual plans, the plans of major technical reform and technology importation, the plans of staff training, the budget and final accounts, and the plans of allocating and using the enterprise’s own funds; secondly, to examine the scheme of enterprise economic responsibility system proposed by the factory director, the wage adjustment plans, the bonus allocation scheme, the labor protection scheme, the scheme of punishments and rewards, and other important rules and regulations; thirdly, to review and decide the scheme of using staff’s welfare funds, the

⁸ Wang Chidong: “A Brief History of Chinese Enterprise Management”, China Workers Publishing House, 1992, p107.

scheme of distributing staff's housing, and other important matters about staff's welfare; fourthly, to appraise and supervise enterprise's leading cadres at all levels, and to put forward suggestions of rewards and punishment, appointment and dismissal; also, the competent authority must fully heed the opinions of the staff congress when appointing or dismissing the leaders of an enterprise. If the staff congress has different opinions with matters within the scope of factory director's authority, it can propose to the factory director. In the staff congress, the factory director on behalf of administration and the trade union chairman on behalf of staff can sign a collective contract or mutual agreement.

The third chapter is about the representatives of staff congress. Staff who has political rights according to law can be elected representative of staff. The staff representative should be directly elected by staff in unit of group or section. In large enterprises, staff representatives can also be elected by staff representatives of branches or workshops. Staff representatives shall have workers, technicians, management staff, leading cadres and other kinds of staff. Generally, administrative leading cadres of enterprises, workshops and offices should account for one fifth of all the staff representatives. Young staff representatives and female staff representatives shall account for a certain percentage. Staff representatives shall form teams in unit of branch, workshop, office and shall elect team leaders in each team. The fixed term system applies to staff representatives, who are re-elected every two years and can be re-elected consecutively. Staff representatives have the following rights: firstly, the right to vote and the right to be voted; secondly, the right to participate in the staff congress's checking work of making sure that its resolution is implemented by the staff and its proposal is carried out, and the right to inquire after the enterprise's leaders; thirdly, the right to enjoy the same treatment as the treatment for attending if one uses working time to participate in activities organized by the staff congress. Staff representatives has the following duties: firstly, to study hard the guiding principles, policies, laws and regulations of the Party and the country, to improve the political consciousness, technical level and ability to participate management; secondly, to tie with the masses, to represent the staff's lawful rights and interests; thirdly, to be a model to observe the law, regulations and enterprise's rules and labor discipline.

The fourth chapter provides the organizing system of staff congress. The staff congress elects its presidium to host the meetings. Members of the presidium should include workers, technicians, administrative staff and enterprise's leading cadres. More than half of the representatives should be workers, technicians and administrative staff. Staff congress should be held at least once every six months. Every meeting must have two-thirds of all the staff representatives to attend. In case of important issues, the factory director, enterprise's trade union or more than one third of the staff representatives can propose to hold a temporary meeting. The decisions the staff congress makes within its authority cannot be modified except the staff congress agrees to do so. The staff congress can set up certain temporary or regular panels to deal with relevant matters assigned by the congress when needed. When the staff congress is not in session, different panels should deal with matters needed to be decided in a short time according to the authorization of the staff congress. The panels are responsible for the staff congress. When the staff congress is not in session, to deal with important matters needed to be decided in a short time, enterprise's trade union committee should call the team leaders of staff representative teams and the responsible persons of panels to organize meetings, and to solve the matters through consultation, and the solutions shall be reported to the next staff congress to be confirmed.

The fifth chapter tells about staff congress and the trade union. The trade union committee as the working organ of the staff congress do the following work: firstly, to organize the election of staff representatives; secondly, to put forward suggestions about the issue of the staff congress, and to host the preparatory work and organizing work for the congress; thirdly, to host the joint meetings of team leaders of staff representative teams and responsible persons of panels; fourthly, to organize panels to do the research and put forward the proposal to the staff congress, to check and supervise the implementation of the resolution of the congress, and to arouse the start to implement the resolution of staff congress; fifthly, to propagandize and educate the staff about democratic management and to improve the quality of the staff representatives; sixthly, to accept and deal with appeals and suggestions from the staff representatives and to safeguard the lawful rights and interests of staff; seventh, to organize other work of democratic management of enterprise.

The sixth chapter tells about the democratic management of workshops and teams and groups. Workshops or branches of factory take the managing form of staff conference or staff congress, staff representative teams, which exercise the right to democratically manage within their authority. The branches of trade union take charge of the daily work of workshops and branches of factory.

The seventh chapter provides supplementary provisions. This regulation is applicable to enterprises of traffic transportation, post and telecommunications, geology, building construction, agriculture and forestry, water conservancy and other fields. The all-China federation of trade unions shall be responsible for the interpretation of this regulation. The regulation came into force on October 1, 1986.

2.1.3 Analysis and summary

After the year of 1978, many fields in China began to reform, and the reform of enterprises began in 1984. During the whole 1980s, the reform of Chinese enterprises is the most important issue all the time. In the 1990s, especially after the socialist market economy was established in 1992, Chinese staff representative system changed a lot, so the year of 1992 is the watershed. Before 1992, the Chinese staff representative system was based mainly on the above laws and regulations, especially the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People”. According to the content of these regulations, we can find that the background of the establishment of Chinese staff congress system was still planned economy, and the nature of enterprises is industrial enterprises owned by the whole people. At that time, the relationship between labor and capital in state-owned enterprises had not yet turned into the conflicting and contradictory relations under the background of marketization, and the staff congress system to some extent reflected the problems of balancing of power in enterprises and the problems of enterprises’ management emerged during the process of the enterprise reform, or namely, the problems of organically integrating enterprises’ managing power and staff’s democratic rights. On the same day the “regulations of staff congress in industrial enterprises owned by the whole people” was issued, the Central Committee of the CCP and the State Council issued the “regulations of directors of industrial enterprises owned by the whole people”, that is to say, the two above regulations were jointly issued by the CCP and the State Council.⁹ The issue of the “regulations of staff congress in industrial enterprises owned by

⁹ After the 1990s, administrative regulations are usually issued by the State Council independently, or at most jointly issued by the State Council and the Central Military Commission when the administrative regulations concern the military.

the whole people” is the first time that enterprise staff congress system be established by form of administrative regulation alone, and to establish enterprise staff congress system by laws and regulations is initiative. That indicated that the system of staff congress gradually became ruled by law.

However, limited to the situation of that age, such a relatively complete administrative regulations about staff congress was after all issued in the age of planned economy. When enterprise reform come into the 1990s, as the relation between labor and capital in enterprises was changing radically, the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People” still had no timely revision at all. People even feel the regulation out of date during the process of marketization. More importantly, the regulation was issued when most laws and regulations concerning labor has not yet been issued. In other words, in the time when the regulation was issued, some labor legislation has just started, for example, labor contract system was just built,¹⁰ and the systems of handling labor disputes such as mediation and arbitration have not been restored, which naturally lead to the result that this administrative regulation did not adapt to enterprises on the background of market economy. For example, although the administrative regulation mentioned that the trade union chairman on behalf of the staff and factory director on behalf of the enterprise administration sign a collective contract, however, nothing about the relationship between the collective contract and the staff congress was stipulated, neither do the connections between the staff congress system and the whole labor legal system. It is worth to say that since the administrative regulation applies to “industrial enterprises owned by the whole people”, the nature of applicable enterprise is limited and the applicable field is limited to industrial field; however, the regulation doesn’t provide not only the specific scope of the industrial field, but also the scale of industrial enterprises which can exercise the staff congress system. Therefore, after the socialist market economic system was established, the “regulations of staff congress in industrial enterprises owned by the whole people”, just as the “Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People” issued two years later, seemed to be forgotten. Only those who engaged in relevant specific work feel such the law and regulation effective.¹¹

Therefore, the administrative regulation need an urgent revision.(to analysis in detail in the third part)

2.2 The situation of Chinese staff representative system since the market economic system was established (since 1992)

The year of 1992 is a key year of Chinese society, when China established the system of market economy under socialism with Chinese characteristics after Deng Xiaoping made the famous speech during his inspection tour to the south of China. China has started a new round of large-scale reform activities concerning reforming economy system and social system, and has launched large-scale law creating work. Afterwards, a lot of important laws and regulations were promulgated one by one, which profoundly influence Chinese economy and society. China’s economic system, social system, and legal system

¹⁰ The “Interim Provision of Labor Contract System in State-owned Enterprises” was also issued in 1986.

¹¹ The Democratic Management Department in the All-China Federation of Trade Unions is responsible for the implement and promotion of enterprises’ democratic management system. In the recent years, the Department did a lot of research on theories and practice about not only the system of staff congress, but also the system of disclosure of factory affairs, which play a key role in constructing relevant system.

nowadays all have some connections with the year of 1992. After 1992, Chinese staff congress met new challenges.

2.2.1 A large number of relevant laws and regulations about staff representative system were promulgated, including “The Company Law of the People’s Republic of China”(“the Company Law”), “The Labor Law of the People’s Republic of China”(“the Labor Law”), “The Trade Union Law of the People’s Republic of China” (“the Trade Union Law”), as well as many local decrees.

a) Provisions about staff representative system in the Company Law

The Company Law promulgated on December 29, 1993 (the law had been revised in 1999,¹² 2005 and 2009) provides in Article 18: “The staffs of a company shall, according to the Trade Union Law of the People's Republic of China, organize a trade union, which shall carry out union activities and safeguard the lawful rights and interests of the staff. The company shall provide necessary conditions for its trade union to carry out activities. The trade union shall, on behalf of the staffs, sign collective contracts with the company with respect to the remuneration, working hours, welfare, insurance, work safety and sanitation, and other matters. In accordance with the Constitution and other relevant laws, a company shall adopt democratic management in the form of staff congress or any other ways. To make a decision on restructuring or any important issue relating to business operations, or to formulate any important bylaw, a company shall solicit the opinions of its trade union, and shall solicit the opinions and proposals of the staff through the staff congress or in any other way.” Paragraph 2 of Article 45 provides: “If a limited liability company established by 2 or more state-owned enterprises or other state-owned investors, the board of directors shall include representatives of the employee of the companies. The board of directors of any other limited liability company may also include representatives of the employee of the company concerned. The employee representatives who are to serve as board directors shall be democratically elected by the staff of the company through the staff congress, the staff conference of the company or in any other way.” Paragraph 2 of Article 52 provides: “The board of supervisors shall include shareholders’ representatives and representatives of the employee of the company at an appropriate ratio to be specifically at least 1/3 prescribed in the bylaw. The staff representatives who are to serve as members of the board of supervisors shall be democratically elected by the staff of the company through the staff congress, or staff conference or by any other means.” Article 68 provides: “A wholly state-owned company shall establish a board of directors, which shall exercise its functions according to Articles 47 and Article 67 of this Law. Each term of office of the directors shall not exceed 3 years. The board of directors shall include representatives of the staff. The members of the board of directors shall be appointed by the state-owned assets supervision and administration institution, but of whom the representatives of the staff shall be elected through the assembly of the representatives of the staff of the company.” Article 71 provides: “The board of supervisors of a wholly state-owned company shall be composed of at least 5 members, of whom the employee representatives shall account for no less than 1/3, the specific percentage shall be specified by the bylaw. The members of the board of supervisors shall be appointed by the state-owned assets supervision and administration institution, however, the staff

¹² After the company law promulgated in 1993, the situation of staff representation change into the situation of employee representation, at least, the factor of employee representation is increasing day by day. Therefore, I use the term ‘employee representation’ in the latter half of the paper even the staff congress system does not change so drastically.

representative members of the board of supervisors shall be elected by the staff congress of the company. The chairman of the board of supervisors shall be designated by the state-owned assets supervision and administration institution from the members of the board of supervisors.” Article 109 provides: “A joint stock limited company shall set up a board of directors, which shall be composed of 5-19 persons. The board of directors may include representatives of the company’s employees. The representatives of the employees who serve as board directors shall be democratically elected through the staff congress, the staff conference, or other methods.” Article 118 provides: “A joint stock limited company shall set up a board of supervisors, which shall be composed of at least 3 persons. The board of supervisors shall include representatives of shareholders and an appropriate percentage of representatives of the company's employees. The percentage of the representatives of employees shall account for no less than 1/3 of all the supervisors, but the concrete percentage shall be specified in the bylaw. The representatives of employees who serve as members of the board of supervisors shall be democratically elected through the staff congress, the shareholders’ assembly or by other means.” The Company Law provides many contents about the system of company’s staff congress after the marketization reform.

b) Provisions about staff representative system in the Trade Union Law

The Trade Union Law was passed on April 3, 1992, and was amended in 2001. Its provisions about the staff congress are as follows: Article 6 provides: “The basic function and duty of the trade unions is to safeguard the legal rights and interests of the employee. While upholding the overall rights and interests of the whole nation, trade unions shall, at the same time, represent and safeguard the rights and interests of employees. Trade unions shall coordinate the labor relations and safeguard the labor rights and interests of the enterprise employee through equal negotiation and collective contract system. Trade unions shall, in accordance with legal provisions, organize the staff to participate in the democratic decision-making, democratic management and democratic supervision of their respective units through the staff congress or other forms.” Article 19 provides: “If an enterprise or public institution violates the provisions of the staff congress system or other democratic management systems, the trade union shall have the right to request corrections and ensure that the employee exercise their rights to democratic management pursuant to the law. The enterprise or public institution shall handle pursuant to law the matters that shall be submitted to the staff conference or staff congress for deliberation, approval and decision provided for by laws and regulations.” Paragraph 2 of Article 20 provides: “A trade union shall represent staff in equal negotiation and signing a collective contract with an enterprise or a public institution managed as an enterprise. The draft of a collective contract shall be submitted to the staff representatives or the complete body of staff for discussion and adoption.” Article 35 provides: “The staff congress of a state-owned enterprise shall be the basic-level structure through which the enterprise executes democratic management as it is the body through which the staff may exercise their rights to democratic management in accordance with the legal provisions. The trade union committee of a state-owned enterprise shall be the working body of the staff congress and shall be responsible for the daily affairs of the staff congress and for inspecting and supervising the implementation of resolutions of the staff congress.”

c) Provisions about staff representative system in the Labor Law

On July 5, 1994, the Labor Law was promulgated, which opened the prelude of China's labor legislation. The law is the signal law in the field concerning relationship between labor and capital in China. Its promulgation makes Chinese labor legal system begin to meet the needs of the system of socialism market economy. Article 8 provides: "Laborers shall take part in democratic management through staff conference, staff congress, or any other forms in accordance with law, or consult with the employer on an equal footing about protection of the legitimate rights and interests of laborers." Paragraph 1 of Article 33 provides: "The staff of an enterprise as one party may conclude a collective contract with the enterprise as another party on labor remunerations, work hours, rests and leaves, labor safety and sanitation, insurance, welfare treatment, and other matters. The draft collective contract shall be submitted to the staff congress or all the staff for discussion and passage."

d) Local decrees about staff representative system

After the staff representative system was provided in the Company Law, the Labor Law, the Labor Law and other relevant laws, quite a number of local decrees provide the staff representative system in more detailed provisions. Such decrees are as follows: the "Ordinance of Enterprise Staff Congress in Hebei Province"(2003), the "Ordinance of Staff Congress in Xinjiang Uygur Autonomous Region"(2005), the "Ordinance of Enterprise Staff Congress in Shandong Province"(2005), the "Ordinance of Staff Congress in Jiangxi Province"(2006), the "Ordinance of Staff Congress in Yunnan Province"(2007), the "Ordinance of Enterprise and Institution Staff Congress in Heilongjiang Province"(2007), the "Ordinance of Enterprise Staff Congress in Hunan Province"(2007). In addition, there are some local decrees in the form of ordinance of staff's democratic management, such as the "Ordinance of Staff's Democratic Management in Inner Mongolia Autonomous Region"(2002), the "Ordinance of Enterprise's Democratic Management in Shanxi Province"(2005), the "Regulation of Securing Enterprise Staff's Right of Democratic Participation in Fujian Province"(2000), the "Ordinance of Enterprise's Democratic Management in Jiangsu Province"(2007), the "Ordinance of Enterprise Staff's Democratic Management in Tianjin Province" (2007), the "Ordinance of Securing Enterprise Staff's Democratic Rights in Henan Province"(2007), and the "Ordinance of Enterprise's Democratic Management in Hubei Province"(2007). At the same time, some provinces promulgated local decrees about the system of disclosure of factory affairs, which indirectly reflect the content of the staff congress system.

2.3 Summary and analysis of current system

2.3.1 The current staff congress system is the system of employee's democratic participation under the background of the modern enterprise system formed after the establishment of the socialist market economic system. After the year of 1992, the reform of Chinese state-owned enterprises sped up. Especially after the promulgation of the Company Law, the proportion of state-owned enterprises in different areas declined in different degrees, and the degree of marketization of state-owned enterprises generally increased. At the same time, enterprises of other ownership, such as foreign-funded enterprises, private enterprises grew up quickly. In enterprises under the background of marketization, the conflict between the labor and capital gradually turned from invisible to dominant. Great changes had taken place in the field of labor relations in China, under that

premise, exploration of the theories and practices of Chinese staff representative system was launched in a definitely new period.

2.3.2 The establishment of the current system of staff congress has gradually become law-based. On one hand, the Company Law, the Trade union Law and the Labor Law have provisions concerning the staff congress system in different aspects. On the other hand, local legislatures show the attitude to make staff congress system more standardized and legal-based, and they promulgated a lot of local decrees and regulations about staff congress. The legalization of Chinese staff congress system can be perceived by just looking at the existing provisions in laws and regulations, that is, both laws and regulations have gradually used the normative legal languages to construct the staff congress system.

2.3.3 The current staff congress system break through the past limit of “Industrial Enterprises Owned by the Whole People”, and began to spread to enterprises of different ownership and in non-industrial fields. According to the above laws and local decrees, the “enterprise” in the enterprise staff congress system is no longer constrained to “industrial enterprises owned by the whole people,” but all enterprises.

2.3.4 The current staff congress system is established in the process of establishing the system of Chinese labor laws. As the market economic system was established, it is inevitable to adjust the relationship between labor and capital by law. It is on that background that Chinese staff congress system began to reconstruct in its true sense.¹³ The system itself has become an important part of the system of labor laws.

2.3.5 The current staff congress system is facing the impact of the reforming of enterprises’ administrative organizations. After the promulgation of the Company Law, the shareholders’ meeting, the board of directors and the board of supervisors become the organs of authority in the company, which gradually replaced the past factory directors and managers. The past parallel pattern of constructing the enterprise director’s responsibility system or the system of enterprise’s management organizations and system of staff congress system in industrial enterprises owned by the whole people was broken. How to balance the relationship between the staff congress and the “new three organs” (the shareholders’ meeting, the board of directors, and the board of supervisors) becomes the topic to be discussed in the new age. In other words, how to coordinate the “old three organs” (the staff congress, the trade union, and the enterprise management committee) and the “new three organs” is a problem. According to the current legal system, though the relationship between the “old three organs” and the “new three organs” has been considered, there remain many unsolved problems.

2.3.6 Local decrees play a big role in promoting the implementation of the staff congress system. The staff congress as a system where staff democratically participate in enterprise’s management lasted for a few decades, has enough flexibility while lacks of stability, “to some extent, it could provide security and protection for the practice of staff’s democratic management. However, since the staff congress has not been brought into the country’s democratic legal system ever, the system of democratic management has been regularly changed as the political situation, especially the leaders of the nation changed, which reflects the color of rule of men and a biggish randomness.”¹⁴ The promulgation and implementation of the local decrees makes the past staff’s democratic management

¹³ I think the staff congress system should be changed into a new system of employee representation except for management participation.

¹⁴ Liu Yuanwen: “The Theory and Practice of Worker Democratic Management”, China Labor and Social Security Publishing House, 2007, p107.

system with poor operability gradually become relatively operable. For example, Article 14 of the “Ordinance of Enterprise Staff Congress in Hebei Province” provides: “Enterprises with less than one hundred persons shall set up the staff conference system or the staff congress system. Enterprises with more than one hundred persons shall set up the staff congress system. In enterprises with more than one hundred persons but less than two hundred persons, the number of staff representatives should not be less than thirty. In enterprises with more than two hundred persons but less than one thousand persons, the number of staff representatives should be determined as fifteen percent of the total number of staff, and usually not be more than one hundred. In enterprises with more than one thousand persons, the number of staff representatives should be determined as ten percent of the total number of staff, and usually not be more than four hundred. The exact number of representatives can be stipulated in the working regulations of the enterprise’s staff congress according to practical situation.” Local decrees do play an important role in promoting the practice of staff congress system, especially in responding to the reality that the relationship between labor and capital has changed in the new century.

2.3.7 The staff congress is a form of conference, according to the current relevant provisions, staff congress is usually held twice a year. At the same time, the staff congress is a kind of organization, it is the organization by which staff participate in the enterprise’s management and supervise the enterprise. Though its working organ, enterprise’s trade union committee, appears to be more concrete than the staff congress, it is the staff congress that represents the staff’s highest organization of authority rather than the enterprise’s trade union committee.

2.3.8 The staff congress system has started to link the labor legal system under the background of the market economy. For example, relevant laws and regulations provide that the signing of a collective contract shall be passed and approved by the staff congress; and according to the “Labor Contract Law of the People’s Republic of China”, the establishment of enterprise’s rules shall be discussed and approved by the staff congress.

3. Prospect of the Future of Chinese Staff Representative System

3.1 To meet the challenge of the “strong capital, weak labor pattern”, and to strive to make the enterprise staff representative system become the real system of democratic participation and democratic management in enterprises.

Looking around today’s world, the academic circle lead by the theories of neoclassicism and neoliberalism, always think that capital is the only thing that dominate the economy, and that labor is just one of the factors of the economy——there is even a problem of defining the laborers as “stakeholders”. As the regimes of former socialist countries collapsed, people even doubt about the existence of “socialism”, which is a system philosophy or value orientation formed in as early as the end of the 19th century. The major problem of socialism is the problem of interpreting the relationship between capital and labor, which has been debated for a long time. Karl Marx created the labor theory of value, holding that the creation of profits wholly comes from the labor value of labor force. However, in some persons perspective, capital brings everything in the contemporary social reality. As is known to all, an enterprise is just an organic integration of labor and capital, and an enterprise’s intangible assets such as technology and commercial credit are inseparable from the existence of both the capital and the laborers. In this world, there are no enterprises without capital but only labor, nor enterprises

without labor elements but only capital. To realize the organic integration of capital and labor is the best way to annotate the staff representative system in enterprises. The staff representative system is not the patent of industry-developed countries, not the invention of economically backward countries, nor the label of socialism enterprises. In my opinion, an existing enterprise always needs to balance the relationship between labor and capital, there are many legal ways to adjust such relationship, for example, to adjust and regulate by laws and regulations, to adjust and arrange by collective agreements, to stipulate the rights and obligations in individual labor contracts, and to discipline by the enterprise's rules and regulations. However, the staff representative system of enterprise is a superior system to adjust the relationship between labor and capital, as well as to promote the growth of enterprises. Operating the staff representative system can not only fully demonstrate the existence of enterprise's labor elements, enhance the employee's sense of belonging, arouse laborers to actively participate in enterprise management; but also promote economic democracy, create democratic gene and social political gene for enterprise's growth in micro economic field, and build the foundation stone for the society to realize democracy. Operating the staff congress system can not only guard the lawful rights and interests of employee, make the protections of employee's rights and interests more integrated and collective, but also restrain capital, prevent arrogance of capital, impel the enterprise's management to analyse deeply, to think rationally, and to listen to the masses' opinions.

As China's economy and society keep developing from the 1990s to the new century, all can observe the growth of Chinese enterprises, the economic development of China stands out from the economic development of the world. At the same time, the weakening of labor element and the strengthening of capital element in Chinese enterprises labor elements synchronize with the growing economy of China! In the history process of promoting Chinese labor legislation in a large scale, the protection of laborers' rights and interests has shown many blind spots and soft spots. In 1993, after the promulgation of the Company Law, the "new three organs" have formed, and it is not an exaggeration to say that the "new three organs" have corroded the status and authorities of the "old three organs". Even in the traditional state-owned enterprises, there has been a weakening trend of the role the staff representative system plays. After all, as the private economy and foreign economy has kept expanding since the 1990s in China, both practitioners and academicians feel confused about how to operate the staff representative system in those non state-owned enterprises. Some people even oppose the staff representative system in enterprises, and see the staff congress system as an obstacle of enterprise's development.

3.2 The problem of turning Chinese staff congress system from "nominal" to "substantial"

Chinese staff representative system has existed for several decades, especially after the socialist market economic system was established, this system was confirmed by laws such as the Company Law, the Trade Union Law, the Labor Law and regulated by local decrees concerning staff congress system. In a word, the legislation of Chinese staff congress is efficient, namely, we do not lack statutory regulations about this system. However, problems such as what the implementation of the staff congress system is like, how much can the system play functions in enterprise development, and how to reflect the voices of the employee when protecting their lawful rights and interests, remain to be resolved. The staff representative system is an important component of enterprise's

economic democratic system, and all the representative system and electoral system need democratic soil full of nutrition. For all the Chinese people, the feudal society had lasted for too long time, and the Revolution of 1911 which overthrew the Qing Dynasty happened only one hundred years ago. During the last one hundred years, generations of Chinese people struggle with great fortitude in order to achieve the goals of founding an independent country, rejuvenating the nation, and enriching the people. Also, in order to achieve political democracy, generations of Chinese people had sacrificed themselves. However, Chinese society which is born lacking democratic gene still has a long way to go to find out how to elect, and how to realize real democracy. In the final analysis, the staff congress system is a democratic system, but the scope of this kind of democracy is relatively narrow—it takes place only in business enterprises. However, this kind of democracy is the basic democracy and substantive democracy. If a business enterprise can balance the relationship between labor and capital, can absorb employee to participate in enterprise's management at the same time when it uses the intelligence of its professional managers, then the enterprise will inevitably take a dominant position in competition. If the professional managers who build connections with the enterprise by contracts can be conscientious in their work, meanwhile the staff representatives can participate in management with conscientiousness and courage to bear, there are not any difficulty to overcome.

Therefore, the key point of Chinese staff congress is not just to create relevant legal system through legislature, but to carry out the system. The most important problems to be solved are the basic ones such as how to make sure the staff representatives are really elected by the staff, so that they can become real exercisers of power and represent staff's interests and say for the staff. Other basic important problems include: how to nominate a candidate for staff representatives? What are the qualification and conditions of a candidate? What is the procedures and specific measures of election? The solution of those problems is the key point of turning Chinese staff congress system from "nominal" to "substantial", and we have a long way to go of turning the empty text in laws and regulations into the lively practice of staff representative system. The procedure system of staff congress is as important as its substantive system, and the system should be standardized, such as the procedure of electing representatives and deciding relevant. Also, we need to solve the problems concerning the remedies after disputes occur during the election. System without remedy system is at least an imperfect system. In the staff representative system, since the staff, the staff representatives and the staff congress are not the same thing, there must be conflicts and disputes among them. There remains a huge blank in current laws and regulations concerning the problems of how to deal with the above conflicts and disputes and how to give impaired rights remedies. Also, if any dispute occurs among the staff congress, the trade union and the enterprise's management, how can the laws provide remedies? And how to classify such dispute? These problems remain to be solved by relevant system or regulations in the future! In the transform process of Chinese enterprises to corporation, how to relieve the incompatibility between the staff congress and the shareholders' meeting, especially the board of directors and the board of supervisors set according to the Company Law? And how to classify the disputes between them? It also needs some future system to make arrangement to provide remedies for that kind of disputes.

3.3 The connections with the system of collective bargaining (it is called group negotiation in China) and the problems about the reform of Chinese trade union system

One of the essences of industrial democratic system is the formation of the system of labor participation and representation. Staff representative system intensively represents the result of gameplaying between labor and capital in enterprises, and reflects social progress. Just think that in the period of laissez-faire capitalism when capital had its supremacy, there would never be employee participation or industrial democracy. To really realize industrial democracy and the staff representative system, we must deeply understand the ins and outs of the cooperation and confrontation between labor and capital.

The trade union system (i.e. the labor organization system) and collective bargaining system (the collective bargaining system) are the results of the gameplaying between labor and capital. In the early time of industrial society, the capitalist repressed the labor organizations, the government regulations restrained the labor organizations, and the laws inclined the balance of legal protection to the capital. On that background, how would there be industrial democracy or employee representative system? After the continual endeavors of laborers and righteous people, and efforts, laborers won the freedom to organize at last, that is to say, laborers can form trade unions freely. Nowadays, the constitutions of all the countries protect laborers' behavior of forming an association freely, of founding trade unions to antagonize the bully, exploitation and oppression of capital. Finally, the result of forcing capital to make a concession was to establish the group negotiation system with legal reason, through which laborers can bargain with their employers and fight for improvement of labor conditions and treatment. The trade union originates from free association, that is to say, laborers become a member of the trade union through applications. In the bargaining process between the trade union on behalf of laborers and the employers, the former shows the power of collectivity. However, the trade union doesn't bargain with the employer gathering all its members, not all the members attend the bargaining. In the forming stage of trade union system, the necessity of representing mechanism had been shown; therefore, the representing mechanism is a necessary component of the negotiation process between the trade union and the employer. The formation of such representing mechanism foreshadowed the later industry democratic system and the staff representative system. The formations of the trade union system and the collective bargaining system aim at safeguarding laborers' interests. Generally, the two systems are constructed in the sense of confrontation between labor and capital, the formation of trade union system does not necessarily result in the formation of industrial democratic system or necessarily result in staff's participation in management. Therefore, compared with the staff representative system by which staff participate in management, the representing system in trade unions is a low level system of industrial democracy.

Chinese trade union system has distinct characteristics, and it is also called "unitary trade union system". The features of the system include: 1) There must be only one trade union in an enterprise. Though the trade union is the nominal association of staff, the system of "establish the trade union firstly, join the trade union secondly" objectively determines that the trade union is attached to the trade union at a higher level. 2) In an enterprise with trade union, a laborer "naturally" become the trade union member as soon as he gets the job, so that there is no division of trade union members and non trade union members because all the laborers are trade union members. 3) The automatic formation of trade unions results in the congenital defects of the representing mechanism, in other words,

since trade union has some of the bureaucratic nature, the representatives are selected rather than completely “elected”. So, the representing mechanism in trade union system has congenital malnutrition. As for the group negotiation system, it is called the collective consultation system in China, thus the initial platform for the confrontation between labor and capital becomes the stage for “cooperation and consultation” in China. The collective consultation system generally aims at increasing wages. Since the system lacks confrontation, it is also difficult to peek “cooperation”.

The history of the formation of Chinese staff congress system shows that such platform for cooperation of labor and capital is a representing system at a higher level. If the trade union representing system has not been established, how would there be staff representative system with industrial democracy (staff can participate in management)? In my opinion, if Chinese trade unions, especially those in private enterprises and foreign-funded enterprises after the marketization, fail to realize laborers’ organizing system and laborers’ representing system in safeguarding employee’s interests, then it is impossible for the employee to participate in management in those types of enterprises. Therefore, to improve representing mechanism in trade unions is the basic step, only if the labor representative system has been learnt in “confrontation” for safeguarding laborers’ lawful interests, can employee’s participation in management be realized in the “cooperation of labor and capital”. No confrontation, no cooperation. Also, mere cooperation is not lasting cooperation. Chinese staff congress system has lasted for quite a long time, while the implementation of the system is not that efficient as people have wished. We are looking forward to the continuous improvement of Chinese trade union system, looking forward to group negotiation system’s getting out of “consultation”, looking forward to Chinese trade union representing system’s laying a solid foundation for a “substantial” industrial democratic system.

3.4 To confirm and expand the scope of enterprises and relevant units which carry out the staff representative system

The “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People” is an administrative regulation issued in 1986 by the State Council. After such a long time, the regulation has been renewed by lots of local decrees issued in recent years this paper just mentioned, thus it is impossible to determine the effectiveness of this regulation. As is known to all, the German industrial democratic system is very characteristic. There is the “Business Council Law” issued in 1946, and the “Law of Joint Decision in Industries of Coal, Iron and Steel” issued in 1952. The former deals with the problem of cooperation of labor and capital in small and medium-sized enterprises, and the latter concerns the cooperation of labor and capital in large-scale enterprises or in industries involving the people’s livelihood and the nation’s development. In other words, the staff congress system mainly aims at large-scale enterprises such as China National Petroleum Corporation (CNPC), China Petroleum & Chemical Corporation (Sinopec), Industrial and Commercial Bank of China. Those kind of enterprises must implement the staff congress system, not only because its capital composition is almost entirely state-owned, but more importantly because those enterprises involve the people’s livelihood and the nation’s development. Meanwhile, it is necessary to consider what the capital nature of the enterprise is. Some distinctions should be made among solely state-owned enterprises, state holding enterprises, foreign enterprises, private enterprises, or other kinds of enterprises. The administrative regulation issued by the State Council in

1986 firstly defines the capital nature of “owned by the whole people”, which was not a mistake at that time. However, as the society develops, it is obvious that enterprises of other kinds of capital nature also need the staff congress system. In addition, it is not reasonable that only “industrial enterprises” need to set up the staff congress system, while the large number of enterprises in tertiary industries, such as financial insurance service enterprises and enterprises in business field, does it need not to set up the staff congress system? Obviously, the administrative regulation issued by the State Council is a little bit “old”. Laws after 1992, such as the Company Law, the Trade Union Law, and the Labor Law, establish the staff congress system which should be set up in all kinds of enterprises. Problem also exists that to include all enterprises into that industrial democracy system without any discrimination is suspicious to be too broadly.

The author thinks that a clear direction should be set for future staff congress system in China, we need to clarify enterprises of what scale and what nature need to set up staff congress system. We should avoid not only the too narrow limit of “industrial enterprises owned by the whole people” in the past, but also the too broad “promotion” without considering the scales and categories of enterprises. Only when we rationally determine the scope of enterprises which shall set up staff congress system, can the staff congress system exhibit its corresponding efficacy, namely, to promote industrial democracy in some enterprises through the implementation of staff congress system; to guarantee large-scale enterprises involving the people’s livelihood and the nation’s development to combine labor force and capital force in order to resist risk together, to go for prosperity together. We should avoid carrying up the staff congress system in too small enterprises, which will lead to capital lost.

3.5 To elevate the legislation level of the staff congress system

We can see from the “Business Council Law” in 1946, and the “Law of Joint Decision in Industries of Coal, Iron and Steel” in 1952 of Germany that, the legislation of industrial democracy system as an important economic system, political system as well as legal system should never be casual or easy. The law issued by central authority in China is the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People”, which has not been amended yet since it was issued. Now the regulation has been obviously inconsistent with relevant laws and regulations.

Firstly, the inconsistency and mismatch with relevant legal system. Though the Company Law, the Trade Union Law, and the Labor Law all provide the staff congress system, none of the laws provide that the staff congress system shall only be established in “industrial enterprises owned by the whole people”. As the Company Law establishes the system of staff directors and staff supervisors, and it provides about establishing staff congress system in solely state-funded companies, the “Regulations of Staff Congress in Industrial Enterprises Owned by the Whole People” lasting for 26 years appears to be apparently out of date now.

Secondly, the inconsistency with the local decrees concerning staff representing. After the last century, great changes have taken place. Quite a lot of local legislatures (the standing committees of local People’s Congress) responded to the social development, and independently legislated since central legislatures had failed to follow the social changes. Those local legislatures met the changes of relationships between labor and capital, and issued new local regulations of staff congress. So, the old regulation issued by the State Council in 1986 also mismatches the date.

Therefore, the central legislature shall respond to the social changes, and enact the “Enterprise Staff Congress Law”, in order to lay the corresponding legal foundation for this industrial democratic system. When doing so, the following several factors should be considered:

Firstly, to determine a reasonable scope of enterprises where the staff congress system should be set up.

Secondly, to clarify the nature of staff congress and the orientation of the this organization.

Thirdly, to clarify the rights, obligations and responsibilities of staff congress.

Fourth, to clarify the organizing system of staff congress and the relationship between the staff congress and relevant organizations.

Fifthly, to provide the election and dismissal of staff representatives.

Sixthly, to provide procedures of dealing with relevant disputes and relief, etc.

System of Employee Representation at the Enterprise The US Report

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A. Introduction

Although employee-representation systems have been coexisting in a collective-bargaining framework in continental Europe for many years, U.S. labor advocates have looked upon those representations systems with suspicion. The reasons for this suspicion are historical: U.S. employee-representation systems have their roots in company-dominated unions that the National Labor Relations Act (“NLRA”) was designed to prohibit. The National Labor Relations Board (“NLRB” or “the Board”), the independent agency created by the New Deal Congress to administer the NLRA, has interpreted that legislation’s prohibition to essentially make unlawful most, if not all, employer-initiated employee-representation systems and many other types of employee-representations systems.

While Congress’s and the Board’s efforts to prohibit employer-dominated employee-representation systems have been noble and are grounded in values designed to preserve employees’ rights to workplace participation to the greatest extent, these efforts have, in fact, muffled employee voice. The problem arises in part from differences in two competing values: employee voice and employee self-organization. At first blush, those values appear to be co-extensive. But in reality, employee voice, which focuses on employee participation and industrial democracy, is a broader concept than self-organization, which focuses on employee autonomy. That section of the NLRA that prohibits company-dominated unions values *self-organization*, or worker autonomy, over employee voice, or participation. Other sections of the NLRA, such as its exclusivity principle, whereby the union that the majority selects or designates is the exclusive employee representative, further serve to stifle employee voice.

A review of employee-representation systems that have managed to take hold in the United States within this hostile framework uncovers several questions, for which this report seeks to provide preliminary responses. Against a backdrop of understanding the instrumental and principled rationale for employee-representation systems, this report asks which types of systems function well within the U.S. legal framework, which systems don’t work well within

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this framework, and to what extent that framework needs to change to accommodate greater participation.

Section B. of this report begins with a brief history of the development of employee-representation systems in the United States, the rise of hostility for those systems, an analysis of the failed legislative attempts to overcome that hostility, and a review of the extent to which workplace safety committees have been a notable exception to the ban on employee-representation committees. Section C. describes the U.S. legal framework of collective-bargaining and provides insight into the legal impediments to bringing employee-representation systems to fruition. Section D. commences with a description of the instrumental and intrinsic values underlying employee-representation systems; it then proceeds to examine those grassroots attempts at employee-representation that have been more successful. That section concludes with a look to the future.

B. Description of the U.S. Employee Representation System

1. Historical Underpinning of the “Company Union”

In the United States there is no formal legal framework for non-union employee representation systems. In fact, the New Deal legacy, which established the framework of modern U.S. labor law, has put into question not only the necessity of such a system but even its mere legality. Historically, the NLRA’s prohibition of “company unions” was a reaction to their rapid spread in the 1930s, prominently featured in John Rockefeller’s declaration that capitalists, workers, and shareholders are to be partners in economic ventures. Rockefeller had devised a worker-participation plan in reaction to pressures from President Woodrow Wilson and public calls to resolve labor conflicts.¹ The New Dealers sought to protect independent labor unionization by limiting other types of employee participation and representation systems and creating a promise of autonomy for industrial unions. According to Senator Robert Wagner, who was the force behind the legislative action, “the company union is generally initiated by the employer; it exists by his sufferance; its decisions are subject to his unimpeachable veto.”²

Non-union systems of employee representation in the United States, despite their tenuous standing under current law, do have historical roots in the United States and have not always been so heavily regulated and warily looked upon as they are today. Rather, the idea of the “company union” and the negative connotations that attach to it connected for the labor movement during the Great Depression. Prior to the Great Depression, employers using forms of non-union systems of employee participation sought to instill cooperation, loyalty, and input on quality. However, the Great Depression changed the course of non-union forms of employee representation. In the wake of the economic turmoil of the Great Depression, the Franklin D. Roosevelt administration envisioned the NLRA as part of the overall plan for economic recovery. In late 1931, even the most employee-oriented companies were forced to

¹ Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1546 (2006).

² 78 CONG. REC. 4229, 4230 (1934) (statement of Sen. Wagner), *quoted in* Leroy, Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromotion Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812, 1817 (1993).

institute wage cuts, layoffs, and production speedups, resulting in an employee loss of faith in the integrity of their employers and a sense of panic that created the mindset that extraordinary reform must be taken to remedy the situation.³ The NLRA sought to promote the formation of unions and the use of collective bargaining. Employers responded in fear to this new mandate for unionization by attempting to fight back by creating “company unions.” Unlike earlier 1920 representation plans, the New Deal era non-union representation efforts were largely motivated by employers with anti-union sentiments. In the wake of the negative response against company unions, non-union representation virtually disappeared for a period in U.S. history.

Columbia Law Professor Mark Barenberg, who has explored in two comprehensive articles the prohibition of “company unions” and its relevance to today’s economy, explains that,

In Wagner’s institutional ideal, company-union-like collaborative structures such as works councils and joint labor-management committees would emerge and operate effectively and non-manipulatively *only within the protective shell of independent unionism*.⁴

The idea of securing a separate autonomous space, or “shell” in Barenberg’s term, for workers, free of coercive powers, is also embodied in the NLRA’s “managerial exclusion” rule. Section 2(3) of the Act excludes “managerial employees” or “supervisors” from the definition of employees that can form a bargaining unit.⁵ Section 2(11) defines the term “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁶

One rationale for this exclusion is similarly the protection of a separate sphere of rank-and-file workers and to prevent the inclusion within a bargaining unit of employees that will have a “conflict of interest,” which will “hinde[r] the functioning of the adversarial model of labor-management relations.”⁷

³ Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL’Y REV. 729, 738 (1999).

⁴ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1391 (1993) (emphasis added). Mark Barenberg argues that banning the company-union for the reasons of preventing despotism is inconsistent with the permission of remaining a non-unionized workplace. *Id.* See also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 761 (1994).

⁵ Section 2(3) of the NLRA states: “The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor.” NLRA § 2(3), 29 U.S.C. § 152(3) (1982).

⁶ NLRA § 2(11), 29 U.S.C. § 152(11).

⁷ See Patrick S. Bryant, *Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 602 (1988). For similar reasons, Congress prohibits guards and nonguards from forming a bargaining unit. See 29 U.S.C. § 159(b)(3). Cf. Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FIU L. REV. 495, 534-42 (2010) (arguing that wholesale exclusion of supervisors from the NLRA, unlike bargaining-unit separations, “punches a gaping hole” in the NLRA’s protective cover for workers).

2. The Rise of Non-Union Employee Representation in Practice

Despite the continued hostility toward non-union representation, the decline of traditional labor law requires alternative models of employee voice and workplace democracy. The NLRA, which prohibits employers from interfering with any form of labor organization, inhibits the development of new forms of employee representation while the realm of traditional collective bargaining continues to shrink. During the 1960s and 1970s, legal academia as well as industry employers rediscovered non-union employee participation.⁸ Since the mid-1980s, employee participation models have accelerated in practice. As labor unions rapidly decline, leaving over ninety percent of the private sector workforce in the United State not unionized, representation and participation models outside of the traditional NLRA framework have become more prominent. One study of large firms in the 1980s found that forty-three percent of non-union manufacturing workers were involved in some form of employee participation or representation model.⁹ A more recent study has found that this number has increased even further, finding that seventy-five percent of all employers used some sort of employee involvement programs and that ninety-six percent of employers with 5,000 or more employees had such programs.¹⁰ Another study looking at companies with fifty or more employees finds that thirty-two percent have self-directed work teams, eighteen percent have peer review of employee performance, and forty-six percent utilize total quality management techniques.¹¹

3. The Dunlop Commission and the TEAM Act

As these practices became a reality, the historical prohibition on non-union employee representation systems have increasingly become the focus of many debates concerning workplace reform. In the mid-1990s, a major attempt for legislative reform of the NLRA was undertaken during the Clinton administration, with the goal of facilitating the growth of employee involvement.¹² The Clinton administration commissioned a report on the future of work relations, the Dunlop Commission's "Goals for the 21st Century American Workplace." The primary goal established in the report was to expand employee participation and labor-management partnerships to more workers and workplaces and facilitating the growth of employee involvement. The Commission recognized the substantial growth in new forms of employee participation, such as self-managed teams, safety and health committees, gain sharing plans, total quality management (TQM), quality circles, and employee ownership plans.¹³

The Commission viewed this rise in various schemes as triggered by market competition,

⁸ See Kaufman, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Maury Gittleman et al., "Flexible Workplace" Practices: Evidence from a Nationally Representative Survey, 52 *INDUS. & LAB. REL. REV.* 99, 105 (1998).

¹² COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS (1994); Teamwork for Employees and Managers Act of 1995, S. 295, 104th Cong; see also Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 *U. PA. J. LAB. & EMP. L.* 121 (2001); Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 *J. LAB. RES.* 387 (1995).

¹³ U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS - FINAL REPORT 24, 98, 100 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2 [hereinafter Dunlop Report].

technological change, changes in organizational structures, and the nature of industrial production. It further emphasized empirical findings showing that millions of workers are interested in participating in decisions and governance at work but lack the opportunity to do so. The Dunlop Commission described the prohibition on “company unions,” as “critically impeded growth of some employee involvement programs and giv[ing] rise to challenges against joint worker-management committees.”¹⁴ The Commission emphasized, however, that employee-sponsored programs should not substitute for independent unions. It “should [still] be an unfair labor practice . . . for an employer to establish a new participation program or to use an existing one with the purpose of frustrating employee efforts to obtain independent representation” or to subvert the collective bargaining experience.¹⁵

Subsequently, the Teamwork for Employees and Managers Act (TEAM Act),¹⁶ which would have repealed the historical prohibition on company unions, was passed by both houses but vetoed by President Clinton. The TEAM Act proposed to amend the NLRA “to provide that an employer’s establishing, assisting, maintaining, or participating in any organization in which employees participate on matters regarding quality, productivity, and efficiency will not be an unfair labor practice.”¹⁷ This would provide a broader framework for instituting different types of employee representation schemes. Proponents of the TEAM Act state that approval of the TEAM amendments would mark “an important step toward improving the ability of American companies to compete in the global market place.”¹⁸ However, there were significant concerns among some that such an amendment would invite the return of the “company union” and give employees a false sense of protection, without adequately ensuring that workers would still be able to institute independent union representation.

4. In the Shadow of Law

Notwithstanding these failed attempts to legally reform the labor law system, new models of employee voice are increasingly introduced in the U.S. labor market. Despite the possible illegality of such experiments, private firms have been broadly introducing new forms of employee representation including self-management teams, quality circles, and employee-action committees, ranging from shop-floor operational consulting to strategic policymaking. As we further discuss below, basic distinctions can be drawn between representation in *decision-making* and participative schemes in *ownership*; between representation in *shop floor practices* and representation in *managerial strategic choices*; between representation about *production and processes* and representation about *work conditions*.¹⁹ Another important

¹⁴ *Id.*

¹⁵ *Id.* at 26.

¹⁶ Teamwork for Employees and Managers Act of 1995, passed both houses of Congress in 1996 but was vetoed by President Clinton. 142 CONG. REC. H8816 (daily ed. July 30, 1996). Identical legislation later was proposed with H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997).

¹⁷ H.R. 634; S. 295; see also Michele L. Maryott, *Participate at Your Peril: The Need For Resolution of the Conflict Surrounding Employee Participation Programs by the TEAM Act of 1997*, 24 PEPP. L. REV. 1291 (1997).

¹⁸ Maryott, *supra* note 17 (citing 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (statement of Rep. Harris W. Fawell)).

¹⁹ On ownership schemes, see Henry Hansmann, *When Does Worker Ownership Work? ESOPs Law Firms, Codetermination and Economic Democracy*, 99 YALE L.J. 1749 (1990); Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”*, 67 FORDHAM L. REV. 957 (1998); Herbert Gintis, *Financial Markets and the Political Structure of the Enterprise*, 11 J. ECON. BEHAVIOR AND ORGANIZATION 311 (1989).

distinction is between representation at the single workplace and cross-firm and cross-sectoral systems of non-union employee representation. Employee representation on corporate boards is extremely rare.²⁰ For example, “of the Fortune 1000 companies in the United States, only three have their own senior HR manager on their corporate board, which is an astoundingly small proportion.”²¹ Although representation on boards is rare, employees as stock holders are common. In general, institutional ownership in U.S. corporate equities increased dramatically in recent decades, in large part due to pension funds growth.²² Such employee ownership schemes, which have grown rapidly since the 1990s, have been shown empirically to improve cooperative employment relations and collaborative work environments.²³

At the same time that there is a burgeoning range of non-union employee representation schemes in the shadow of law, scholars continue to argue that experimenting with non-union systems of employee representation would require “turning the Wagner Act upside down” to allow more established and structured representation systems.²⁴ Numerous commentators have described the NLRA prohibition on non-union employee representation systems as critically impeding the growth of contemporary management strategies. Moreover, the lack of a legal framework for employee representation continues to shed a problematic light on work law in the United States. For example, the National Labor Relations Board (NLRB) has recently held that nonunionized employees do not have a right to have other employees accompany them during disciplinary procedures.²⁵

In the context of occupational safety regulation, the Occupational Safety and Health Administration (OSHA) has been reluctant to promote worker involvement in safety-regulation compliance, despite strong evidence of worker safety committees’ success in reducing risk.²⁶ OSHA has been deeply criticized for its lack of structured involvement of workers.²⁷ Under the Occupational Safety and Health Act (the OSH Act), even in non-unionized work settings, any worker is entitled to request an inspection, accompany inspectors during an inspection, and receive relevant information about compliance. And yet, the courts have interpreted the Act as not requiring an employer to pay wages for time employees spend accompanying OSHA inspectors.²⁸ A recent OSHA initiative “deputizes” workers as Special

²⁰ DAVID CHARNY, WORKERS AND CORPORATE GOVERNANCE: THE ROLE OF POLITICAL CULTURE 91–120 (Margaret M. Blair & Mark J. Roe eds., 1999); Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, in WORKING UNDER DIFFERENT RULES 97, 99 (Richard B. Freeman ed., 1994); Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58 (1995).

²¹ Sanford M. Jacoby, *Employee Representation and Corporate Governance: A Missing Link*, 3 U. PA. J. OF LAB. & EMPLOYMENT L. 449, 483 (2001).

²² MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 45–46 (1995).

²³ Margaret M. Blair et al., *Employee Ownership: An Unstable Form or a Stabilizing Force*, in THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION 241 (Margaret M. Blair & Thomas A. Kochan eds., 2000); Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743 (1999); Michael A. Conte & Jan Svejnar, *The Performance Effects of Employee Ownership Plans*, in PAYING FOR PRODUCTIVITY 143 (Alan S. Blinder ed., 1990).

²⁴ CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 254–56 (1988).

²⁵ *In re IBM Corp.*, 341 N.L.R.B. No. 148 (2004) (overruling *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676 (2000)).

²⁶ Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005); see also Anne Marie Lofaso, *What We Owe Our Miners*, 5 HARV. L. & POL’Y REV. 87, 107 (2011) (documenting a similar success story regarding worker safety committee in the coal mining industry).

²⁷ See Lobel, *supra* note 26, at 1114–15.

²⁸ *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1164 (D.C. Cir. 1975).

Government Employees (SGEs). The SGE program trains workers at participating Voluntary Protection Program (VPP) sites to serve alongside OSHA officials “as full-fledged members of evaluation teams.”²⁹ This initiative is quite new, is limited to employers that voluntarily opt to participate in the program, and is further limited to certification processes of firms showing they are particularly safe rather than extending to the ongoing operational management of safety. Despite strong empirical evidence that employee representation and joint employee-employer safety committees reduce risk, “OSHA has largely failed to triangulate the governance of work safety with the aim of systematically including workers. In recent years, there have been recurrent proposals to reform the OSH Act to mandate the creation of safety and health workplace committees, yet ‘even the whiff of ‘labor law reform’ was sufficient to doom [the] proposals.’”³⁰

In sum, while reform efforts of U.S. labor law have thus far been largely unsuccessful, and while the NLRA continues to formally exclude systems of non-union employee representation, a tenuous frame and practice of such systems does exist in the background of the union framework. Because the current post-depression labor law framework set forth in the NLRA and subsequent case law have placed such practices on shaky footing, employee representation systems vary widely in practice.

C. Relationship between Employee Representation Systems and Collective Bargaining

1. Overview of Unionization and Collective Bargaining

a. Legal Framework Regulating Unionized Workplaces and Collective Bargaining

In the United States, several laws govern the relationship between unions and employers. In the private sector, union-employer relations are regulated by the National Labor Relations Act (NLRA),³¹ or in some cases the Railway Labor Act (RLA).³²

Section 7 of the NLRA grants employees the following rights:

- to self-organize;
- to join, form, or assist unions;
- to bargain collectively through representatives of their own choosing;
- to engage in other concerted activities for the purpose of collective bargaining;
- to engage in other concerted activities for the purpose of other mutual aid or protection; and

²⁹ OSHA Directive CSP 03-01-001, Policies and Procedures Manual for Special Government Employee (SGE) Actively Conducted Under the Auspices of the OSHA’s VPP (Jan. 4, 2002).

³⁰ Lobel, *supra* note 26, at 1132 (citing Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1541 (2002)).

³¹ 29 U.S.C. § 151 et seq. (2006).

³² 45 U.S.C. § 151 et seq. (2006). The RLA regulates the employer-union relationship in the railroad and airline industries, established the National Mediation Board (NMB) to govern labor disputes in those industries. The NMB, which has a very different administrative structure and which provides for a very different dispute resolution process from the NLRB, is not discussed in this paper.

- to refrain from any of these activities, except as this right is affected by an agreement requiring union membership as a condition of employment.³³

Congress created the National Labor Relations Board (NLRB or Board), an independent federal administrative agency, to protect these rights.³⁴

The NLRA covers most employees in the private sector. The NLRA expressly excludes the following individuals:

- agricultural workers;
- domestic servants;
- those employed by their parents or spouses;
- independent contractors;
- supervisors;³⁵
- those employed by employers subject to the RLA; those employed by the federal, state, or local government; or any other person employed by an employer that is not covered by the NLRA.³⁶

The statutory definition of employee is the gateway to legal protection of U.S. workers.³⁷ Employees not covered by the NLRA do not possess Section 7 rights and are not protected in the event that an employer takes some adverse employment action against them because that worker engaged in an activity otherwise protected by the NLRA.³⁸

b. Unionization Rates in the Private Sector Continue to Decline

As a result of congressional, administrative, and judicial modification to the NLRA through legislative and adjudicative amendment, increasingly fewer workers are protected by the NLRA.³⁹ Moreover, the nature of production and industry has been evolving and economic pressures have contributed to these transformations. For both the reasons that are internal to the legal system and the reasons that are related to industrial change, private-sector union density has decreased dramatically in the past few decades. Whereas the union membership rate in the United States was 11.8 percent in 2011, the union membership rate was 20.1 percent in 1983, the first year for which comparable union data were collected.⁴⁰

³³ 29 U.S.C. § 157.

³⁴ *Id.* § 153.

³⁵ *Id.* §§ 152(3), 152(11).

³⁶ The Federal Labor Relations Act governs the relationship between unions representing federal workers and the federal government. 5 U.S.C. § 7101. State law governs the relationship between public employees and their employer (the state or local government). This paper concerns employee representation at the enterprise and therefore will not examine the significant differences between private-sector and public-sector collective bargaining.

³⁷ See generally Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 203 (2010).

³⁸ See *id.*; see also Ellen Dannin, *Not a Limited, Confined, or Private Matter—Who is an “Employee” Under the National Labor Relations Act*, 59 LAB. L. J. 5, 5 (2008).

³⁹ Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 F.I.U. L. REV. 497 (2010).

⁴⁰ BUREAU OF LABOR STATISTICS, Economic News Release, Jan. 27, 2012, <http://www.bls.gov/news.release/union2.nr0.htm>.

The number of workers belonging to a union has also decreased from 17.7 million union workers in 1983 to 14.8 million workers in 2011.⁴¹

By contrast, public-sector union density rates are much stronger than private-sector union density rates. Nearly half of all union workers—7.2 million—are public employees. The union membership rate in the public sector is 37.0 percent making it five times higher than the union membership rate in the private sector, which is 6.9 percent.⁴² Union density rates in the private and public sectors are also higher in the northern states of the United States than in its southern states.⁴³

c. Federal Law Imposes a Mutual Duty to Bargain Collectively on Private-Sector Employers and Unions

Private-sector employers and unions have a mutual duty to bargain collectively under Section 8(a)(5) and 8(b)(3) of the NLRA.⁴⁴ In particular, the NLRA imposes on unions and employers a “mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”⁴⁵ In *N.L.R.B. v. Insurance Agents’ International Union*, the United States Supreme Court observed that the NLRA “impose[s] a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace.”⁴⁶ United States labor scholars have explained that this good-faith requirement means that employers and unions have a duty to bargain collectively with a view *toward* reaching agreement.⁴⁷ The duty to bargain in good faith does not, however, imply an “obligation [to] compel either party to agree to a proposal or require the making of a concession.”⁴⁸

To the extent that the US-style duty to bargain can be viewed as “a free market solution to a free market problem,”⁴⁹ the Board’s role in resolving collective-bargaining disputes is intentionally limited to ensuring procedural regularity and does not extend to examining the substantive terms of the agreed-upon contract. Along those lines, the Supreme Court in *H.K. Porter v. N.L.R.B.* observed that “[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”⁵⁰ In support of that view, the NLRA’s duty to bargain requires the free flow of information, most obviously by incorporating an employer

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, Economic News Release, Jan. 27, 2012, Table 5. *Union affiliation of employed wage and salary workers by state*, available at <http://www.bls.gov/news.release/union2.t05.htm>.

⁴⁴ 29 U.S.C. §§ 158(a)(5), 152(b)(3) (2006).

⁴⁵ *Id.* § 158(d).

⁴⁶ 361 U.S. 477, 488 (1960).

⁴⁷ Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing and Encouraging Individual Rights to Job Security in a Collective System* (A Tribute to Clyde Summers), 14 EMP. RTS. & EMP. POL’Y J. 55 (2010).

⁴⁸ 29 U.S.C. § 158(d); see also *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395, 404 (1952).

⁴⁹ Lofaso, *supra* note 47, at 62 (attributing this comment to Professor Clyde Summers).

⁵⁰ 397 U.S. 99, 107–08 (1970).

duty to furnish unions with information relevant to collective bargaining into the duty to bargain itself.⁵¹

The duty to bargain in the private sector extends to what are known as mandatory subjects of bargaining,⁵² or “wages, hours, and other terms and conditions of employment.”⁵³ In addition to this definitional limitation on the duty to bargain, there are other judicially imposed limitations. For example, employers are never required to bargain over a decision to go out of business. Nonetheless, employers are required to bargain over the effects of that decision.⁵⁴

2. Union Influence over the Selection or Working of Employee Representatives

a. Union Influence over the Selection of Union Employee Representatives

In the United States, individual bargaining over the terms and conditions of employment is the default legal rule. U.S. labor law gives “employees the right to depart from this default by forming labor unions and bargaining collectively with their employers over terms and conditions of employment.”⁵⁵

With regard to the question whether or not a union should represent employees for the purposes of collective bargaining, employees—not unions—select employee representatives through one of two processes, card check or secret-ballot election.⁵⁶ In either event, employee choice must be free, that is, uncoerced by either the employer or the union.⁵⁷ Almost all union campaigns begin with a card check that is highly regulated by the NLRB to ensure employee free choice. Employees may solicit their coworkers’ signatures on union authorization cards, which typically state that the undersigned wishes to be represented by the specified union. Although solicitation may occur at the workplace during breaks and in nonworking areas,⁵⁸ most solicitations are done by house calls.⁵⁹ An employer is prohibited from discriminating against an employee for soliciting coworkers.⁶⁰ By contrast, employers are not required to yield access to their property to nonemployees union organizers for the purpose of soliciting,⁶¹ which may explain why so much organizing is done away from the worksite.

To obtain an election, the union must petition the Board for an election and present a thirty percent showing of employee interest⁶² in “a unit appropriate” for purposes of collective

⁵¹ See generally *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

⁵² For a general discussion of the distinction among mandatory, permissive and illegal subjects of bargaining, see *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁵³ 29 U.S.C. § 158(d).

⁵⁴ See *First Nat. Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 681 (1981).

⁵⁵ Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 656, 664 (2010).

⁵⁶ See generally *id.*

⁵⁷ NLRA section 8(a)(1) makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). NLRA section 8(b)(1)(A) makes it unlawful for a union “to restrain or coerce employees in the exercise of the rights guaranteed in section 7.” *Id.* § 158(b)(1)(A).

⁵⁸ See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 800–04 & nn.6–10 (1945).

⁵⁹ Sachs, *supra* note 55, at 664 (“[a]lthough some discussions between employees take place at work, the effort consists primarily of visits with employees when they are not at work through so-called ‘house calls.’”).

⁶⁰ 29 U.S.C. § 158(a)(1), (3).

⁶¹ See *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).

⁶² NLRB RULES AND REGULATIONS, 29 C.F.R. § 101.18. This rule is based on NLRA Section 9(c)(1)(A), which provides:

bargaining.⁶³ The unit appropriate is more colloquially known as the bargaining unit. If the solicited union has garnered over 50% employee support, the employer may lawfully recognize it as the majority representative of the employer’s employees and bargain with it upon request over the terms and conditions employment. Although the employer may, upon request, voluntarily recognize the union (card check), the employer may also lawfully refuse to bargain and demand that the union prove its support through a NLRB-conducted, secret-ballot election.⁶⁴

An employer’s duty to recognize and bargain with a union attaches only once a majority of employees in the bargaining unit has decided to unionize by secret-ballot vote or when the employer agrees voluntarily to recognize a union that enjoys majority support as evidenced by a card check. The union, as the representative of the majority of employees selected or designated, is the sole and exclusive representative of those employees.⁶⁵ Indeed, it is unlawful for an employer to recognize or bargain with a union as the exclusive bargaining representative before that union enjoys majority support.⁶⁶ Employees may then choose their local representatives, which typically include a shop steward who serves as a point person between management and the employees as well as between management and the union.

b. Union Influence over the Selection of Other Workplace Employee Representatives

Once a union is in place as the exclusive bargaining representative of a majority of the workers, unions will exert a certain amount of influence over the selection of other workplace employee representatives. A union has the most direct influence over the shop steward, a bargaining-unit worker, selected by his or her coworkers to serve as the union’s bargaining-unit representative. Although the shop steward’s duties vary by each union’s constitution, by-laws, and local practices, these duties typically include monitoring the workplace for statutory, contractual, and other legal violations, enforcing and maintaining the provisions of the collective-bargaining agreement, representing bargaining-unit employees in grievance

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provided for an appropriate hearing upon due notice. If the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1)(A).

⁶³ Section 9(a) instructs that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. § 159(a) (emphasis added).

⁶⁴ See *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974).

⁶⁵ See *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944).

⁶⁶ See *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 738 (1961) (holding that an employer violates Section 8(a)(2) and (1) and a union violates Section 8(b)(1)(A) when the employer recognizes the union as the exclusive bargaining representative before the union enjoys majority support).

proceedings, and serving as a liaison between bargaining-unit employees and management as well as between bargaining-unit employees and local and international union officials.⁶⁷

c. Section 8(a)(2)'s Limits to the Authority of Employee Representatives in a Unionized Workplace

Unions can also place limits on other types of employee representatives that are not union officials. In particular, the NLRA places limits on the employer's ability to select employee representatives or to create employee participation groups. As noted earlier, NLRA Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."⁶⁸ NLRA Section 2(5) defines labor organization to mean "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁶⁹

Interpreting these statutory sections, the Board, in *Electromation, Inc.*, has determined that an employee group or committee constitutes a statutory labor organization if that committee involves: "(1) employee participation, (2) a purpose to *deal with* employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an 'employee representation committee or plan' is involved, evidence that the committee is in some way representing the employees."⁷⁰ Applying that test, the Board has concluded that "dealing with" is a broader term than bargaining that encompasses any "bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals."⁷¹ In other words, a labor organization is something broader than what we normally think of as a union. Applying its own analysis, the Board held in *Electromation* that an employer violated section 8(a)(2) when it established "employee-action committees."⁷² These committees were comprised of six employees and one or two members of management to discuss issues such as bonuses, no-smoking policies, and raises. The court affirmed that these committees were unfairly dominated by the employer, because the employer had structured the committees, was involved in structuring its proposals, and paid the employees for their time on the committee. Thus, the committees were held to violate the NLRA.

The Board's seminal decision in *Electromation* thus instructs that, if a union is already representing employees in a particular workplace, whether or not a collective-bargaining agreement has been executed, then management-initiated working groups, which meet the Board's construction of the statutory definition of labor organization, violate Section 8(a)(2) of the Act.⁷³ In the unionized setting, the NLRB has similarly found other types of non-union

⁶⁷ Examples of shop steward clauses found in collective bargaining agreements are available at Collective Bargaining Agreements—U.S. Department of Labor, on line at <http://digitalcommons.ilr.cornell.edu/blscontracts/>.

⁶⁸ 29 U.S.C. § 158(a)(2).

⁶⁹ *Id.* § 152(5).

⁷⁰ *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992) (emphasis added), *enforced*, 35 F.3d 1148 (7th Cir.1994).

⁷¹ *Id.* at 997–98.

⁷² *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1161–71 (7th Cir. 1994).

⁷³ *See generally* LeRoy, *supra* note 2.

committees to be in violation of the NLRA. For example, in *Du Pont*, the Board found six safety committees and one fitness committee to be employer-dominated labor organizations prohibited by the NLRA. The Board found that the respondent employer had bypassed the union in dealing with the committees. The Board explained that while employers were not prohibited from encouraging its employees to express their ideas, to report hazards, and to become more aware of safety problems, employers were prohibited from involving employees in developing safety policies and in decision-making processes. The Board emphasized that because the committees were charged with making proposals, including employee compensation proposals to management, they were unlawful.⁷⁴

The consequence of these and other decisions puts in jeopardy most management-initiated groups that might have had the possibility of enhancing worker participation into decisions affecting employees' work lives, where the Board makes the additional finding of employer domination. The Board has determined that employer domination occurs "when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement."⁷⁵ The Board's construction of Sections 2(5) and 8(a)(2) do not, however, jeopardize a "unilateral mechanism, such as a 'suggestion box,' or 'brainstorming' groups or meetings, or analogous information exchanges."⁷⁶ Nor is an enterprise's delegation of authority to lower managerial bodies viewed as prohibited "dealing with," but rather as lawful change-of-command management. For example, in *General Foods Corporation*, the Board found no "dealing" where an enterprise "flatly delegated [managerial functions] to employees" involved in a "job enrichment program" designed "to enlarge the powers and responsibilities of all its rank-and-file employees and to give them certain powers or controls over their job situations which are normally not assigned to manual laborers."⁷⁷

d. An Employee Representative System Cannot Supersede the Functions of Collective Bargaining

The Board's construction of Section 8(a)(2) informs us that an employee representation system cannot supersede the function of collective bargaining. Indeed, the above analysis shows that employer dealings with employer-dominated committees often violate Section 8(a)(5)'s prohibition on bargaining with anyone except the exclusive representative of the employees. At best, employee representation systems can complement collective-bargaining functions, so long as they are unilateral or, if bilateral, are not dominated by employers. While this may make unlawful some labor-management work teams, it does so to ensure that employees remain uncoerced in their decision-making. This view of labor-management relations values worker autonomy over subordinated worker participation.⁷⁸ Nevertheless, as

⁷⁴ E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 893, 893, 918–19 (1993) (holding that employee participation committees in a *unionized-setting* are unlawful if they discuss anything other than concerns of quality and production; in particular, discussing issues such as work benefits violates sections 8(a)(2) and 8(a)(5) by "bypass[ing] the Union" and fostering an unlawful competing organization).

⁷⁵ *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992), *enforced*, 35 F.3d 1148 (7th Cir.1994).

⁷⁶ *Id.* at 995, n.21.

⁷⁷ 231 N.L.R.B. 1232, 1232–33, 1235 (1977).

⁷⁸ See generally Anne Marie Lofaso, *Toward a Foundation Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007).

we discussed, the lack of workplace voice for employees has garnered much attention—both before and after the Board decided *Electromation*.⁷⁹ Many of these labor academics view Section 8(a)(2) as a “barrier” to employee workplace voice.⁸⁰

D. Function and Dysfunction of Employee Representation System

1. The Multiple Roles of Representation and Voice

a. *Instrumental Rationales for Non-Union Employee Representation*

There are both instrumental and principled reasons for employee representation systems.⁸¹ The American system is paradigmatic of one in which, for most people, work is the main source of access to material income, including regular wages and other economic and social benefits, such as health care coverage, pension programs, disability compensation, childcare provision, severance pay, and supplemental unemployment benefits. Welfare has been structured around the workplace, creating an “employee welfare state” rather than a universal public provision regime.⁸² In such systems, employee representation at work is even more crucial than in other regulatory regimes. Moreover, another possible role for employee representation systems is facilitating the portability of employee benefits. In light of the changes in typical career cycles in the direction of much shorter tenure frames and more frequent turnover, employee associations can play a particularly important role as labor-market intermediaries that provide continuity in welfare benefits. As mentioned above, the U.S. social welfare regime has been intimately tied to the workplace. While the New Deal established the Social Security Act, creating certain universality in retirement benefits, and an unemployment insurance system, the New Deal continued the close link between income security and the industrial work cycle. In the industrial era, workers could expect to receive benefits through a stable employment relationship. As is evident from the recent heated debates concerning health care reform, social security, and pensions, the U.S. system heavily relies on privately provided benefits.

From the perspective of employee rights, representation can serve to address the pervasive problem of under-enforcement of individual protective regulations in non-unionized workplaces. This is particularly true in industries and workplaces where non-compliance with labor standards is a widespread phenomenon.⁸³

⁷⁹ See generally Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837 (2011); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B. C. L. REV. 499 (1986).

⁸⁰ See Cooper, *supra* note 79, *supra* at 837.

⁸¹ PHILIP SELZNIK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 152 (1969).

⁸² See generally GOSTA ESPING-ANDERSEN, *WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES* (1996); GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); David Chamy, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601 (1996).

⁸³ On under enforcement, see, for example, Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994); Saskia Sassen, *The Informal Economy*, in *DUAL CITY RESTRUCTURING NEW YORK* 79 (John Hull Mollenkopf & Manuel Castells eds., 1991); Saskia Sassen-Koob, *Growth and Informalization at the Core: A Preliminary Report on New York City*, in *THE CAPITALIST CITY: GLOBAL RESTRUCTURING AND COMMUNITY POLITICS* 138

b. Symbolic Rationales for Non-Union Employee Representation

At the same time, work is a central locus of social interaction, identity formation, and community. As such, employee representation systems serve to consolidate and create a common space of interaction and engagement. Professor Cynthia Estlund recently emphasized the role of such spaces thinking of the workplace as a training ground for political activism.⁸⁴ From the management perspective, while asserting the need to preserve managerial prerogatives and authority, employee representation is understood as potentially increasing competitiveness and productivity by offering an efficient way of extracting information from employees.⁸⁵ Under this view, employee representation can efficiently eliminate the need for mid-managerial positions by increasing self-monitoring, discipline, and responsibilities of employees, creating a variety of new pressures on employees designed to deter shirking and reduce workplace frictions by increasing loyalty.⁸⁶ Taking it a step further, some thinkers believe that employee representation serves the function of internalizing the goals of worker incorporation. Louis Kelso believed that creating forms of employee participation and representation would produce “mini-capitalist” employees who would understand the value of capitalism for a society.⁸⁷ Indeed, while representation on corporate boards is rare even as employees increasingly become shareholders through employee stock programs, American corporate scholars have offered reasons why managers might favor elected employee representatives on their boards:

They may see employee representation as a way of taking power back from shareholders and moving away from policies that require them to bear more risk than they would otherwise prefer. After all, workers, like managers, are less diversified and more risk-averse than shareholders. When managers pursue risk-minimizing policies such as growth, diversification, and earnings retention, workers benefit by receiving more firm specific training, career opportunities, stable employment, and higher wages. Thus workers and managers have common interests, which do not always align neatly with shareholder objectives.⁸⁸

(Michael P. Smith & Joe R. Feagan eds., 1987); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2180 (1994).

⁸⁴ CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (Yale University Press, 2010) [hereinafter *REGOVERNING THE WORKPLACE*]; CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (Oxford University Press, 2003) [hereinafter *WORKING TOGETHER*].

⁸⁵ See Stephen M. Bainbridge, *Privately Ordered Participatory Management: an Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979 (1998).

⁸⁶ See Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265 (1998); Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 27–50 (Joel Rogers & Wolfgang Streeck, eds., Chicago: University of Chicago Press 1995).

⁸⁷ See LOUIS KELSO & MORTIMER ADLER, *THE CAPITALIST MANIFESTO* (1958); LOUIS KELSO & PATRICIA HETTER KELSO, *HOW TO TURN EIGHTY MILLION WORKERS INTO CAPITALISTS ON BORROWED MONEY* (1967); Elana Ruth Hollo, Note, *The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy*, 23 RUTGERS L.J. 561, 563–64 (1992).

⁸⁸ Jacoby, *supra* note 21, at 452; see also Sanford M. Jacoby, *American Exceptionalism Revisited: The Case of Management*, in *MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS* 173 (Sanford M. Jacoby ed., 1991).

Whether from the perspective of employees or employers, it is commonly agreed that employee representation thus serves a voice function. As Charles Handy has described, “our economic well-being and the continued success of capitalism depend on efficient and effective organizations of all types. One way, perhaps the only way, to match our needs for democracy in our critical institutions with our need for efficiency is to think of our organizations as membership businesses.”⁸⁹

2. Categories of Employee Representation

Generally, non-union employee representation systems in the United States are constituted as workplace advisory groups that focus on issues such as quality of work life and improved production. These programs involve periodic elections of representatives, who meet with management to discuss grievances, shop-floor operational problems, and, less frequently, wages and benefits, although most often, final authority over all decisions, including grievances, remains with management. The types of programs that have emerged in the shadow of the NLRA prohibition are numerous. Many of these various models can be viewed as “institutions of ‘employee voice’ that are set up to serve management needs, but may also take on a life of their own, becoming a forum to express dissatisfaction [and] often perceived by their members as an alternative to unionization.”⁹⁰

a. *Self-managed Teams and Quality Circles*

Typically, a self-managed or self-directed team consists of a group of several employees at the shop-floor level, organized around certain areas of production and authorized to make collective decisions about day-to-day work problems.⁹¹ Such teams oversee their assigned project and may elect team leaders who serve representative functions vis-à-vis the rest of the organization.⁹² Quality circles refer to small groups of employees that are formed to discuss productivity, procedures, and product and service quality.⁹³ These programs have an almost sole focus on productivity and quality, without involving any focus on working conditions. Both types of employee groups are focused on shop floor production issues rather than employment conditions and work relations.

b. *Quality of Work Life, Advisory Councils and Safety Committees*

Quality of Work Life programs (QWL) or “employee-action committees” are small groups of employees, who usually, on a voluntary basis, represent employees in formulating recommendations for management concerning work-related conditions.⁹⁴ Committees with

⁸⁹ CHARLES HANDY, *THE AGE OF PARADOX* 24 (1995).

⁹⁰ Lobel, *supra* note 12, at 174.

⁹¹ JOHN L. COTTON, *EMPLOYEE INVOLVEMENT* 174 (1993).

⁹² Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 761 (1994).

⁹³ JEROME T. BARRETT, *LABOR-MANAGEMENT COOPERATION IN THE PUBLIC SERVICE: AN IDEA WHOSE TIME HAS COME* 3–6 (1985).

⁹⁴ DONALD M. WELLS, *EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT* (1987); MIKE PARKER, *INSIDE THE CIRCLE: A UNION GUIDE TO QWL* (1985); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379, 1393 (1995); Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 685 (1996).

such general characteristics are also called “focus groups,” “human resource programs,” or “employer-employee committees.” Many non-unionized workplaces also have extensive grievance systems.⁹⁵

Employee safety committees are widespread; over half of the large non-unionized manufacturing firms in the United States have some form of safety committees.⁹⁶ In 2004, a study of the U.S. Government Accountability Office (GAO) found that firms attributed much of the success of OSHA initiatives to employee involvement, including participation on safety committees, weekly meetings, assistance with training other employees, and employee participation in tours of other facilities in search for new ideas. Workers involved in internal safety programs reported major changes in attitude and communication and felt that participation in safety decisions spilled over to other aspects of voice at the workplace.

Safety committees may become even more common in the near future. The Department of Labor announced in 2010 that it would be launching its Plan/Prevent/Protect program as part of its good jobs agenda. This initiative would require employers to “create a plan for identifying and remediating risks of legal violations and other risks to workers—for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plans.”⁹⁷ According to the Department of Labor’s website, Plan/Prevent/Protect, which includes an injury and illness prevention program, requires management commitment to employee safety, employee engagement, and a hazard recognition program that would include hazard evaluation and hazard control.⁹⁸

c. Profit-Sharing Programs

Many firms, particularly in the high-tech industry, have constructed some form of profit-sharing programs, which may include collective or individual ownership of stocks or firm assets (Employee Stock Ownership Plans (ESOP)),⁹⁹ or simply structural bonuses that are linked to profits of the firm (Gain Sharing Programs, such as *Scanlon plans* and *Improshare plans*),¹⁰⁰ usually without providing for power in decision-making.

d. Employee Caucuses and Identity Groups

Employee caucuses have become widespread, initiated mainly by professional employees in the high-tech industry, with the goal of voicing concerns about work conditions and benefits

⁹⁵ See DAVID EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 299–308 (1989).

⁹⁶ Dennis Devaney, *Electromation and DuPont: The Next Generation*, 4 CORNELL J.L. & PUB. POL’Y 3, 16 (1994).

⁹⁷ U.S. DEP’T OF LABOR, *Department-Wide Regulatory and Enforcement Strategies—“Plan/Prevent/Protect” and Openness and Transparency* (Spring 2010), available at www.dol.gov/regulations/2010RegNarrative.htm (last visited February 2, 2012).

⁹⁸ U.S. DEP’T OF LABOR, Video, *Jim Thornton of Northrup-Grumman Discusses OSHA’s Injury and Illness Prevention Program*, available at <http://www.dol.gov/regulations/> (last visited February 2, 2012).

⁹⁹ See generally KELSO & ADLER, *supra* note 87; KELSO & HETTER, *supra* note 87. Considered the “father” of Employee Stock Ownership Plans (ESOP), Kelso supported distribution of stock to workers in order to broaden their financial bases, but not other forms of worker participation, which Kelso believed would reduce management control over the firm.

¹⁰⁰ *Scanlon plans* link profit sharing to other forms of participation, such as making suggestions to improve the workplace, while *Improshare plans* are provided without constructing any further participatory schemes, but rather are linked to increases in profits for the company or productivity bonuses. See Bainbridge, *supra* note 85 at 988–89; JOHN L. COTTON, EMPLOYEE INVOLVEMENT 89–95 (1993).

without the burdens of formal unionization.¹⁰¹ “Identity caucuses” are similarly non-union employee groups that have formed in recent years around issues of identity, ethnicity, gender, and discrimination: The first identity caucus, BABE (Bay Area Black Employees) was founded by African-American sales representatives at the Xerox corporation in 1969, in reaction to receiving inferior sales territories.¹⁰² Similarly, employers frequently set “employee diversity committees” as a response to complaints by minority employees and with the goal of informing management about steps to bring more equality to the workplace.¹⁰³

e. Labor-Management Cooperation Committees

As discussed above, Labor-Management Cooperation plans are the typical term for participatory plans *within* unionized settings. These are committees consisting of management and union officers, set for discussion of general issues, primarily regarding the collective bargaining relationship, and specific issues such as work conditions, safety, and workplace environment.¹⁰⁴ They differ from simple collective bargaining in their more frequent, informal discussions with management. For example, the first cooperative safety program adopted in the United States in the early 1980s was in fact a joint labor-management initiative in the construction industry, developed collaboratively by managers and the construction union, despite OSHA’s initial opposition.¹⁰⁵

f. Cross-Workplace Employee Associations

Worker membership organizations that are not workplace-centered are associations that have the goal of facilitating training, networking, and human capital nurturing.¹⁰⁶ The dramatic decline in unionism in the United States has created great pressures on the U.S. labor movement to re-envision the role of employee representation in the new economy. The AFL-CIO’s associate membership program now offers nonunion worker services and consultation.¹⁰⁷

3. Directions for the Future

The NLRA collective-bargaining model was based on the idea that workers should present a unified voice to advance their common goals: “The [NLRA] requires a well-defined form of representation, which involves strict separation between leadership and grassroots activities, demands loyalty to the group from its members, and requires that representation be

¹⁰¹ Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993).

¹⁰² *Id.* at 172–73; Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 72 (1995); Rachel Geman, *Safeguarding Employee Rights in Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 379–80 (1997).

¹⁰³ Note, *Labor-Management Cooperation after Electromation: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 683–84 (1994).

¹⁰⁴ DON DEWAR, *THE QUALITY CIRCLE GUIDE TO PARTICIPATION MANAGEMENT* (1980); JEROME T. BARRETT, *LABOR-MANAGEMENT COOPERATION IN THE PUBLIC SERVICE: AN IDEA WHOSE TIME HAS COME* 3–4 (1985) (defining labor-management cooperation as committees, usually comprising equal numbers of union and management officers, who meet regularly to discuss work related issues).

¹⁰⁵ Lobel, *supra* note 26, at 1131.

¹⁰⁶ Lobel, *supra* note 1, at 1547; Janice Fine, *Building Community Unions*, NATION, Jan. 1, 2001, at 18.

¹⁰⁷ David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, 31 INDUS. REL. 56 (1992) (advocating a “new brand of unionism”).

exclusive.”¹⁰⁸ The American union has therefore been perceived as “*an entity external to the employees*: as a large, bureaucratic organization whose full-term officials periodically negotiate a long-term contract behind closed doors with the employer, and then represent a fairly small number of employees who are aggrieved by the way management administers the contract during its lifetime.”¹⁰⁹ Scholars have criticized the NLRA because it treats union participation as a “foreign entity,” rather than an “organic ‘activity’” that is essential to employees.¹¹⁰ At a time when unionization in the United States is at an all time low, non-union employee representation is gaining more attention.

The perverse effect of the prohibition on non-union employee representation systems under the NLRA is that “in nonunionized firms, today comprising approximately ninety percent of the private workforce [employee groups] are allowed under the NLRA to discuss issues important to the employer, such as, the quality of the product and production, but not those issues related to the quality of work and life of workers.”¹¹¹ For example, in one case, the NLRB struck down two committees that addressed “the needs or conveniences of employees” but allowed a third, which focused on “quality of product.”¹¹² Quality circles are not viewed as conflicting with the NLRA requirements because they are considered a “management tool . . . designed to permit rank-and-file employees to assist management in making its operations more efficient” and as “solely involved in operational matters.”¹¹³ Conversely, as described above, employee committees that potential negotiate, propose, and contribute to the improvement of employee work benefits, conditions, and welfare are deemed suspect and may be found unlawful.

U.S. federal law has posited that union-based collective bargaining and non-union representation are mutually exclusive.¹¹⁴ And yet despite the differences and the gaps between union and non-union representation systems, the goals and logic of each are surprisingly similar. Compare the preamble of the NLRA:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and

¹⁰⁸ Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace*, in *DIVERSITY IN THE WORKFORCE* 131, 137–38 (Nancy DiTomaso & Corinne Post eds., 2004).

¹⁰⁹ PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 11–12 (1990) (emphasis added).

¹¹⁰ James B. Raskin, *Reviving The Democratic Vision of Labor Law*, 42 *HASTINGS L.J.* 1067, 1071 (1991).

¹¹¹ Lobel, *supra* note 26, at 1135.

¹¹² *Simmons Indus.*, 321 N.L.R.B. 228, 254 (1996).

¹¹³ *Vons Grocery Co.*, 320 N.L.R.B. 53, 68–69 (1995).

¹¹⁴ Lobel, *supra* note 1.

wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.¹¹⁵

With the following more recent statement:

Managers are beginning to realize that in today's competitive economy workers and management better swim together, or they will sink together.¹¹⁶

Both statements tie the success of industry with voice and cooperation between management and labor. With the constraints of and uncertainty caused by the *Electromation* decision and subsequent case law, there is clearly a need for change in the current legal framework to allow employer instituted employee participation models to function efficiently. Despite the bad connotations attached to these programs and the idea of the "company union," there is a growing discontent with the current system and a recognition of the need for change. The following statement by William Buddinger, Chairman and CEO of Rodel, Inc., to the Senate Committee on Labor and Human Resources in testimony on the impact of the NLRA's section 8(a)(2) on employers reflects this discontent:

A modification of the NLRA to allow teamwork and collaborative management is clearly needed. . . . The modern experiments in teamwork have generally produced the best of two worlds--more competitive enterprises and happier workers. . . . American enterprise must be free to change. . . . We cannot do that if we are shackled by laws that lock us into the past.¹¹⁷

Beyond labor law reform, suggestions to increase employee representation in the U.S. market include increasing disclosure laws, securing the availability of information that would permit employees to monitor management, financial performance, operating results, strategic plans, and business risk factors.¹¹⁸ These suggestions include calling for the Organisation for Economic Cooperation and Development (OECD) recent recommendation to grant employees information relevant to the employment relationship, including training opportunities, compensation practices, and health and safety records.¹¹⁹ Other suggestions from corporate law reformers include mandating employee-owner representation on corporate boards.

E. Conclusion

This report suggests that two values underlying employee participation in workplace decision-making tug in different directions. While some U.S. labor policies encourage employee voice, others encourage self-organization. The conflict is most dramatic in situations where NLRA Section 8(a)(2), in the name of protecting worker autonomy, paralyzes

¹¹⁵ The Preamble of National Labor Relations Act (NLRA) §1, 29 U.S.C. §151.

¹¹⁶ JOHN R. PHILLIPS, *THE FUTURE OF LABOR-MANAGEMENT COOPERATIVE PROGRAMS* 14 (1994).

¹¹⁷ *Teamwork for Employees and Managers Act of 1997: Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources*, 105th Congress (1997).

¹¹⁸ Jacoby, *supra* note 21, at 485 (2001).

¹¹⁹ *Id.* (citing Directorate for Financial, Fiscal and Enterprise Affairs, *OECD Principles of Corporate Governance*, OECD, 19-22 (1999), available at <http://www.oecd.org/daf/governance/principles.htm>).

potentially important channels for employee voice. The United States, which has a workplace-benefit structure rather than a citizenship or universal-benefit system, should be particularly concerned about legal obstacles that prevent workers from having some say in how such benefits will be distributed. The United States, as a federal democratic republic, should also be concerned about any legal obstacle that stifles employee participation in workplace decision-making. Instead, U.S. policy makers should seek out ways to encourage democratic participation in as many social units as possible. While the workplace is one of the more difficult social units to democratize, it is also one of the most important as it tends to be the locus for social interaction, identity formation, and community.¹²⁰

¹²⁰ See, e.g., Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 20 HOFSTRA L. REV. 301, 310–17 (2011); ESTLUND, *REGOVERNING THE WORKPLACE*, *supra* note 85; ESTLUND, *WORKING TOGETHER*, *supra* note 84.

The Evolving Pluralistic Approach to Employee Representation at the Enterprise in Australia

Anthony Forsyth*

1. Employee Representation at Enterprise Level

1.1 Introduction

Australia has never had a system of employee representation at the enterprise level of the kind operating in many European countries. From 1904 until the early 1990s, the conciliation and arbitration framework functioned as the principal mechanism for determining employees' wages and conditions.¹ Between the early 1990s and 2006, conciliation and arbitration was overshadowed by the shift to enterprise-level bargaining.² With effect from March 2006, the conservative Howard Government's 'Work Choices' legislation³ drove the final nail into the coffin of the traditional arbitral system. Individualized employment bargaining was that Government's priority, although it failed to take hold on a widespread basis.⁴ The election of a Labor Government in late 2007 saw an immediate return to collectivism in labour relations,⁵ with further support to collective bargaining provided under the *Fair Work Act 2009* (Cth) (FW Act) with effect from 1 July 2009.⁶

Throughout the development of Australian employment relations, workers' interests have been represented primarily via the 'single channel' of trade unions.⁷ European-style mechanisms for worker participation, such as works councils, have not enjoyed the support

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¹ Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

² Richard Mitchell and Richard Naughton, 'Australian Compulsory Arbitration: Will It Survive into the Twenty-First Century?' (1993) 31 *Osgoode Hall Law Journal* 265.

³ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); for a retrospective analysis and assessment of this highly significant reform legislation, see Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, 2009.

⁴ Although estimates varied, at their highest, statutory individual workplace agreements covered between 5% and 7% of the workforce: Department of Education, Employment and Workplace Relations (DEEWR), *Submission to the Senate Standing Committee inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, pages 7-8.

⁵ Mainly through the abolition of statutory individual workplace agreements by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

⁶ Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law' (2011) 40:2 *Industrial Law Journal* 116. On the FW Act generally, see Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22:1 *Australian Journal of Labour Law* 3.

⁷ Greg Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29:1 *University of New South Wales Law Journal* 8, at pages 9-10. See also Greg Patmore, 'Giving Employees a Voice in the Workplace: A Comparative Historical Perspective', in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations – An Era of Change (Essays in Honour of Russell Lansbury)*, The Federation Press, Sydney, 2011, page 153.

of Australian unions, employers or industrial tribunals. On the other hand, there have been several waves of interest in various types of worker participation schemes in Australia, especially in the 1970s and mid-1980s. The period since the 1990s has seen increasing use of joint consultation committees (JCCs) – formal, ongoing committees consisting of management and employee representatives⁸ – and other workplace-based forms of employee voice.⁹ However, the steady decline in union membership over the last thirty years, and the growth of ‘high trust’ human resource management (HRM) practices, have not led to the evolution of a ‘second channel’ of employee representation.

The most important form of employee representation at enterprise level in Australia is the enterprise bargaining framework, which provides a role for union and non-union bargaining representatives. The application of agreements made under the FW Act to all relevant employees within an enterprise, or part of an enterprise, means that many more employees benefit from enterprise bargaining than are members of trade unions. Given its significance in the Australian labour law system, the regulation of enterprise bargaining under Part 2-4 of the FW Act is explained in section 2 of this article – with a particular focus on the provisions relating to employee bargaining representatives. First, though, some further historical background is provided about the limited development of works councils/committees in Australia; followed by a discussion of the incidence of JCCs and some other voluntary employee representation practices, occupational health and safety (OHS) committees, and employee representation on company boards.

1.2 Historical background¹⁰ and current position

(a) 1904-1996

From the commencement of the federal conciliation and arbitration system in 1904 until the early 1990s, ‘awards’ made by an independent industrial tribunal were the main form of regulation of employees’ terms and conditions of employment.¹¹ While the award system provided significant legal rights to registered trade unions,¹² awards did not generally make provision for the establishment of employee consultative or information-sharing bodies at workplace level.¹³ This was due both to constitutional constraints on the capacity of the federal industrial tribunal,¹⁴ and an attitudinal reluctance on the part of

⁸ Mick Marchington, ‘Surveying the Practice of Joint Consultation in Australia’ (1992) 34:3 *Journal of Industrial Relations* 530, at page 533.

⁹ Raymond Markey, ‘The State of Representative Participation in Australia: Where to Next?’ (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 533.

¹⁰ This section of the article summarises the discussion in Anthony Forsyth, ‘The “Transplantability” Debate Re-Visited: Can European Social Partnership Be Exported to Australia?’ (2006) 27:3 *Comparative Labor Law and Policy Journal* 305, at pages 306-315.

¹¹ Ronald McCallum, ‘Crafting a New Collective Labour Law for Australia’ (1997) 39 *Journal of Industrial Relations* 405. The tribunal, now known as ‘Fair Work Australia’ (previously known as the Australian Industrial Relations Commission), will be referred to herein as ‘the federal industrial tribunal’ or ‘FWA’. On the role and functions of FWA under the FW Act, see Anthony Forsyth, ‘Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR’ (2012) 23:3 *International Journal of Human Resource Management* 476.

¹² W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, The Law Book Company Limited, North Ryde, 2nd ed, 1993, pages 888-889.

¹³ Richard Mitchell, ‘The Employment Protection Act 1975 and the Extension of Industrial Democracy in Britain – Lessons for Australia’ (1978) 6 *Australian Business Law Review* 105, at page 116.

¹⁴ Creighton, Ford and Mitchell, above note 12, Chapter 18. These limitations on the federal tribunal’s powers no longer apply, because the main constitutional basis for federal labour law has shifted from the ‘labour power’ (in section 51(xxxv) of the *Australian Constitution*), to the ‘corporations power’ (in section 51(xx)): for further discussion, see Rosemary Owens, ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2009) 22:3

many of its members, to regulate matters relating ‘to managerial prerogative’.¹⁵ In turn, Australian unions and employers adopted positions of ambivalence and even hostility towards the notion of worker participation – particularly, for unions, if this entailed the development of alternative employee representative structures.¹⁶

Unions became more interested in industrial democracy from the late 1960s, influenced partly by overseas developments and driven by the need to ensure that employees had a ‘voice’ in the introduction of new technologies which threatened job security.¹⁷ This resulted in some modest efforts on the part of the Whitlam Labor Government (1972-1975) and the conservative Fraser Government (1975-1983) to promote union-management consultative practices and ‘employee participation’.¹⁸ Stronger support for worker participation eventuated under the Hawke and Keating Labor Governments (1983-1996), including the mandatory development of industrial democracy plans and departmental councils across the federal public service.¹⁹ Further, by the mid-1980s, the federal industrial tribunal’s aversion to interfering with managerial prerogative had started to break down. As a result, awards increasingly began to require employers to inform and consult with employees and unions about workplace restructuring, technological change and redundancies.²⁰

With the shift to enterprise bargaining from the early 1990s, the Labor Government’s promotion of workplace democracy was replaced by a range of measures to enhance the productivity and efficiency of Australian firms.²¹ That said, the economic recession and mass job-shedding during that period led the Government to enact statutory provisions requiring employers to inform and hold discussions with workers and their representatives about redundancies affecting fifteen or more employees.²²

(b) The Coalition Government, 1996-2007

The Howard Government’s de-collectivist labour law reforms from 1996 involved not

Australian Journal of Labour Law 258.

¹⁵ Joe Isaac, ‘Industrial Democracy in the Context of Conciliation and Arbitration’, in Russell Lansbury (ed), *Democracy in the Work Place*, 1980, page 34 at 36-42; see also Robert Pritchard, ‘The Legal Framework in Australia for Industrial Democracy’, in the same volume, page 54 at 56.

¹⁶ Kenneth Walker, *Australian Industrial Relations Systems*, Harvard University Press, Cambridge, Massachusetts, 1970, pages 80-81; Orwell de R Foenander, *Industrial Conciliation and Arbitration in Australia*, The Law Book Co. of Australasia Pty Ltd, Sydney, 1959, page 191.

¹⁷ Walker, above note 16, pages 63, 65, 405; Alastair Crombie, ‘Industrial Democracy – Job Satisfaction or Social Transformation’, in Robert Pritchard (ed), *Industrial Democracy in Australia*, CCH Australia Limited, Sydney, 1976, page 47.

¹⁸ Julian Teicher, ‘Consultation and Participation in the Australian Public Sector’, in Edward Davis and Russell Lansbury (eds), *Managing Together: Consultation and Participation in the Workplace*, Longman, South Melbourne, 1996, page 115 at 116-118; Department of Productivity, *Commonwealth Government’s Policy on Employee Participation*, 1978.

¹⁹ Public Service Board, *Guidelines on the Establishment and Operation of Departmental Councils in the Australian Public Service*, July 1984; Department of Employment and Industrial Relations, *Industrial Democracy and Employee Participation: A Policy Discussion Paper*, 1986. For discussion see Michael Gurdon, ‘The Emergence of Co-Determination in Australian Government Employment’ (1985) 124 *International Labour Review* 465.

²⁰ See, in particular, *Termination, Change and Redundancy Case* (1984) 8 I.R. 34; and the High Court of Australia’s decisions in *Federated Clerks’ Union v Victorian Employers’ Federation* (1984) 154 C.L.R. 472 and *Re Cram; Ex parte NSW Colliery Proprietors’ Association Limited* (1987) 163 C.L.R. 117. On the extensive reach of award information and consultation obligations by the early 1990s, see Debora Campbell and Malcolm Rimmer, ‘Managing Retrenchment: Award Standards or Enterprise Agreements?’ (1994) 20 *Australian Bulletin of Labour* 45.

²¹ See further section 2.1(b) of this article, below.

²² Marilyn Pittard, ‘International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment’ (1994) 7 *Australian Journal of Labour Law* 170; in essence, these provisions were a statutory formulation of the redundancy protections that had been inserted in many awards since the *Termination, Change and Redundancy Case* in 1984 (see note 20 above and accompanying text).

only the dilution and removal of many of the rights traditionally enjoyed by trade unions, but also the dismantling of support for employee participation in the workplace through collective or union-based structures.²³ Instead, the Government promoted employee share ownership²⁴ and other approaches that provide a limited basis for genuine employee involvement in workplace decision making. Somewhat paradoxically, the late 1990s-early 2000s saw a renewed debate within the Australian union movement about the merits of works councils and other processes for information provision and dialogue at the workplace.²⁵ In part, this focus on European-style worker participation came in response to a series of high-profile corporate collapses, which highlighted the absence of legal rights for Australian employees to information and consultation over business restructuring issues.²⁶ However, divisions among unionists about the role that any alternative employee representative bodies might play²⁷ – and the predominant focus of trade unions on the Howard Government’s reduction of their collective bargaining and organizational rights²⁸ – saw this brief interest in works councils dissipate without the adoption of any decisive policy position.

(c) The Rudd and Gillard Labor Governments, 2007-present

The Labor Government elected in November 2007 did not bring to office any policy commitment to expand employee participation in the enterprise – other than through the long-established Australian tradition of trade union representation. However, the Government has bolstered employee and union rights to information and consultation over workplace restructuring in the following ways:

- awards (now known as ‘modern awards’) may include ‘procedures for consultation, representation and dispute settlement’ (FW Act, section 139(1)(j)) – a standard ‘consultation clause’ has been inserted in all modern awards,²⁹ requiring employers to provide information and consult with employees (and their representatives) about decisions to implement major workplace changes affecting current or future employment levels;
- to obtain approval by FWA,³⁰ enterprise agreements *must* have a ‘consultation term’

²³ See eg Anthony Forsyth, ‘The Retreat from Government Support for Social Dialogue in the Australian Public Service’ (2003) 62 *Australian Journal of Public Administration* 52.

²⁴ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours: Inquiry into Employee Share Ownership in Australian Enterprises*, 2000.

²⁵ Australian Council of Trade Unions (ACTU), *Works Councils – Time for a Debate*, Discussion Paper for the ACTU Executive, March 2001; Greg Combet, ‘Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions’, in Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy*, Pluto Press, Sydney, 2003, page 134.

²⁶ Much interest centred on European Union law, and the laws of some continental European countries (primarily Germany), which enable employees to be routinely involved in management decisions about workplace restructuring and its consequences. See Anthony Forsyth, ‘Giving Employees a Voice over Business Restructuring: A Role for Works Councils in Australia’, in Gollan and Patmore, above note 25, page 140.

²⁷ See eg Martin Foley, ‘Democratising the Workplace: Unions and Works Councils?’, in Paul Gollan, Ray Markey and Iain Ross (eds), *Works Councils in Australia: Future Prospects and Possibilities*, The Federation Press, Sydney, 2002, page 37.

²⁸ Rae Cooper, Bradon Ellem, Chris Briggs and Diane van den Broek, ‘Anti-unionism, Employer Strategy, and the Australian State, 1996-2005’ (2009) 34:3 *Labor Studies Journal* 339.

²⁹ See eg *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, clause 8, at: http://www.fwa.gov.au/documents/modern_awards/award/ma000089/default.htm.

³⁰ Enterprise agreements only have legal effect once they are approved by FWA (FW Act, section 54(1)). Such approval requires FWA to be satisfied that numerous requirements have been met in relation to the making and content of a proposed agreement (see sections 186-187), including that employees will be ‘better off overall’ under the agreement than they would be under a relevant modern award (see also section 193).

(FW Act, section 205(1)), requiring information and consultation about major workplace change – a model consultation term (in much the same form as the standard award consultation clause referred to above) applies if the parties to an enterprise agreement do not include their own consultation provision (FW Act, section 205(2); *Fair Work Regulations 2009* (Cth), Schedule 2.3),³¹

- under Part 6-4 of the FW Act, FWA may make remedial orders where an employer fails to notify and consult with relevant unions about proposed redundancies affecting fifteen or more employees (see sections 786-789).³²

The Labor Government was returned to office at the federal election held in August 2010, although without a clear majority. As a result, Labor currently governs with the support of several independent members of Parliament, and another from The Greens. While industrial relations was a key election issue in 2007, by the time of the 2010 election it had receded in importance with both major political parties adhering to a policy of ‘no further change’ to the FW Act. However, workplace relations returned to the newspaper headlines in late 2011, following major bargaining disputes between Australia’s main airline, Qantas, and the Transport Workers Union (TWU), the Australian Licensed Aircraft Engineers Association (ALAEA) and the Australian and International Pilots Association (AIPA). The dispute in fact made the news globally, when Qantas grounded its world-wide fleet on 29 October 2011, at the same time as it announced a proposed lockout following months of industrial action by members of the three unions.³³ The federal Government then became involved in the dispute, making an application to FWA for termination of all protected industrial action affecting the airline. FWA granted the application,³⁴ paving the way for the tribunal to arbitrate the three bargaining disputes. Qantas and the ALAEA have since reached an agreement,³⁵ while the disputes between the airline and the TWU and AIPA are scheduled for arbitration throughout 2012.

At the time of writing, a Government-appointed panel is conducting a ‘post-implementation review’ of the FW Act (the panel must report to the Minister for Employment and Workplace Relations by 31 May 2012).³⁶ The Review aims to assess whether the legislation has been operating in accordance with its stated objects, which include: ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’ (FW Act, section 3). In light of the Qantas dispute, the statutory provisions regulating enterprise bargaining and protected industrial action have been a major focus of the Review. It is highly unlikely that the Review will make recommendations concerning

³¹ See eg *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)* [2010] FCA 652, where a penalty of A\$660,000 was imposed on an employer that failed to observe the consultation requirements applicable under a number of enterprise agreements, in relation to the proposed privatization of its business and the effects this would have on employees. This penalty was reduced, on appeal, to A\$249,600: see *QR Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)* [2010] FCAFC 150.

³² These provisions reflect those first introduced in 1993, discussed at note 22 above and accompanying text.

³³ Protected (ie lawful) industrial action may be organized and taken by employees/unions, and employers, in support of claims made in negotiations for an enterprise agreement under the FW Act; see section 2.1 of this article.

³⁴ *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444.

³⁵ The agreement has been endorsed by FWA through the exercise of its powers under Part 2-5 of the FW Act to make ‘workplace determinations’, in limited situations including where the tribunal has terminated protected industrial action: see *ALAEA v Qantas Airways Ltd* [2012] FWAFB 236; and section 2.1 below.

³⁶ Full details of the Review terms of reference, process, and submissions made by interested parties may be found at: <http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx>.

the development of non-union employee representative structures, such as works councils, as there is no impetus for this among Australian unions, employers or policy-makers at the present time.

1.3 Legal status and frequency of voluntary employee representation system

Given that there has been little direct legal support for industrial democracy and worker participation under Australian law, the incidence of voluntary consultative and participatory practices has always been fairly limited. The last Australian Workplace Industrial Relations Survey showed that in 1995, JCCs operated in 33% of workplaces surveyed; 43% per cent had OHS committees (see further section 1.4 below); and 16% had employee representatives on company boards (see further section 1.5 below).³⁷ Much more common than these representative forms of employee participation were ‘direct engagement’ HRM techniques, such as management ‘walk-arounds’, team building and work groups.³⁸

There is little recent data on the incidence, nature and operation of JCCs in Australian workplaces. The two most recent studies are those by Forsyth et al (2008, capturing data mostly from the period 1991-2003),³⁹ and Holland et al (2009, analyzing data obtained in 2003-2004)⁴⁰ (see Table 1 below). Both these studies provide evidence of an increase in the incidence of JCCs in Australian workplaces from the early 1990s to the mid-2000s; and suggest that JCCs have been used to complement (rather than to act as a substitute for) traditional union forms of employee representation.⁴¹ Despite the high level of employees’ perception of effectiveness of JCCs reported in Holland et al’s study, the conclusion of the Forsyth et al study that JCCs act as a form of employee *voice* – but not employee *power* – remains apposite today. There is still no legislation providing for such matters as the independent election of employee representatives on JCCs, or the extent of the committees’ information, consultation or co-decision making rights – raising ongoing questions as to the ability of JCCs to act as a vehicle for genuine employee influence in the workplace.⁴²

³⁷ Alison Morehead, Mairi Steele, Michael Alexander, Kerry Stephen and Linton Duffin, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Addison Wesley Longman, Sydney, 1997, pages 123, 188-189, 453.

³⁸ *Ibid*, pages 181-182, 187-188.

³⁹ Anthony Forsyth, Samantha Korman and Shelley Marshall, ‘Joint Consultative Committees in Australia: An Empirical Update’ (2008) 16:1 *International Journal of Employment Studies* 99.

⁴⁰ Peter Holland, Amanda Pyman, Brian Cooper and Julian Teicher, ‘The Development of Alternative Voice Mechanisms in Australia: The Case of Joint Consultation’ (2009) 30:1 *Economic and Industrial Democracy* 67. See also Julian Teicher, Peter Holland, Amanda Pyman and Brian Cooper, ‘Australian Workers: Finding their Voice?’, in Richard Freeman, Peter Boxall and Peter Haynes (eds), *What Workers Say: Employee Voice in the Anglo-American Workplace*, ILR Press, Ithaca, New York, 2007, page 125.

⁴¹ Although compare the findings in Raymond Markey, ‘Non-Union Employee Representation in Australia: A Case Study of the Suncorp Metway Council Inc. (SMEC)’ (2007) 49:2 *Journal of Industrial Relations* 187, examining a non-union employee representative body more in the nature of a works council than a JCC.

⁴² See also Raymond Markey and Rosemary Reglar, ‘Consultative Committees in the Australian Steel Industry’ in Raymond Markey and Jacques Monat, *Innovation and Employee Participation through Works Councils: International Case Studies*, Avebury, Aldershot, 1997, page 358; and Markey, above note 41.

Table 1: JCCs in Australian Workplaces

	Forsyth et al 2008 (results of analysis of federal enterprise agreements, 1991-2003)	Holland et al 2009 (results of large-scale employee survey, 2003-2004)
Incidence of JCCs	JCCs operating in 33.3% of agreements (in 2003) ⁴³	52.8% of employees reported presence of JCC in workplace
Union/non-union agreements ⁴⁴	JCCs in 47.8 of union agreements; 33% of non-union agreements (1991-2003)	[no equivalent finding]
Selection of employee representatives on JCCs	Provision for union representation in 11% of agreements (1991-2003) ⁴⁵	Unelected volunteers, 29.4% Elected by employees, 29.2% Management-chosen, 17.6% Union-selected, 4.9%
Effectiveness of JCCs	69% of agreements provided for JCC input into strategic business issues; 63% silent on powers of JCC (additional sample of 48 federal agreements 2003-2006)	80% of employees perceived JCC as quite/very effective

Holland et al's study also provided updated data on the incidence of various HRM/indirect employee representation practices, such as 'open door policies' for the discussion of workplace problems (employees reported these to be present in 83.4% of workplaces); regular staff meetings (64.7%); and employee involvement programs, eg quality circles (40.4%).

1.4 Employee representation under occupational health and safety legislation

In the absence of works council-type bodies, the only example of mandatory employee representation through formalized structures at the enterprise level in Australia is in respect of OHS.⁴⁶ The post-Robens⁴⁷ OHS statutes operating at federal, state and territory levels have all contained provisions requiring employers to inform and consult workers about a wide range of safety issues through elected OHS representatives and workplace-based OHS committees.⁴⁸ Following concerted efforts over the last few years to harmonize the separate OHS statutes operating around Australia into one common piece of legislation,⁴⁹ the *Work Health and Safety Act* (WHS Act) commenced operation on 1 January 2012 in the following jurisdictions: Commonwealth (ie federal), New South Wales, Queensland, Australian Capital Territory and Northern Territory.⁵⁰

⁴³ Note that the incidence of JCCs in federal agreements peaked, at 57.9%, in 1999.

⁴⁴ The former distinction between union and non-union agreements no longer applies under the FW Act; all enterprise agreements are now made between bargaining representatives of employers and employees, see section 2 of this article.

⁴⁵ However, the *actual* incidence of union representation on JCCs was thought to be considerably higher.

⁴⁶ Ray Markey and Greg Patmore, 'Employee Participation in Health and Safety in the Australian Steel Industry, 1935–2006' (2011) 49:1 *British Journal of Industrial Relations* 144.

⁴⁷ *Report of the Committee on Safety and Health at Work 1970-72*, HMSO, London, 1972 (Robens Report).

⁴⁸ Michael Quinlan and Richard Johnstone, 'The Implications of De-collectivist Industrial Relations Laws and Associated Developments for Worker Health and Safety in Australia, 1996–2007' (2009) 40 *Industrial Relations Journal* 426, at page 430.

⁴⁹ See eg Commonwealth of Australia, *National Review into Model Occupational Health and Safety Laws*, First Report (2008) and Second Report (2009). For further background on the monumental OHS harmonization process, see Breen Creighton and Andrew Stewart, *Labour Law*, 5th edition, The Federation Press, Sydney, 2010, Chapter 15.

⁵⁰ It is unclear, at the time of writing, when (or if) South Australia, Victoria and Western Australia will adopt the WHS Act; Tasmania will do so from 1 January 2013.

Part 5 of the WHS Act contains provisions giving effect to one of the objects of the legislation, ‘which is to provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety’.⁵¹ These provisions are largely modeled on those operating under Victorian legislation.⁵² In summary, Part 5 of the WHS Act provides for the following representation and consultative arrangements:⁵³

- A ‘person who conducts a business or undertaking’ (PCBU; this includes employers and occupiers of workplace premises) must consult with its workers (eg employees, contractors, volunteers) about health and safety matters directly affecting them – for example, the identification of workplace hazards and risks, and ways of minimizing or eliminating those risks. Such consultation must ensure that the workers are properly informed, have an opportunity to contribute their views on the PCBU’s decision-making process, have those views taken into account, and be advised of the final outcome of the consultation. Penalties of up to A\$100,000 may be imposed where a PCBU fails to comply with these consultation obligations.
- Workers may request a PCBU to conduct an election for health and safety representatives (HSRs) representing separate ‘work groups’ within the PCBU. Negotiations over the composition of these work groups must commence within 14 days of the request (with any disputes resolved by an inspector from the relevant OHS regulatory agency in each jurisdiction). Elections for HSRs are to be conducted in the manner preferred by the employees in each work group, with the PCBU required to provide any necessary resources, facilities and assistance.
- Once elected, HSRs hold office for a three-year term. They have significant powers of representation, consultation, monitoring and investigation in relation to health and safety matters affecting the work group – including the capacity to call in an inspector, and to direct workers to cease work in the event of a serious risk or imminent hazard. Further, PCBUs must provide HSRs with (for example) reasonable resources to carry out their functions, paid time off to attend relevant training courses, and payment at normal rates while performing their functions as a HSR.⁵⁴
- HSRs also have the power to request a PCBU to establish a health and safety committee (HSC), which must be set up within two months of the request (a group of five or more workers in the PCBU may also initiate this process). The workers and the PCBU must agree on the composition of the HSC (with any disputes resolved by an inspector), although at least half of its members must be workers who have not been nominated by the PCBU. In addition, the HSR for each work group must be included in the HSC. The role of HSCs includes developing standards, procedures and rules on health and safety issues to be observed in the PCBU, and (more generally) facilitating cooperation on such issues. To those ends, HSCs must meet at least once every three months, or on the request of at least half of the committee’s members. HSC members have similar rights of support from the PCBU to those accorded to HSRs (see above).

⁵¹ Safe Work Australia, *Worker Representation and Participation Guide*, page 2.

⁵² *Occupational Health and Safety Act 2004* (Vic), Parts 4 and 7.

⁵³ Creighton and Stewart, above note 49, pages 475-484. See also Safe Work Australia, above note 51.

⁵⁴ On this last right of HSRs, compare the position of bargaining representatives under the FW Act; see *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, discussed in section 2.2 of this article.

There is limited data on the incidence of HSRs and HSCs operating under the federal, state and territory OHS statutes that preceded the new WHS Act. Creighton and Stewart point to various (somewhat dated) sources indicating that ‘only a minority of workplaces have [HSRs]’, and that HSRs ‘make only very sparing use of the powers which are conferred on them’ under the relevant legislation.⁵⁵ In contrast, according to Markey and Patmore: ‘Recent Australian data indicates that, for the eastern states at least, 59 per cent of workplaces with five or more employees have [HSCs] (Considine and Buchanan 2007), compared with 43 per cent in all Australian workplaces with 20 or more employees in 1995 (Morehead *et al.* 1997: 453).’⁵⁶

1.5 Employee representation on corporate boards

Adhering to the Anglo-American, shareholder-oriented model of corporate regulation, there are no legal requirements in Australia for employee representation on company boards of the kind found in European ‘stakeholder’ systems.⁵⁷ However, from the 1950s, it was common for the boards of state – and later, federal – government authorities to include some form of employee representation in their governance structures (eg the NSW Electricity Commission, and the Australian Broadcasting Corporation). These practices reached their peak in the 1970s and 1980s, but have declined since then due to the privatization and corporatization of many public sector bodies.⁵⁸ While the Australian corporate governance framework does not mandate formalized employee representation on boards, there has been increased academic attention in recent years to issues such as corporate social responsibility (CSR); workplace partnerships; and other measures that could see employees play a greater role in the management of companies.⁵⁹ However, apart from the voluntary CSR initiatives implemented by many companies, there is little public policy pressure around these sorts of issues in Australia at the present time.⁶⁰

2. Employee Representation and Collective Bargaining

2.1 Unionization and collective bargaining today

(a) Australian unions and unionization

In recent years, the precipitous decline in union membership levels in Australia has slowed down. In 2008, the total number of employees in unions grew by 3%, although

⁵⁵ Creighton and Stewart, above note 49, page 475.

⁵⁶ Markey and Patmore, above note 46, page 147, referring to Gillian Considine and John Buchanan, *Workplace Industrial Relations on the Eve of Work Choices: A Report on a Survey of Employers in Queensland, NSW and Victoria*, Workplace Research Centre, University of Sydney, 2007; and Morehead *et al.*, above note 37.

⁵⁷ See eg Irene Lynch-Fannon, *Working Within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding: US and EC Perspectives*, Hart Publishing, Oxford, 2003; Richard Mitchell, Anthony O’Donnell, Shelley Marshall, Ian Ramsay and Meredith Jones, *Law, Corporate Governance and Partnerships at Work*, Ashgate, Farnham, 2011, Chapter 1.

⁵⁸ Raymond Markey, ‘A Stakeholder Approach to Corporate Governance: Employee Representatives on Boards of Management’, in Gollan and Patmore, above note 25, page 122 at 129-132.

⁵⁹ See eg Mitchell *et al.*, above note 57; Stephen Bottomley and Anthony Forsyth, ‘The New Corporate Law: Corporate Social Responsibility and Employees’ Interests’, in Doreen McBarnett, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, Cambridge, 2007, page 307; Shelley Marshall, Richard Mitchell and Ian Ramsay (eds), *Varieties of Capitalism, Corporate Governance and Employees*, Melbourne University Press, Carlton, 2008.

⁶⁰ For a rare example of media attention being given to European-style corporate governance, see Fiona Smith, ‘Faber-Castell puts workers on board’, *The Australian Financial Review*, 29 November 2011.

union membership density remained at its 2007 level of 18.9% of the workforce.⁶¹ In 2009, union density increased for the first time in twenty years, to 19.7% of the workforce.⁶² However, the most recent figures show union density at a new low of 18.3% in 2010, with 41.5% of public sector employees – but only 13.8% of private sector workers – in trade unions.⁶³ Despite the overall drop in membership, unions retain a strong presence in key sectors of the economy including construction, manufacturing, road transport, aviation, education and health care. The union movement also played a critical role (through the ACTU's 'Your Rights at Work Campaign') in the unseating of the Howard Government in 2007,⁶⁴ and the subsequent replacement of the deeply unpopular Work Choices legislation with the FW Act. Unions remain highly influential within the Labor Party and, therefore, the present federal Government.

The statutory framework for labour regulation provides Australian unions with significant legal rights, as it has done for most of the past century (apart from the Howard Government's period in office, 1996-2007, when some of these rights were diluted).⁶⁵ Detailed provisions regulating the formation, registration and operation of unions (and employer organizations) are found in the *Fair Work (Registered Organisations) Act 2009* (Cth) (FWRO Act), which has among its stated objects: 'to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered' (section 4). Most registered unions are large, industry-based organizations which emerged from the union amalgamation process in the late 1980s/early 1990s.⁶⁶ The FWRO Act also provides for the registration of 'enterprise associations' having at least twenty members employed within the same enterprise (sections 18C, 20) – perhaps similar in some ways to Japan's enterprise-based unions. However, very few enterprise associations have been established under these provisions in the FWRO Act (or previous statutory provisions).⁶⁷

Under Part 3-4 of the FW Act, officials of unions registered under the FWRO Act have the right to enter an employer's premises for purposes of ensuring compliance with employees' minimum entitlements under legislation, awards and agreements; to hold discussions with employees (ie union members and potential members); and for purposes of enforcing federal and state OHS laws.⁶⁸ These union 'right of entry' provisions provide

⁶¹ Australian Bureau of Statistics (ABS), *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2008, Cat. No. 6310.0.

⁶² ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2009, Cat. No. 6310.0.

⁶³ ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2010, Cat. No. 6310.0. To give some idea of the extent and rapidity of membership decline, union density in Australia was 49.5% in 1982; 28.1% in 1998; and 20.3% in 2006. See further David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47:4 *British Journal of Industrial Relations* 623, noting that the rate of union membership decline in Australia has been 'much steeper' than in most other OECD countries (at page 627).

⁶⁴ See Kathie Muir, *Worth Fighting For: Inside the Your Rights at Work Campaign*, UNSW Press, Sydney, 2008; and Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide*, Cambridge University Press, Melbourne, 2008, Chapter 8.

⁶⁵ Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16:2 *The Economic and Labour Relations Review* 215.

⁶⁶ See eg Kerrie Hose and Malcolm Rimmer, 'The Australian Union Merger Wave Re-visited' (2002) 44 *Journal of Industrial Relations* 525.

⁶⁷ Franklin Gaffney and Paul Gollan, 'Enterprise Unions: A False Hope or the New Frontier?', Paper for the Australian Labour Law Association Conference, University of Sydney, 2004.

⁶⁸ Note that there are many requirements that must be met by union officials in order to obtain entry to an employer's premises for any of these purposes, eg the production of a right of entry permit, and the provision of at least 24 hours' notice of any proposed entry: see further Creighton and Stewart, above note 49, pages 709-716.

a significant basis for union recruitment and activism in the workplace. Unions are also able to initiate court proceedings on behalf of their members, eg to enforce minimum employment standards and other rights accorded to employees under the FW Act.⁶⁹ Further, union members (and, indeed, employees who choose *not* to join or be involved in unions) have important rights under the ‘general protections’ provisions in Part 3-1 of the FW Act. These include protection from dismissal or other adverse treatment by an employer for reason of an employee’s union membership or activism, or seeking representation by a union in relation to workplace issues (eg disciplinary action against an employee, or negotiations for a new enterprise agreement).⁷⁰ The broad interpretation by the courts of the general protections provisions, particularly those relating to ‘industrial activity’, has led to an appeal to the High Court of Australia in a case involving the actions of a workplace union delegate in raising allegations of impropriety within his employer’s organization.⁷¹

(b) Collective bargaining

Unions also have a central role in the system of enterprise bargaining which operates under Part 2-4 of the FW Act – although, as noted earlier in this article, the bargaining framework now envisages the participation of non-union employee representatives in enterprise agreement negotiations (see further section 2.2 below). The shift away from the traditional conciliation and arbitration architecture, in favour of enterprise-based bargaining, was a policy response to the significant restructuring of the Australian economy in the mid-late 1980s – including deregulation of the financial sector, the removal of import tariffs, and increased exposure of Australian firms to international competition. As Don Watson, an adviser to former Labor Prime Minister Paul Keating, explains:

One school of hardline rationalists, including the *Economist* magazine, believed Australia began deregulation at the wrong end – the government should have started with the labour market and moved onto the financial markets later. But whichever end it began, how could it be stopped once started? Each reform created pressure for another. Once competitiveness became the essential condition of success, how could labour be quarantined? That had been the refrain from business and from the other side of politics for years.⁷²

The move to *enterprise* bargaining was considered necessary, as a supplement to industry-level awards determined by the federal industrial tribunal, because it was through negotiations at the enterprise level that the parties could focus on changes to work practices that would deliver improvements in efficiency and productivity.⁷³ That overall philosophy has guided successive legislative reforms – of both Labor and Coalition governments – over the last twenty years.⁷⁴ During this period, there has also been a general consensus as

⁶⁹ See FW Act, Part 4-1, especially section 539; and Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 22:3 *Australian Journal of Labour Law* 306.

⁷⁰ See Creighton and Stewart, above note 49, pages 557-574.

⁷¹ *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (Full Court of the Federal Court, 9 February 2011), where the majority found that disciplinary action taken by the employer against the union delegate breached Part 3-1 of the FW Act. The High Court heard the appeal on 29 March 2012, and (at the time of writing) the Court’s decision is reserved.

⁷² Don Watson, *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM*, Random House Australia, Milsons Point, 2002, page 367.

⁷³ Critical also, here, was the *linking* of improvements in wages and employment conditions to productivity measures at the enterprise level. See eg Business Council of Australia (BCA), *Enterprise-Based Bargaining Units: A Better Way of Working*, Report to the BCA by the Industrial Relations Study Commission, Volume 1, July 1989; Prime Minister, *Speech by the Prime Minister, The Hon PJ Keating MP, to the Institute of Directors Luncheon*, Melbourne, 21 April 1993.

⁷⁴ On the early series of statutory provisions supporting enterprise bargaining, see Ron McCallum, ‘Collective Bargaining

to the desirability of enterprise bargaining among the main union and employer groupings.

That said, there have been (sometimes, profound) differences of view as to the precise *shape* of the legal framework for enterprise bargaining. The key differences have centred around union rights in bargaining, the role of the federal tribunal in facilitating and intervening in negotiations, the imposition of ‘good faith bargaining’ obligations, and whether the system should provide for individualized – or only collective – bargaining. A detailed consideration of these issues, in the context of the evolution of statutory support for enterprise bargaining in Australia, is beyond the scope of this article.⁷⁵ It suffices to say, as indicated earlier, that the FW Act has restored the primacy of *collective* bargaining. Further, the 2009 legislation provides for greater levels of tribunal oversight of the bargaining process – including through FWA’s powers to make orders to enforce the good faith bargaining requirements applicable to all bargaining representatives.

The FW Act retains the predominant focus upon bargaining at the level of a single enterprise (or part of an enterprise),⁷⁶ although multi-employer agreements may also be made.⁷⁷ Single-enterprise agreements are *made* between employers and their employees, when a majority of the employees who vote on a proposed agreement vote in favour of it,⁷⁸ whereas agreements are *negotiated* between the bargaining representatives of the employer and employees involved. The bargaining process is quite closely regulated, with bargaining representatives having the ability to apply to FWA for:

- good faith bargaining orders⁷⁹ and serious breach declarations (an order to address serious and repeated breaches of the good faith obligations),⁸⁰
- majority support determinations (the mechanism through which a reluctant

Australian Style: The Making of Section 115 Agreements under the Industrial Relations Act 1988 (Cth)’ (1990) 3 *Australian Journal of Labour Law* 21; Ron McCallum ‘Enhancing Federal Enterprise Bargaining: The Industrial Relations (Legislation Amendment) Act (Cth)’ (1993) 6 *Australian Journal of Labour Law* 63; Richard Naughton, ‘The New Bargaining Regime Under the Industrial Relations Reform Act’ (1994) 7 *Australian Journal of Labour Law* 147. These laws followed the faltering (and largely reluctant) attempt by the federal tribunal to introduce an enterprise focus for determining wages and conditions, within the constraints of the award system: see *National Wage Case April 1991 Decision* (1991) 36 I.R. 120; *National Wage Case October 1991 Decision* (1991) 39 I.R. 127.

⁷⁵ See the references at note 74 above; and Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62; Ron McCallum, ‘Australian Workplace Agreements – An Analysis’ (1997) 10 *Australian Journal of Labour Law* 50; Anthony Forsyth and Carolyn Sutherland, ‘Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining’ (2006) 19:2 *Australian Journal of Labour Law* 183; Joel Fetter, ‘Work Choices and Australian Workplace Agreements’ (2006) 19:2 *Australian Journal of Labour Law* 210; Rae Cooper and Bradon Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22:3 *Australian Journal of Labour Law* 284.

⁷⁶ FW Act, sections 12 (definition of ‘enterprise’) and 172(2)(a).

⁷⁷ FW Act, section 172(3)(a). ‘Greenfields’ agreements (for a single enterprise, or multiple enterprises), may be made for a genuine new enterprise that an employer proposes to establish (section 172(2)(b), (3)(b), (4)), eg a new construction project or mining venture; greenfields agreements must be made between an employer and a union (or unions) with the right to represent the interests of the employees who will perform work under the proposed agreement.

⁷⁸ FW Act, section 182(1); those entitled to vote are the employees who will be covered by the proposed agreement. Employees cannot be requested to vote on an agreement until certain ‘pre-approval steps’ have been taken by the employer, including the provision to employees of information about the terms of the agreement and the voting process: see FW Act, sections 180-181.

⁷⁹ See the good faith bargaining requirements set out in FW Act, section 228; and sections 229-233 relating to bargaining orders. On the operation of these provisions, see Anthony Forsyth, ‘The Impact of ‘Good Faith’ Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, at pages 13-33. See also Breen Creighton, *Good Faith Bargaining under the Fair Work Act – Striking a Balance*, Discussion Paper for the Business Council of Australia, January 2010; Breen Creighton and Pam Nuttall, ‘Good Faith Bargaining Down Under’ (2012) 33:2 *Comparative Labor Law and Policy Journal* 257.

⁸⁰ FW Act, sections 234-235.

- employer can be compelled to bargain);⁸¹
- scope orders (to deal with disputes over the coverage of an agreement);⁸²
- low-paid authorisations (which trigger the operation of a special low-paid bargaining stream aimed at facilitating the making of multi-enterprise agreements for low-paid employees, who traditionally have not been covered by collective agreements);⁸³
- assistance by the tribunal in resolving bargaining disputes (eg through conciliation, mediation or – if all bargaining representatives agree – arbitration).⁸⁴

However, the Labor Government’s intention was that these various ‘tools’ through which FWA can intervene in bargaining should operate in the background. *Voluntary* bargaining relationships developed between employers, employees and unions are meant to be the norm: ‘Where there is new regulation it is focused on facilitating the bargaining processes in situations where an employer and their employees are unable to successfully bargain together.’⁸⁵ Table 2 below shows that (consistent with the Government’s plans) the number of applications for bargaining orders, majority support determinations, scope orders, low-paid bargaining authorisations and FWA assistance under section 240 represents only a small proportion of the total number of enterprise agreements submitted to FWA for approval.

Table 2: Applications for FWA Involvement in Bargaining under FW Act, Part 2-4⁸⁶

Matter Type	1 st Year (1 July 2009 – 30 June 2010)	1 st Quarter 2010-11 (1 July – 30 Sept 2010)	2 nd Quarter 2010-11 (1 Oct – 31 Dec 2010)	3 rd Quarter 2010-11 (1 Jan – 31 March 2011)	4 th Quarter 2010-11 (1 April – 30 June 2011)	1 st Quarter 2011-12 (1 July – 30 Sept 2011)	2 nd Quarter 2011-12 (1 Oct 2011- 31 Dec 2011)
Applications for bargaining orders (s.229)	121	26	19	24	27	25	34
Application for serious breach declaration made (s.234)	0	0	0	0	0	0	0

⁸¹ FW Act, sections 236-237; see Forsyth, above note 79, pages 33-47. Majority support determinations may be made if FWA is satisfied that a majority of employees in a workplace want to bargain. This mechanism is a rough approximate of the ‘union recognition’ laws that operate in the British and North American labour law systems, with the difference that the Australian provisions do not *require* a ballot to be conducted among the relevant employees; rather, majority support for collective bargaining can be established on the basis of petitions signed by employees (among other methods).

⁸² FW Act, sections 238-239.

⁸³ FW Act, Part 2-4, Division 9; see Richard Naughton, ‘The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?’ (2011) 24 *Australian Journal of Labour Law* 214.

⁸⁴ FW Act, section 240.

⁸⁵ Commonwealth of Australia, *Explanatory Memorandum, Fair Work Bill 2008 (Cth)*, para [r.114].

⁸⁶ FWA, *Annual Report of Fair Work Australia: 1 July 2009-30 June 2010*, Melbourne, 2010, pages 73-77; FWA, *Annual Report of Fair Work Australia: 1 July 2010-30 June 2011*, Melbourne, 2011, pages 80-83; FWA, *Quarterly Reports to the Minister*, available at: <http://www.fwa.gov.au/index.cfm?pagename=aboutquarterlyreports>.

Applications for majority support determinations (s.236)	111	29	25	14	25	16	19
Applications for scope orders (s.238)	48	5	6	9	11	11	6
Applications for FWA to deal with bargaining disputes (s.240)	506	55	44	55	67	84	115
Applications for low-paid authorisations (s.242)	2	0	0	0	0	0	1
Applications for approval of enterprise agreements (s.185)	7420	2127	2036	1210	1700	1967	2379

As was mentioned in section 1.2 of this article, an important adjunct to the formalized enterprise bargaining process is the legal recognition of the right of employees/unions to strike and take other forms of industrial action (eg work bans, short stoppages) – and of the employer to engage in a lockout of the workforce – in support of bargaining claims.⁸⁷ The exercise of these rights is subject to many limitations and restrictions (including the requirement that protected industrial action by employees must be approved by a majority voting in a secret ballot).⁸⁸ Further, protected industrial action may be ended by FWA on various grounds, including that the action threatens community health, safety or welfare, or to cause significant damage to the Australian economy (or an important part of it).⁸⁹ When this occurs, FWA may then arbitrate the outcome of the bargaining dispute (after the expiry of a mandatory 21-day, or up to 42-day, negotiating period).⁹⁰ While overall levels of industrial disputation in Australia have fallen considerably over the last thirty years, most of the industrial action that now takes place is (not surprisingly, given that it is legally sanctioned) connected to enterprise bargaining.⁹¹

The FW Act has, in the early period of its operation, had a modest effect in increasing the coverage of collective agreements. ABS data show that the number of Australian

⁸⁷ FW Act, Part 3-3. For a detailed examination of the these provisions, see Shae McCrystal, *The Right to Strike in Australia*, The Federation Press, Sydney, 2010.

⁸⁸ FW Act, Part 3-3, Division 8; see Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272.

⁸⁹ FW Act, Part 3-3 Division 6, especially s 424; it was under this provision that the tribunal terminated all industrial action in the Qantas dispute in late 2011, see notes 33-34 above and accompanying text.

⁹⁰ In this instance, FWA would be making an 'industrial action related workplace determination' under FW Act, Part 2-5, Division 3; the Qantas dispute provides a rare example of the exercise of these powers, see note 35 above and accompanying text.

⁹¹ For detailed discussion of the relevant ABS data over an extended period, see David Peetz, 'Industrial Conflict with Awards, Choices and Fairness', in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012 (forthcoming).

employees covered by collective agreements increased from 39.8% of the workforce in 2008, to 43.4% in 2010.⁹² This level of collective bargaining coverage is relatively high among comparable industrialized economies. Further, DEEWR data show an increase in the number of operative enterprise agreements from 22,371 (covering 2.05 million employees) in July 2009, to 23,403 agreements (covering almost 2.6 million employees) as at 30 June 2011.⁹³ Overall, however, the evidence to date suggests that the FW Act has not had a major impact on the spread of collective bargaining – and is unlikely to have altered van Wanrooy et al’s assessment (in 2009) that such bargaining is confined mainly to large, unionized workplaces in the public sector and to some sections of the private sector.⁹⁴

2.2 Role of labor unions in the selection or working of employee representatives

(a) Overview of the bargaining representative provisions

As is already apparent from the discussion in section 2.1 above, bargaining representatives (BRs) play a key role in the collective bargaining framework operating under Part 2-4 of the FW Act. Division 3 of Part 2-4 contains provisions relating to the obligation of employers to notify employees of their right to be represented in bargaining, and the appointment and revocation of appointment of employee and employer BRs. Unions have somewhat privileged status in the arrangements for the selection of employee BRs. However, as a member of FWA has observed: ‘It can be seen that the scheme of the legislation is that employees are advised that they are free to choose their [BR] and may also nominate themselves. This is not surprising given that any resultant agreement is between the employer and the employees at the enterprise.’⁹⁵ This pluralistic approach to employee representation under the FW Act stands in contrast to North American labour law systems, where a ‘majority’ union obtains the *exclusive* right to bargain on behalf of employees in a bargaining unit.⁹⁶

(b) Requirement to notify employees of representational rights

Under section 173 of the FW Act, within 14 days of the commencement of bargaining for an enterprise agreement, an employer must provide each employee that will be covered by the proposed agreement with a notice of their right to be represented in the bargaining. This ‘notice of employee representational rights’ must specify that the employee is entitled to appoint a BR for purposes of bargaining, and any application that may be made to FWA in relation to the bargaining (section 174(2)). The notice must also explain the effect of an employee’s membership of a union on their right to appoint a BR (section 174(3); see further below).⁹⁷

⁹² ABS, *Employee Earnings and Hours*, August 2008 and May 2010, Cat. No. 6306.0.

⁹³ DEEWR, *Trends in Federal Enterprise Bargaining*, June Quarter 2011.

⁹⁴ Brigid van Wanrooy, Sally Wright and John Buchanan, *Who Bargains?*, Report for the NSW Office of Industrial Relations, Workplace Research Centre, University of Sydney, 2009, pages 45–49.

⁹⁵ *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, para [8].

⁹⁶ See Clyde Summers, ‘Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle’ (1998) 20 *Comparative Labor Law and Policy Journal* 47; Anthony Forsyth, ‘Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law’, in Creighton and Forsyth, above note 91.

⁹⁷ See also the *pro forma* notice of employee representational rights in Schedule 2.1 of the *Fair Work Regulations 2009* (Cth); and on the manner in which the notice must be given to employees, see regulation 2.04. A considerable body of case law has developed to clarify employers’ obligations under these provisions: see eg *Bland v CEVA Logistics (Australia) Pty Ltd* [2011] FWAFB 7453.

(c) Employee bargaining representatives: union and non-union

The FW Act establishes a ‘default rule’ in favour of union BRs in the following circumstances. If an employee who will be covered by a proposed enterprise agreement is a member of a union, and the union is entitled to represent the industrial interests of the employee⁹⁸ in relation to work that will be performed under the agreement, then that union will *automatically* be the employee’s BR (section 176(1)(b), (3)).⁹⁹ However, the union will not have such default BR status if the employee has:

- appointed another person, including the employee himself or herself, as the employee’s BR (section 176(1)(c), (4)); or
- revoked the union’s status as the employee’s BR (see below).

An employee may nominate a person other than a union to be his or her BR by appointing the person in writing (section 176(1)(c)), provided that the person is free from improper influence or control by the employee’s employer or another BR (*Fair Work Regulations 2009* (Cth), regulation 2.06). For example, a management employee who will not be covered by a proposed agreement will not satisfy this requirement of independence of employee BRs.¹⁰⁰ A BR may be appointed at any time prior to the approval of a proposed agreement. The appointment will come into force on the day specified in the instrument of appointment (FW Act, section 178(1)).¹⁰¹ The instrument of appointment of a non-union BR must, on request, be provided to the employee’s employer (section 178(2)(a)). An employee may revoke the appointment of a non-union BR by written instrument (section 178A(1)); or revoke the default status of a union as the employee’s BR by written instrument (s 178A(2)).

One consequence of these provisions is that the range of persons authorized to act as employee BRs could shift over the course of negotiations for an agreement. Ascertaining the identity of the other BRs involved in agreement negotiations is an important issue for employers, unions and individual employee BRs, so that they are aware of precisely whom they owe obligations to under Part 2-4 (especially the good faith bargaining obligations in section 228). In *Construction, Forestry, Mining and Energy Union v Ostwald Bros Pty Ltd* [2012] FWA 2484, it was found that an employer may call into question the basis on which a union asserts that it has the right to represent the industrial interests of employees (and therefore, the union’s right to act as the employees’ default bargaining representative):¹⁰²

⁹⁸ A union’s right to represent the industrial interests of particular employees is determined by the union’s ‘eligibility rule’, which sets out the occupations, types of work or job functions that form the basis for eligibility for membership (see eg *Australian Workers Union v Debco Pty Ltd* [2011] FWA 4393). As these eligibility rules sometimes overlap, contests between unions over membership coverage are quite common in Australia (ie ‘demarcation’ disputes). Sections 133 and 137A of the FWRO Act enable unions and employers to obtain ‘representation orders’ from FWA to resolve such disputes; for a recent (and rare) example, see *Shop, Distributive and Allied Employees Association of Australia v National Union of Workers* [2012] FWAFB 461.

⁹⁹ Putting this another way, a union has a right to act as a BR in negotiations for an enterprise agreement, if it has at least one member among the employees who will be covered by the agreement: see eg *Australian Manufacturing Workers Union v Inghams Enterprises Pty Ltd* [2011] FWAFB 6106 (finding that the union was not a BR due to its inability to meet this requirement). FWA has also determined that a union having the status of a BR of employees by virtue of section 176(1) does not stand in a fiduciary relationship with those employees: see *Jupiters Limited v United Voice* [2011] FWA 8317, paras [36]-[39].

¹⁰⁰ *Re MIDG Pty Ltd T/A Healthy Habits Queens Plaza* [2010] FWA 1131.

¹⁰¹ There is no prescribed form for the instrument of appointment of an employee BR. However, there must be clear evidence of such an appointment, communicated to the employer, to make it effective. For example, employees cannot simply vote for another employee to act as their BR, without providing a formal instrument of appointment to the employer: *Re Safety Glass Pty Ltd* [2009] FWA 1156.

¹⁰² See notes 98-99 above and accompanying text.

when this occurs, ‘the onus falls upon the [union] to demonstrate that its [bargaining representative] status is not merely asserted but open to demonstration as a fact.’¹⁰³

Apart from the above requirements, the FW Act does not place any conditions on who may be appointed as a non-union BR. An employee could appoint another employee, a third party such as a consultant, or (as indicated above) the employee him/herself to act as the employee’s BR. A question that has arisen in the practical operation of these provisions is whether an employee may appoint *another* union – of which the employee is not a member, and which does not have the right to represent the industrial interests of that employee – as his or her BR. In *Tracey v Technip Oceania Pty Ltd* [2011] FWA 3509, a single member of FWA determined that the Maritime Union of Australia (MUA) could act as an employee’s BR in these circumstances, as the MUA official was acting in his *personal* capacity rather than on behalf of the union.¹⁰⁴ However, this ruling was overturned on appeal, the Full Bench majority finding that the evidence was ‘bristling with indications that, in his dealings with the [employer], Mr Tracey was acting as an official of the MUA’ (eg he had sent emails to the employer using the union logo, address and contact details): *Technip Oceania Pty Ltd v Tracey* [2011] FWAFB 6551, para [26].¹⁰⁵ As the MUA official was not a validly-appointed BR under the FW Act, he could not apply for a bargaining order to enforce the good faith bargaining requirements.

(d) Multiplicity of bargaining representatives and implications for bargaining

It is possible that more than one union may have default BR status in the negotiation of an enterprise agreement (eg where the proposed agreement will cover different types of workers employed at the same enterprise, such as production and administrative employees in a manufacturing plant). It is also possible that one or more of the employees to be covered by an agreement may nominate another person or persons to be their BR. An employer BR¹⁰⁶ may, therefore, be faced with a situation where it is obliged to bargain with a large number of union and non-union BRs for a proposed agreement – with significant potential to ‘drag out’ the negotiation process. However, if an employer BR (or any other BR) has concerns that bargaining is not proceeding efficiently or fairly because there are multiple BRs for the agreement, the BR may apply for a bargaining order (see FW Act, sections 229(4)(a)(ii) and 230(3)(a)(ii)). In these circumstances, FWA may make an order that particular employee BRs not continue to be involved in negotiations for the agreement.

A number of examples have arisen of employers facing difficulties due to a multiplicity of employee BRs at the bargaining table.¹⁰⁷ For instance, two senior

¹⁰³ [2012] FWA 2484, at para [96].

¹⁰⁴ In this case, the relevant employees were operators of sub-sea ‘remotely operated vehicles’ in the offshore oil and gas industry, whose work falls within the eligibility rule not of the MUA but of the Australian Maritime Officers Union (AMOU); however, none of these employees sought to be represented by the AMOU in negotiations with the employer for a new agreement.

¹⁰⁵ See also *Heath v Gravity Crane Services Pty Ltd* [2010] FWA 7751.

¹⁰⁶ The BRs of employers are the employer itself, and anyone it appoints in writing (eg a lawyer, consultant or employer association): FW Act, section (s 176(1)(a), (d)). See eg *Queensland Nurses Union of Employees v Lourdes Home for the Aged* [2009] FWA 1553; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399; *Liquor, Hospitality and Miscellaneous Union v Carinya Care Services* [2010] FWA 6489; *Australian Nursing Federation v Victorian Hospitals’ Industrial Association* [2012] FWA 285.

¹⁰⁷ See eg Australian Mines and Metals Association, *Submission to the Fair Work Act Review Panel*, February 2012, pages 87-89, 94-97; Business Council of Australia, *Submission to the Review of the Fair Work Act*, February 2012, pages 35-39.

employment relations operatives at Qantas made the following observations, prior to the development of the full-scale bargaining dispute at the airline during the course of 2011.¹⁰⁸

... Qantas is in the early stages of a bargaining round, so our experience with the new bargaining rules is limited, but suffice it to say that already we have had some [BRs] nominated outside of the normal channel of union representation, which has involved a range of separate meetings with non-union [BRs]. This has been time-consuming to say the least. In another case involving an agreement covering an important, but numerically small, group of employees, the time that key managers have been taken away from their normal duties to be involved in bargaining has doubled by having to conduct separate and parallel negotiations with two unions in their role as separate [BRs]. In the future, there is scope for electoral battles within unions to be reflected in bargaining forums; for special interest groups based on geography, gender or simply on specific interests such as part-time employment, to seek representation; and for traditional demarcation lines between unions to be revisited.¹⁰⁹

Some of these issues subsequently played out in the negotiation of an agreement covering Qantas's administrative staff, with two individual BRs representing 111 part-time employees going so far as to oppose the approval of the agreement by FWA.¹¹⁰

In other instances, it has been the main union involved in agreement negotiations that has been frustrated by the presence of non-union BRs.¹¹¹ For example, in *National Union of Workers v Patties Foods Ltd* [2011] FWA 4103, the union sought to obtain a degree of coordination in the dealings of twelve non-union BRs with the employer (eg by having them provide details of their bargaining claims to the union). The employer responded by informing the employees that they were free to represent the employees who had appointed them, as they saw fit. FWA found that while the union's actions did not amount to improper control over the non-union BRs (in breach of regulation 2.06, see above), nor was there anything improper in the employer's response: 'The general circumstances of these negotiations require the parties to act with some sensitivity and respect towards each other and to ensure that they comply with the provisions of the Act and the Regulations. They also require the parties to ensure that they do not overreach their roles or overreact to the actions of other parties.'¹¹²

(e) Rights of employee bargaining representatives

The *substantive* rights of both employee and employer BRs in the bargaining process are governed by the good faith bargaining obligations and mechanisms for their

¹⁰⁸ See notes 33-35 and 89-90 above and accompanying text.

¹⁰⁹ Sue Bussell and John Farrow, 'Continuity and Change: The Fair Work Act in Aviation' (2011) 53:3 *Journal of Industrial Relations* 392, at page 398. See also 'Fault lines emerging in good faith bargaining laws, says academic', *Workplace Express*, 4 August 2011.

¹¹⁰ Their efforts, which included arguments that the proposed agreement discriminated against female workers (by allocating overtime to the predominantly male full-time workforce), were unsuccessful: see *Re Qantas Airways Ltd (Australian Services Union (Qantas Airways Ltd) Agreement 9)* [2011] FWA 3632.

¹¹¹ See eg 'Bargaining representatives who don't bargain should lose rights: SPSF', *Workplace Express*, 21 February 2012, discussing Community and Public Sector Union (State Public Services Federation Group), *Submission to Fair Work Act Review Panel*, pages 11-15. See also *Re E Morcom* [2009] FWA 694, where FWA stated (at para [7]) that: '... there appears to be an issue in the minds of the AMWU and CEPU, as bargaining representatives, that Mr Morcom's participation in the bargaining is impeding the bargaining. In relation to that, the bargaining scheme within the current Act clearly recognises the possibility of multiple bargaining representatives. ... In circumstances where the exercise of those rights results in multiple bargaining representatives and, following bargaining, it is thought that the fact of multiple bargaining representatives is impeding bargaining, the Act does not envisage that it is in the hands of one bargaining representative to unilaterally seek to exclude another bargaining representative from the bargaining process.'

¹¹² [2011] FWA 4103, para [21].

enforcement.¹¹³ While the FW Act contains no provisions dealing with the *procedural* rights of union and non-union BRs, this issue has been addressed in several cases. For example, FWA has determined that an individual, non-union BR does not have the right to paid leave from his/her employer to attend bargaining meetings: ‘For an employee to act as a [BR] it is essentially a voluntary act. I cannot see that the employer is failing to bargain in good faith by the simple act of declining to pay a person who volunteers to act as a bargaining representative with all the rights and responsibilities that such a function entails.’¹¹⁴ Further, FWA considered that it was not necessary for the employer to conduct bargaining through a ‘single bargaining unit’, as long as the employer met with the individual BR at reasonable times.¹¹⁵ In another decision, FWA found that workplace-level union delegates level are not automatically considered BRs as a consequence of the union’s status as a BR under section 176(1), and therefore delegates do not have a right to attend bargaining meetings.¹¹⁶ A contrary finding was made in *Liquor, Hospitality and Miscellaneous Union v Carinya Care Services* [2010] FWA 6489, leaving the position somewhat uncertain. In practice, union delegates often participate in enterprise agreement negotiations by agreement with the employer or under the terms of a pre-existing enterprise agreement.¹¹⁷

3. Evaluation and Trends

It can be seen from the discussion in this article that employee representation at the enterprise in Australia has historically been predominantly union-based. This remains the case today, despite the continuing decline in levels of union membership among the Australian workforce. Alternative forms of employee representation such as JCCs exist alongside traditional union structures – but without any legal basis, JCCs and similar bodies have little influence in workplace decision-making. Works councils of the kind operating in Germany, and employee representation on corporate boards, are virtually non-existent. The FW Act requires information-provision and consultation over workplace restructuring issues, although for the most part without specifying any representative structure through which this must occur. The only legally-mandated structures for employee representation at the enterprise level are the provisions for electing HSRs and forming HSCs, now found in the WHS Act. Trade unions (and their officials/members) continue to enjoy significant rights and protections under federal workplace laws. Most importantly, unions play a central role in the enterprise bargaining process, although the recognition of non-union bargaining representatives under the FW Act is seeing the evolution of a more pluralistic approach to employee representation in Australia.

¹¹³ See notes 79-80 above and accompanying text.

¹¹⁴ *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, para [29]. In this case, the individual BR had been appointed to represent himself and 132 other police officers in the negotiations, with the Police Federation of Australia acting as the union BR for most other officers. While the bargaining meetings occurred only during working hours, the employer had offered flexible rostering to Sergeant Bowers to enable him to attend – but it was not prepared to pay him for time spent acting as a BR.

¹¹⁵ [2011] FWA 2862, paras [25]-[28].

¹¹⁶ *Flinders Operating Services Pty Ltd T/A Alinta Energy v Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers, Scientists and Managers, Australia; Australian Manufacturing Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FWA 4821.

¹¹⁷ The ACTU is currently campaigning to enhance the rights of union delegates in bargaining, and more generally under the FW Act: Mark Skulley and Pip Freebairn, ‘Unions seek bill of rights for delegates’, *The Australian Financial Review*, 13 January 2012, page 10.

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