

THE ROLE OF EMPLOYEES IN CORPORATE GOVERNANCE IN THE ANGLO-AMERICAN MODEL; DEVELOPMENTS IN SOUTH AFRICA.

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Introduction

Thirty years ago Galbraith, reflecting on the Berle/Dodd debate, wrote of the behavior of corporate officers in these terms:

In the earlier stage of the development of the corporation, and notably in the decade of the thirties, it was feared that those in control would make their firm an instrument of their own personal enrichment. And this would, it was also feared, destroy the corporation as a whole...

The danger did not develop. This, without doubt, was partly because some of the more promising avenues of enrichment were closed by law...

But the legislation principally affected those who, like murderers and thieves in less exalted areas, find it difficult to live in accordance with the accepted canons of behavior. In most corporations, even in the twenties, there was no abuse, as personal profit maximization by insiders was even then called. And the legislation closed only a few of the avenues for enrichment. The management of every mature and profitable corporation has numerous lawful and unexploited opportunities for increasing its personal revenue at the expense of the stockholder. Most of the devices – more pay, more deferred compensation or pension rights, more stock options or stock purchase plans, more profit-sharing – would require only the routine blessing of counsel or pro forma ratification by the annual meeting.

The danger of damage, through personal profit maximization, disappeared as power passed into the technostructure.¹

Corporate governance is *de rigueur*, discussed, it seems, daily in the business press with interest generated by spectacular disasters like Enron, Worldcom, and, closer

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1 JK Galbraith, *The New Industrial State* (1967), 1974, 129-132

to home, HIH and OneTel. There is little doubt that investors are anxious and confidence in corporate management is comparatively low.

Paradoxically, this popular concern for corporate governance distracts from more fundamental issues. Writing in the sixties, Galbraith was little concerned with wrongdoing by company officers. His critique went to the evolution, function and future of the modern business corporation. Complex corporate decision making took place within the 'technostructure' and necessitated group processes where no single individual had 'more than a fraction of the necessary knowledge'². By contrast, the current popular debate goes, in the main, to that 'danger of damage through personal profit maximization' by officers or to the inaction, incompetence or fraudulent conduct of officers, particularly auditors.

It is true that there are dishonest company directors, managers and officers. Galbraith's faith in the bureaucratic organisation of business corporations as a counterweight to individual wrongdoing would be dismissed as naïve if advanced today. There is, of course, a clear need to foster practices, both cultural and regulatory, that forestall opportunities for dishonest or avaricious personal enrichment at the expense of shareholders and others. But an undue focus of these issues would obscure the normative proposition that, for the most part, officers comply with regimes for the regulation of their conduct and with 'accepted canons of behaviour'. While there continues a proper debate as to the adequacy of those regimes and canons, there is little in the literature to suggest a *widespread* pattern of illegality by corporate officers in the developed market economies.

The subject of governance can not be confined to mechanical issues of code-creation, scrutiny and compliance. The focus of this paper is on issues shaping, in Galbraith's term, the technostructure of the modern company operating under the anglo-american model of governance. In particular the role of employees of the firm in the governance of corporations - in the technostructure - is discussed and developments in South Africa are outlined.

Chapter 2 discusses the relationship between employees and the employing corporation in the context jurisprudence of the employee/employer relationship and current theoretical conceptions of the corporation. That chapter also looks at the role of employees in the US (as the exemplar of anglo-american governance) as owners/shareholders through pension funds and as participants in a wider pattern of corporate scrutiny by institutional investors.

Chapter 3 reviews recent developments in South Africa, including an attempt to introduce employee-participation through, not company, but labour law.

2 Ibid 80.

Employees as Contractors, Beneficiaries and Participants

A Legal Basis for an Employee Governance Role in the Current Anglo-American Model?

The Berle & Means problematic is the separation of ownership and control given specialist manager/agents and wide public stockholding. The fundamental assumption underlying such analysis is that the position of shareholders is, or ought to be, paramount with no governance role for employees (or others) anticipated.

According to Hill, the concept of shareholder primacy is inconsistent with the modern contractual model of the corporation since under that model shareholders are merely one in a series of groups including managers, employees and creditors whose inter-relationship is contractually regulated through their mutual dealings in the corporation³ At the same time, communitarian models of the corporation similarly conceive the firm as an aggregate, able to be broken down into its stakeholder/member constituents.⁴

Under an 'aggregation' approach, employee interests can be seen in contractual and fiduciary terms. This is so because an aggregate approach necessitates a conception of interests and obligations as arising from intra-corporate relations between stakeholders. For example, Dallas describes a sophisticated model – the Power Coalition Theory – to critique agency cost and nexus-of-contracts analysis. Her model draws liberally from psychology, sociology, economics and organisational theory and emphasises prospects for coalition building amongst company stakeholders. However the role of the corporation as a social entity in itself is paid scant attention while emphasis is placed on stakeholder coalition as the impetus for governance.⁵ While Hill is right to describe the communitarian approach as sociological; this absence of concern for corporations as playing an institutional role is puzzling given sociology's otherwise strong interest in institutions. This is what Jackson describes as the unmet challenge of the corporate governance literature – 'to conceptualize the firm and its governance structures in terms of their embeddedness in social structures'⁶ [author's

3 J Hill, 'Public Beginnings, Private Ends – Should Corporate Law Privilege the Interests of Shareholders?' (1998) 9 *Australian Journal of Corporate Law* 21.

4 Ibid. Perhaps Hill builds something of a 'straw man' in this view of communitarianism.

5 L Dallas 'Working Towards a New Paradigm', *Progressive Corporate Law* (1995).

6 G Jackson, 'Comparative Corporate Governance: Sociological Perspectives', in J Parkinson, A Gamble and G Kelly (eds) *The Political Economy of the Company* (1999) 265, at 267. David Sciulli has also noted the failure of sociology to apply the 'new institutionalism in the sociology of organisations' to the business corporation (and specifically the US courts' failure to approach corporations as social institutions); *D Sciulli, Corporations vs. The Court. Private Power, Public Interests* (1999) 11.

emphasis]. In the comparative governance literature, examination of this 'embeddedness' finds its clearest expression in concepts of 'path dependency' – the proposition that the nature of firm governance and a nation's regulatory framework is dependent in large measure on its political and social history.⁷

An 'organisational/entity approach focuses on the character and role of the corporation itself, that is, as a distinct social entity different in character to the sum of its constituent members/stakeholders⁸ In the social-entity model employee interests are fulfilled in a paradigm of participation and industrial democracy.

But what aspects of the legal rationale of the firm in the anglo-american model might support an employee role in governance?

Although the nexus-of-contracts theory has come to be seen in left-leaning scholarship as antithetical to a governance role for employees, Stone finds in employer preference for a long-term, stable and trained workforce, an implicit *contractual* promise of job security⁹. The terms of employment contracts between a worker and the firm are usually unwritten and often unclear and vary during the term of employment. Employees are induced to acquire firm-specific skills¹⁰ often through deferral of higher pay rates until higher skills are achieved. Other important features distinguishing labour from other contracts are that the employment contract is clearly defined only with respect to pay with the 'gap in indeterminacy' closed in the firm through managerial authority, and that, unlike other commodities, labour can not be separated from its owner making the need to secure worker co-operation a fundamental object of the firm.¹¹ After canvassing

7 M Roe, 'Path Dependence, Political Options and Governance Systems', in K Hopt & E Wymeersch (eds), *Comparative Corporate Governance* (1997) 165. A good example of this path dependence/political culture approach applied specifically to the comparative role of employees to governance is offered by David Charney, 'Workers and Corporate Governance: The Role of Political Culture', in M Blair and M Roe (eds), *Employees and Corporate Governance* (1999) 91.

8 See for example, H Collins, 'Organizational Regulation and the Limits of Contract' in J McCahery, S Picciotto, C Scott (eds), *Corporate Control and Accountability and the Dynamics of Regulation* (1993) 91. This aggregation/entity dichotomy is drawn out by Hill in earlier writings on Australian industrial bargaining; J Hill, 'At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 204.

9 K Stone, 'Labour Markets, Employment Contracts and Corporate Change, in J McCahery, S Picciotto, C Scott, *Corporate Control and Accountability, Changing Structures and the Dynamics of Accountability* (1993) 61.

10 Stone borrows liberally here from Williamson's analysis of the firm-specific nature of human capital investment which a firm's workforce often makes – or what Blair conceives as 'The Firm as a Nexus of Specific Investments'; M Blair, 'Firm-Specific Human Capital and Theories of the Firm' in M Blair and M Roe (eds) *Employees and Corporate Governance* (1999) 58.

11 K Stone, *supra* n9, p69.

the inadequate remedies available to employees who have such implicit terms of their contracts breached, Stone concludes that the solution lies in an expansive conception of collective bargaining in which labour contends for a greater say in corporate decision making. She accepts the nexus-of-contracts conception in which 'no group has an *a priori* privileged relation to the entity as a whole' and argues for a model in which labour is able to 'utilize its economic weapons' in order to bargain for a share of corporate control; 'From this perspective, we can imagine collective bargaining transposed to the boardroom, where unions can then contend not only management, but with all the other constituent groups that comprise the firm'¹² Although unclear, it seems that Stone contends for a co-determined unitary board with board positions available through industrial bargaining.

While Stone purports to provide a contractual basis for employee governance her real mission appears to lie in an appeal for reform of US labour statutes which has been interpreted as precluding bargaining over matters that 'lie at the core of entrepreneurial control'. She provides a rationale for legislative action. This in itself underscores an inability to find a contractual basis for employee governance in the (US) law as it stands. Importantly Stone seeks to provide employees with a governance role through labour law reform, an approach which will be later seen to have been taken in South Africa.

Fiduciary law offers a better theoretical foundation for an employee governance role in the anglo-american model.

O'Connor exemplifies authors contending that fiduciary law might be used to advance the interests of employees since:

...fiduciary obligations arise as a matter of law in a wide variety of contexts because the status of the parties is sufficient to prove that a fiduciary relationship exists...Unconventional fiduciary relationships provide precedent for recognizing fiduciary obligations to workers. An examination of the law reveals courts impose such unconventional fiduciary obligations to defend the weaker party in various long-term contractual circumstances. In determining whether to use fiduciary duty to restrict the stronger party on the weaker party's behalf, courts first question whether the association involves mutual trust, loyalty and confidence and, second whether the stronger party has betrayed the weaker party's trust.¹³

Analysis of fiduciary features overlaying the principle/agent relationship between corporate managers and members is well developed. For example, Whincop notes that English corporations law arises from 'doctrinal pragmatism' marrying contract law with the law of trusts and partnerships and that fiduciary duty has

12 K Stone, supra n9, p 84.

13 M O'Connor, "Labor's Role in American Corporate Governance Structure" (2000) 22 *CLLPJ* 97 at 104,105.

pervaded the manager/member relationship¹⁴ However, in the management/member relationship, the *ex ante* contract remains paramount:

*The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract... The fiduciary relationship cannot be superimposed upon the contract itself in such a way so as to alter the operation which the contract was intended to have according to its true construction.*¹⁵

This reasoning has the capacity to put a brake on the development on a wider 'stakeholder' conception of the anglo-american firm. Fiduciary duties arising entirely out of contractual terms return employees to reliance on an 'implied term' path which Stone finds wanting. In this regard the House of Lords case of *Malik v BCCI*¹⁶ has generated some interest. In that case a major British bank collapsed in circumstances where it was later found that the business of the bank had been conducted in a dishonest and corrupt manner. The applicants sued for breach of the employment contract on several grounds but relevantly that the applicants' employment relationship had caused them stigma-damage and disadvantaged them in the search for new jobs. The House of Lords found for the applicants on this ground on the basis that their existed in the employment contract an implied term of mutual trust and confidence, breached by BCCI. It has been noted that this and other 'mutual trust' cases in English employment law feature bad or illegal conduct by employers; there is little yet to suggest that the implied contractual term oblige employers to positively advance the interest of employees.¹⁷ The UK company law requires directors to have regard to the interests of the company's employees as well as the interests of company members.¹⁸ The provision is permissive not prescriptive and provides no remedy in the event of breach of the duty, leaving unions or workers reliant on the derivative action as the enforcement tool.¹⁹ Nevertheless the thrust of these developments is to conceive of employees as beneficiaries of fiduciary duties imposed on the company.

What flows from a notion of the employment relationship as a fiduciary one? O'Connor argues that, just as the US legislatures have sought to modify the

14 M Whincop, *An Economic and Jurisprudential Geneology of the Corporate Law* (2001) especially Chapter 3, 'Fiduciary Office' at 70-121.

15 *Hospital Products Ltd v United States Surgical Corp.* (1984) 156 CLR, 41, 97. Cited in Whincop supra n14 at 76.

16 *Malik v BCCI* (1997) 3 All E.R. 1.

17 D Brodie, 'Fundamental Obligations' (1997) 21 *Employment Law Bulletin* 3. Brodie however concludes that, 'Looking ahead, *Malik* indicates that notions of good faith will become increasingly central to employment law'.

18 *Companies Act* (1985) UK, s309(1).

19 Lord Wedderburn of Charlton, 'Employees, Partnership and Company Law', (2002) 31 *Industrial Law Journal* 99 at 107.

management/shareholder fiduciary relationship for policy reasons – the anti-takeover ‘stakeholder’ statutes of the 80’s – the precedent has been set for legislation to formalize an employee role in company governance. While the US corporate law theoretically allows directors to protect workers human capital investments, directors continue to give increasing shareholder value as the paramount corporate goal.²⁰

The continued priority given to shareholder interests is important too in regard to the ‘Business Judgement Rule’ (and therefore to the Australian discussion). While the Rule is often considered as a shield against shareholder action, its capacity for the sponsorship of stakeholder interests is less frequently considered. In its Australian statutory incarnation the rule provides that a director or officer must exercise his or her duties with the care and diligence that a reasonable person in the officer or director’s place would employ. This standard is met where the officer or director makes a business judgement in good faith and for a proper purpose; is disinterested and informed; and believes the judgement is in the best interests of the company (unless such belief is one which no reasonable person in his or her position would hold).²¹

Farrar lays out the background surrounding the enactment of the rule, including the uncertainty that prevailed post-*AWA*²² and the policy objective of fostering necessary risk-taking particularly in an increasingly competitive globalised business environment.²³ Risk-taking might include entering into innovative or experimental industrial arrangements with employees, profit-sharing, industrial democracy mechanisms, expanded consultation procedures and job-security guarantees. (It might also include a range of other ‘communitarian’ measures beyond employees). Of course, even without the Business Judgement Rule, none of these initiatives are precluded by directors’ common law obligations. But if the policy objective of the Rule is to encourage novel entrepreneurial activity, then the Rule can be seen as consistent with the evolution of a stakeholder conception of the firm. Much will depend, in this regard, in the construction of the “proper purpose” provision as it applies to the Rule.

Resort to fiduciary concepts to govern the *employment* relationship in the US (both O’Connor and Stone deal with the US situation) would not in itself give rise to an employee voice in US corporate governance; perhaps the opposite. The concomitant to recognising greater directorial/management obligation to employees, is recognition that management, not workers, governs the firm; fiduciary obligations arise where employees put trust and reliance on *decisions by*

20 M O’Connor, *supra* n13, at 103-105.

21 *Corporations Act* (2001) s180.

22 *AWA Ltd v Daniels* (1992) 10 ACLC 933.

23 J Farrar, ‘Towards a Statutory Business Judgement Rule in Australia’ (1998) 8 *Australian Journal of Corporate Law* 237.

management, that is, where employees remain largely outside the governance process.

What O'Connor and others are really presenting is a moral claim for admission of workers to governance in light of the potential impact or harm corporate actions have on employees. In this they argue for relational rights for employees upon which ownership rights should be contingent.²⁴ O'Connor and Stone seek justifications in jurisprudence for a political position. This may be because a formalized employee role in governance is so divorced from contemporary US experience that US authors feel it necessary to present moral claims in a legal idiom.²⁵

What is, however, very much in the mainstream of contemporary US corporate governance experience is the growing role and voice of institutional investors, with unions and employees sharing that voice. Does this provide an alternative to legislative reform in providing an employee role in governance?

24 A concomitant of this is 'debunking the moral claim' surrounding the residual ownership of shareholders by radical theorists like Ewald Engelen who argues '...ownership should not be conflated with the object in question. Rather, ownership describes and prescribes a certain set of social relations surrounding the object that is supposedly 'owned'. Ownership constitutes a relationship between the owner and other agents and demarcates *relational rights* instead of *absolute ones*. In that sense, ownership does not so much concern things or objects as relations. Property does not say so much 'this is mine' as 'I can do this with it and not that, whereas you can do this but not that'. E Engelen, 'Corporate governance, property and democracy: a conceptual critique of shareholder ideology (2002) 31 *Economy and Society* 391 at 399.

25 O'Connor does elsewhere explicitly recognise the normative nature of her fiduciary thesis – 'Some commentators view the contractual duty of good faith and the fiduciary obligation of loyalty as lying on a continuum that involves a subtle and continuous shading of self-interested motives and communitarian inclinations. The discrete contract lies at one end of the continuum where contract law presupposes that parties are free to be self-interested. At the other end, we find enduring relationships, including many trust relationships, where fiduciary law starts with the opposite premise, imposing restraints on self-interested action...Although I reject the notion that the contractual duty of good faith and the fiduciary duty of loyalty rest on a continuum, this view has some important conceptual and normative benefits ...Rather the factor that most differentiates fiduciary law is its socializing power to promote and reinforce trust and honesty in business transactions. Thus although the duty of good faith and fiduciary law have some similarities as applied to long term contractual arrangements, the use of fiduciary law is more frankly normative', M O'Connor, 'Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements' in L Mitchell (ed), *Progressive Corporate Law* (1995) 219 at 231-2.

The US and Fiduciary Capitalism

The estimated value of US pension fund assets currently stands at around US \$6.5 trillion.²⁶ These funds own over half of all shares issued by all US listed companies as compared with just 10% in the early 60's.

Many of the major public sector pension funds in the US are union or worker influenced, with the various instruments giving rise to public sector funds providing for employee or union representation on the trust board. A small number of US pension funds are 'Taft-Hartley' plans governed by the *Employee Retirement Income Security Act* (ERISA) and managed by an equal number of employer and union nominated trustees or trust directors. The Taft-Hartley funds are typically established out of industrial negotiations between unions and companies and are multi-employer.

In 1997 the peak council of US unions – the AFL-CIO – established the 'Center for Working Capital', a co-ordination and resource service for unions and union trustees. In the five years since its inception the centre has built a sound reputation amongst the 'mainstream' institutional investment community. Its reputation on corporate governance issues is particularly strong. Nevertheless the AFL-CIO mission here is overtly political and directed, not merely to maximizing shareholder return, but to the marshalling of worker pension funds in a manner consistent with employee interests.²⁷

The issue here is not whether institutional investors in the US have brought, or are beginning to bring, their considerable ownership interests to bear on US and other corporations and to exert greater governance authority. There is considerable evidence to indicate that they are²⁸. Rather the matter lies in the nature of the pressure brought by unions, either in coalition with other institutional investors or more narrowly by union-influenced pension plans. Does this pressure result in greater preference to the interests of employees of US corporations either in terms of a general cultural shift, or in the conduct of

26 These estimates are by the AFL-CIO 'Capital Stewardship Program', August 2001 estimated from US Federal Reserve 'Flow of Funds' data.

27 Much this information about the Center for Working Capital and the Capital Stewardship Program comes from presentations given by AFL-CIO officials to union superannuation trustees and to the ACTU and in direct discussions between the writer and Richard Trumka, Secretary-Treasurer of the AFL-CIO.

28 For example see J Pound, 'The Rise of the Political Model of Corporate Governance and Corporate Control' (1993) 68 *New York University Law Review* 1003; T Thompson and G Davis, 'The Politics of Corporate Control and the Future of Shareholder Activism in the United States' (1997) 5 *Corporate Governance* 152.

individual firms? This is a distinction between what some authors call 'fiduciary capitalism' and an employee governance role *per se*²⁹.

The concentration of company ownership in institutional hands has raised the possibility that the Berle & Means problematic of dispersed and weak ownership no longer pertains.³⁰ While ownership remains dispersed through a large number of institutions, those institutions have the capacity to involve themselves in the ongoing politics of corporate governance. This is what Pound and others call the 'political model of governance, which has taken over from the market for corporate control as the governance paradigm, particularly following the fall from favour of the 'market for control' model following anti-takeover legislation and the prevalence of takeover deterrents in company constitutions³¹.

But employee influence in companies through 'pension fund socialism'³² and fiduciary capitalism faces significant barriers. First union trustee-directors (and their employer counterparts) in Taft-Hartly and other pension plans are bound by ERISA's 'five primary requirements:

- 1 the fiduciary must discharge his duties solely in the interests of the plan participants and beneficiaries,
- 2 the fiduciary must discharge his duties for the exclusive purpose of providing benefits to participants and their beneficiaries,
- 3 the fiduciary must act with the care skill and diligence of the prudent man acting in like capacity,
- 4 a fiduciary must diversify the plan investments so as to minimize the risk of large losses and
- 5 the fiduciary must discharge his duties in accordance with the documents and instruments governing the plan.

29 In using the term "fiduciary capitalism" the writer adopts the definition of Ghilarducci et al, 'By fiduciary capitalism we mean the dramatically increased importance of various fiduciary institutions (for example mutual funds, pension funds, insurance companies, bank trusts) which must, in the performance of their legal and 'prudential' duties act in the interests of their ultimate beneficiaries in the ownership of publicly traded equity and debt'; T Ghilarducci, J Hawley and A Williams, 'Labour's Paradoxical Interests and the Evolution of Corporate Governance', (1997) 24 *Journal of Law and Society* 26 at 26.

30 Blair, for example, notes, 'The effort to define a new and constructive role for institutional investors has generated a new phrase for the lexicon of corporate governance: 'relationship investing'... advocates most often describe it as a situation in which the investing institution is responsibly engaged in overseeing the management of the company, rather than remaining detached or passive, and is committed to the company for the 'long term'; M Blair, *Ownership and Control. Rethinking Corporate Governance for the Twenty-First Century* (1995)

31 J Pound, *supra* n28; T Thompson and G Davis, *supra* n28.

32 W Simon, 'The Prospects of Pension Fund Socialism' in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability, Changing Structures and the Dynamics of Accountability* (1993) 165.

The 'exclusive purpose' and 'sole interests' requirements have been liberally constructed so as not to preclude investments with a collateral social objective or collateral intangible benefits to fund beneficiaries.³³ Hence the requirements do not preclude what, in the US, are termed 'ETIs' – economically targeted investments. Spalding and Rudd define these as 'investments which are prudent and responsible and which provide financial returns commensurate with inherent risk, but which also have collateral benefits, which other, equally prudent and responsible investments do not have'³⁴. This is supported in interpretative guidelines issued by the US Department of Labor, which administers ERISA. The DOL again stresses the need for diversification.³⁵

If union trustees are able, 'all things being equal', to target investments on collateral interests, then this might provide an important tool in gaining employee influence in individual firms (which is one of the AFL-CIO's explicit goals). However diversification militates against this. Simon argues that from a perspective of industrial democracy, pension funds should be 'focused on the institutions that most affect beneficiaries'.³⁶ This suggests funds concentrated in the industries or enterprises in which the beneficiaries work. Such concentration would not only be riskier but is prescribed by ERISA. Moreover, because of this additional risk, a concentrated portfolio may breach the 'prudent man' requirement of ERISA³⁷. In a dilute investment environment, then, unions have sought to make common cause with other institutional investors in the proxy battles of major US corporations. Broad diversification of the pension plans, according to Monks and Minnow, 'endows them with a breadth of concern that naturally aligns with the public interest'.³⁸

33 K Spalding and M Kramer, 'What Trustees Can Do Under Erisa' <www.corpgovnet.com>.

34 K Spalding and E Rudd, '*Culture Clash: Labor's Economic Agenda and Taft-Hartley Trustees' Interpretation of ERISA*' (1997) Centre for the Study of Law and Society, <www.corpgovnet.com>.

35 *Department of Labor Interpretative Bulletin* 94-1. The bulletin directs that ETIs expected return must be commensurate with rates of return of alternative investments with similar risk characteristics and must be an appropriate investment in terms of the pension plan's diversification policy. Collateral benefits noted approvingly in the bulletin included 'expanded employment opportunities, increased housing availability, improved social service facilities and strengthened infrastructure'.

36 W Simon, *supra* n32, at 169.

37 The DOL has ruled that fiduciaries need not invest only in 'blue chip' investments – "The relative risk of a specific investment ... does not render such investment either per se prudent or per se imprudent", Preamble to the Rules and Regulations for Fiduciary Responsibility: Investment of Plan Assets Under the Prudence Rule, (1976) 44 *Federal Regulations* 37,221. But a decision to concentrate investments in those industries employing beneficiaries would almost certainly breach the prudence rule.

38 R Monks and N Minnow, *Corporate Governance* (1995) at 169.

The AFL-CIO is a founding member of the US Council of Institutional Investors (CII) and increasingly a major participant and initiator of CII campaigns. In this the major tool is the Shareholder Proposal Rule³⁹. The Rule requires company management to include shareholder-sponsored proposals in the company's proxy material for an upcoming General Meeting⁴⁰. This allows proposal sponsors an opportunity to secure majority support for the proposal by securing the proxies of absent shareholders since typically the majority of shareholders participating will do so through proxies. Maya identifies two major types of shareholder proposal, corporate governance and social policy (including employment standards); significantly the Rule withstood proposed amendment in 1997 which would have omitted all employment-related proposals.⁴¹ However unions have directed their proposals to corporate governance not employment issues or social policy *per se*. Schwab and Thomas document the growth of union sponsored proposals in the 90's. For example in the 1995 'proxy season', unions co-ordinated 75 of the 265 shareholder proposals on corporate governance issues that were tracked by the Investor Responsibility Research Center:

*The amazing thing about these union-sponsored shareholder proposals is how ordinary they are, from the perspective of the institutional investor. They involve standard corporate governance issues designed to maximize the value of the corporation by improving efficiency of the market for corporate control and aligning manager incentives with shareholder interests. The most frequent proposals in the 1995 and 1996 proxy seasons were those to redeem or vote on poison pills and to repeal classified boards.*⁴²

A review of the Council of Institutional Investors website shows 72 shareholder proposals by unions or union-influenced pension plans, in the 2002 US AGM season monitored by CII, of which 62 dealt with mainstream corporate governance issues – auditor independence, poison pills, executive compensation, director independence and classified boards. Eleven dealt with 'workplace standards' (6 of these dealt with overseas child labour issues). Only one of these initiatives sought employee representation on the board of directors.⁴³

39 17 *C.F.R.* s240.14a-8.

40 M Maya, 'The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors and the 1998 Amendments' (1999) 28 *Stetson Law Review* 451. The rule is a regulation promulgated by the SEC pursuant to its powers under s14(a) of the *Securities Exchange Act* to make rules regulating the proxy system as are "necessary or appropriate in the public interest or for the protection of investors".

41 *Ibid.*

42 S Schwab and R Thomas, 'Realigning Corporate Governance: Shareholder Activism by Labor Unions' (1998) 96 *Michigan Law Review* 1018 at 1045.

43 That proposal was one by the International Brotherhood of Du Pont Workers, 'That the shareholders of EI Du Pont Nemours & Co. hereby request that the Board give consideration to having a Du Pont wage roll employee who is currently serving as a representative of employees at his or her plant site, to be nominated for election to the

There are several explanations for this apparent conservatism by unions and union trustees.

First, union trustees share with other investors the goal of maximizing shareholder value. After all, beneficiaries are union members and the constituency of union leaders. This is consistent with the findings of Del Guercio and Hawkins in their study of the largest, most active funds (including CALPers) between 1987 and 1993, which found no evidence in pension fund shareholder activism of any motivation other than fund value maximization.⁴⁴ This of course should be treated cautiously as the activity studied is a now at least a decade old and predates the 1997 articulation of new directions by the AFL-CIO previously noted.

Second, in the case of the large public funds, Romano points out that trustee appointment is a political process involving state, federal or local government appointment, beneficiary elections and *ex officio* participation, all of which leaves trustees subject to the normal vagaries of political pressure.⁴⁵ At any rate, in the writer's experience, observers commonly overestimate the radical inclinations of unions and unionists and the study confirms the writer's anecdotal observations of union-influenced superannuation funds in Australia.⁴⁶

Third, a concern for mainstream governance issues could be used as a stalking horse for other agendas. In a leading example the Hotel and Restaurant Employees International Union (HERE) organised resistance to a restructuring proposal for the Marriott group. Restructuring was premised on a dual class stock proposal involving super shares for members of the Marriott family. Marriott Hotels had developed a reputation for union-busting activities. HERE garnered enough support to defeat the proposal. Key to that support was the fact that the Marriott proposal violated a policy plank of shareholder activists – one vote, one value.⁴⁷ The failure of the restructuring provided no benefits to employees and union-members employed in Marriott hotels, but protected shareholder value. At the same time HERE has at least informally acknowledged that the campaign was payback for Marriott's anti-union stance and a warning to other like-minded

Board of Directors.' The proposal received 3.5% of the general meeting vote including proxies <www.cii.org>.

44 D Del Guercio and J Hawkins, 'The motivation and impact of pension fund activism' (1999) 52 *Journal of Financial Economics* 293.

45 R Romano, 'Public Pension Fund Activism and Corporate Governance Reconsidered', in T Baums, R Buxbaum and K Hopt (eds) (1994) *Institutional Investors and Corporate Governance*, 105.

46 The writer is Chair of the Health Employees Superannuation Trust of Australia (HESTA) an 'industry fund' with equal numbers of union nominated and employer elected directors. The term 'industry fund' is often used as a synonym for funds influenced by Australian unions.

47 C Weller and D White, 'The New Kids on the Block: Unions are Playing Their Institutional Investor Card' (Spring 2001) *Social Policy* 46.

employers. Again the Council of Institutional Investment website indicates that Marriott faced 6 shareholder proposals in 2002, each sponsored by unions or related organisations, more than any other company reviewed. While a proposal to remove non-audit work from the company auditors received 30% support, a resolution requiring the company to adhere to ILO conventions to guarantee workers the right to join trade unions received less than half of that support.

This highlights the fourth point - union-influenced pension funds rely on the support of other institutional investors for their proposals to gain any significant support. In this unions can not successfully pursue agendas significantly more radical than the institutional investor community generally. While Taft-Hartley pension funds were the single biggest authors of shareholder proposals in 1994, with 20 of 25 receiving more than 30% support, the key to this support is agreement that maximizing shareholder value remains the primary company goal⁴⁸. Even where the goal of shareholder proposals is to publicize aspects of company conduct, coalition building remains key.

Clearly the US pension funds, including union-influenced funds, are playing a significant role in corporate governance as part of the activist shareholder and institutional investor community. '[W]orkers have entered the manager-owner nexus as pension-fund beneficiaries, [but] it is through the emergence of fiduciary capital, the exercise of power and influence, that labour's traditional and narrower interests may be significantly altered by their role as property owner'.⁴⁹ But is this role distinctive from that of institutional owners generally to the extent that it can be said that employees have secured, or are securing, a distinctive role in governance in the US? It is difficult to conclude that it is.⁵⁰ The recent history

48 S Kellock and C Rosenberg, 'The Role of Taft-Hartley Funds in the Corporate Governance Debate' (1995) 3 *Corporate Governance Advisor* 12.

49 T Ghilarducci, J Hawley and A Williams, 'Labour's Paradoxical Interests and the Evolution of Corporate Governance' (1997) 24 *Journal of Law and Society* 26, 26.

50 In one area the US does provide a model of employee governance - Employee Share Ownership Plans (ESOPs) not otherwise dealt with in this paper. This is so because the focus of this paper is the context other than where employees are the direct owners or substantial owners of the enterprises in which they work. In the anglo-american model ownership, including employee ownership, confers, at least theoretically, a strong governance role. The focus of this paper is on the environment where employees have no direct ownership of the enterprise in which they are employed (although they may be beneficiaries of dilute institutional investment as elsewhere discussed). At any rate only a small fraction of ESOPs result in direct boardroom representation for non-managerial workers, Blasi and Kruse report the growth of participatory culture in the top 1000 US ESOPs. Moreover these authors are optimistic about the capacity of ESOPs to garner support for employee board representation amongst public shareholders predicting that in the future institutional investors "will support and recommend proposals for board representation for employee-holders as a group to make corporate governance more responsible and less entrenched". Interestingly the authors also predict novel investment vehicles such as

suggests that issues raised by US unions that affect labour *qua* labour (and not simply as owners) fail to garner support. Moreover Schwab and Thomas suggest that while proxy guidelines issued by institutional investors to fund managers often require managers to support corporate governance proposals, they are silent on worker-related proposals making the failure of such proposals inevitable.⁵¹

There is real prospect too, that by pursuing mainstream governance proposals that emphasize shareholder value, US organised labour actually assists in reinforcing a 'shareholder-centric' view of the company that militates against either a wider stakeholder conception (which might more readily accommodate employee interest), or a formalized role for labour in governance. In a case study of the CalPERs German portfolio, Andre found that the fund's goals were to impose US governance standards on foreign companies⁵². Ironically, as pressures to export anglo-american governance practices grow, including to countries that do provide a formal governance role for labour, the activities of US labour could even promote the globalisation of the shareholder-before-all approach.

Co-Determinism for South Africa?

A Brief History

The upheaval that South Africa has experienced in recent times has the potential to dramatically alter the governance landscape in that nation. Since the election of the ANC in 1994, the new government has set out on an ambitious program of economic reform. This includes the 'restructuring' (privatisation) of parastatals and state owned enterprises (SOEs), integration of customary law into the legal system (including customary family/property law and land reform), labour law reform and the formalization of a tripartite approach to economic management and development through the National Economic Development and Labour Council (NEDLAC). A feature of the reform process is the breaking down of the small number of large, pyramidal, family-controlled groups that have been a feature of the South African company landscape since the 1930's. Yet on the issue

mutual funds that invest only in firms with significant employee-ownership and receive capital only from employee-ownership plans. This is an interesting notion promising a vehicle which at once promotes direct employee ownership yet provides for risk-attenuation through diversification. All things are possible and such an investment vehicle may well be welcomed by the union-influenced pension funds or more generally. All that can be presently said that in the decade since publication their prediction has yet to be realized; J Blasi and D Kruse, *The New Owners, the Mass Emergence of Employee Ownership in Public Companies and What It Means for American Business* (1991).

51 S Schwab and R Thomas, supra n42, at 1085.

52 T Andre, 'Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany' (1998) 73 *Tulane Law Review* 69.

of corporate governance matters specifically it has been largely inactive even in the face of international and domestic corporate scandals.

The earliest European company to operate within the territory of modern South Africa was the Dutch chartered company, the Dutch East India Company, established in 1602, bringing Dutch-Roman mercantile law to the Western Cape⁵³. By the early 19th century English settlement of the Western Cape had brought early industrialization to southern Africa, particularly gold and diamond mining, notoriously capital-intensive. The old Dutch law no longer met the needs of this industry. (Ironically Napoleon's invasion of the Netherlands saw Dutch-Roman law replaced by the *Code de Commerce*. The old Dutch law never evolved to meet industrial needs. South Africa therefore retains some of the last vestments of old Dutch law in practice). In this environment the English commercial law dominated, culminating in the formal establishment of an English legal system in the Cape in 1827, coinciding with the establishment of a Cape legislature. For the next century and a half developments in the English company law were absorbed into the law of the Cape and the other colonies/provinces both before and after the South African Union in 1910. An 1861 Act was substantially based on the UK *Limited Liability Act* of 1855, the Cape's *Companies Act* of 1892 adopted *en bloc* the UK legislation then applying, while the *Union Companies Act* of 1926 merely reproduced the UK *Companies (Consolidation) Act* of 1908 with further amendments in 1939 and 1952 in line with English developments. During this period too the South African courts faithfully adopted English case law.

Not until 1973, with the relationship between Britain and the former colony growing cooler as international condemnation of apartheid rose, were there the first signs of legislative independence. The Van Wyk de Vries Commission (itself established to respond to the British Jenkins Committee and the *Companies Act* of 1967) reported:

*While we are able to benefit from many of the findings of the Jenkins Committee (1962) and from the ensuing legislation ... they should be treated with some caution. The past decades have witnessed the emergence of differences between company activities and their underlying concepts in the respective countries. The time has passed that South Africa can simply rewrite into its own legislation what it finds in the corresponding English legislation.*⁵⁴

53 Sources for the following brief history are: H Hahlo, 'Early progenitors of the Modern Company', (1982) *Juridical Review* 139; B Beinart, 'The English legal contribution to South Africa: the interaction of civil and common law' (1981) *Acta Juridica* 7; and S Girvan, 'The Antecedents of South African Company Law' (1992) 13 *Journal of Legal History* 63.

54 Quoted in Girvan, *supra* n53, at 71.

One practical result of this declaration of legislative independence was the abandonment of the *ultra vires* doctrine in the resulting 1973 *Companies Act*, anticipating that development in Britain by sixteen years. Significantly too, the new Act provided for a system of no-par value shares, the notorious 'N-shares', which would be subsequently used by the pyramidal company groups to further entrench control of those groups.⁵⁵ The passing of the *Close Corporations Act* 69 of 1984 was another very significant departure from the UK lineage.⁵⁶

The Standing Advisory Commission on company law (SAC) was established by s18 of the 1973 Act, with a mandate to develop company law proposals specific to the needs of South Africa. In 1997 the SAC issued a statement, with apparent government endorsement, announced a 'five-Act' proposal for the reform of entrepreneurial law:

- Provisions of the *Companies Act* 61 of 1973 dealing with insolvency and securities regulation would be excised;
- A new *Securities Act* dealing inter alia with capital raising, primary and secondary markets and mergers & acquisitions would be introduced;
- A new *Bankruptcy Act* which would include all current provisions dealing with insolvency of individuals, companies, banks, insurance companies, co-operatives and so on would be brought in;
- A new *Business Enterprises Act* would codify the law relating to unincorporated partnerships and trusts. (South African partnership law is one area where substantive elements of the Dutch-Roman law continue);

55 B Kantor, 'Ownership and Control in South Africa Under Black Rule', 10 *Journal of Applied Corporate Finance* 69.

56 J Henning, 'The Five-Act Approach to Entrepreneurial Law Reform in South Africa' (1999) 1 *International and Comparative Law Journal* 63. Henning enthusiastically highlights the close corporation as a significant feature of the South African company landscape:

'The South African close corporations may startle traditional company lawyers. Under the Act, a close corporation is a fully fledged corporation which confers on its members all the usual advantages associated with legal personality. It has the same capacity and powers as a natural person of full capacity. The *ultra vires* and constructive notice doctrines are inapplicable. It is a closely held entity in which all or most members are more or less actively involved. In principle there is no separation between ownership and control. No board of directors nor general meeting is required. Every member is entitled to participate in the management of the business and to act as an agent for the corporation. Every member owes a fiduciary duty and a duty of care to the corporation. The consent of all the members is required for admission of new members. Capital maintenance requirements have been replaced by solvency and liquidity... Though the maximum number of members is limited to 10, there is no restriction on the size of a close corporation's business or undertaking ...It can also provide a viable mechanism for helping to bridge the gap between formal and informal sectors of the economy. In this way a wide range of business enterprises is effectively promoted', 76.

Finally, the *Close Corporation Act* 69 of 1984 would be retained, substantially unaltered, but with relevant provisions of the *Companies Act* included; that is, the Act would form an entire code for close corporations.⁵⁷

The approach of the SAC appears to be to map out a problematic and a structure for legislative reform to facilitate a debate about content. In the face of perceptions that South Africa now lagged behind even Britain in company law reform, remedial measures were recommended, several of which have been introduced. The *Insider Trading Act* 135 of 1998 replaces and broadens the terms of the former provisions of Companies Act while the *Companies Amendment Act* 17 of 1999, *inter alia*, removes the capital maintenance requirements on public companies and permits them to buy their own shares.

Progress towards implementing the 'five-Act' schema appears slow. What is lacking, at any rate, is a clear expression of the relationship between company (entrepreneurial) law and labour law. Commenting on SAC proceedings, Henning notes that 'it should serve South African law reformers well to be sensitive to the altered priorities consequent upon comprehensive constitutional, economical, political and social changes wrought since the democratic elections of 1994. Practical examples of issues with enhanced priority for effective reform is workers' participation in the managing organs of corporations (e.g. the board of directors) [and] facilitating the introduction of ESOPs (employee share ownership plans)...'⁵⁸

What changes, then, have occurred in the realm of labour law?

Workplace Forums and Labour Law Reform

One of the first major pieces of legislation passed by the new ANC government was the Labour Relations Act 66 of 1995. The legislation arose out of consultations between the government, unions and business in NEDLAC⁵⁹. Initially agreement on the establishment of the forums could not be reached by unions and business, which agreed instead that the forums were not a high priority and should be dropped from draft legislation:

At that point Tito Mboweni (then Minister of Labour) intervened. He told the weary negotiators that government would not consider dropping workplace forums from the Act. They were of fundamental importance to the new industrial relations regime being introduced and would be included no matter what. If the parties could not agree on a remodeling of the workplace

57 Ibid.

58 Ibid, 70.

59 *National Economic Development and Labour Council Act* 35 of 1994.

*forum provisions they would go into the Act as is ...[E]ventually agreement around workplace forums was reached*⁶⁰

The government has made clear that one of the goals of the Act is to advance co-determination and industrial democracy⁶¹. The ANC has been highly influenced by German and Swedish co-determination fostered by the strong support given to ANC by Western European social democratic and labour movements during the apartheid era⁶².

However workplace consultative forums have a checkered history in South Africa. Both the *Bantu Labour Act* 1953, applying to the black workforce, and the *Industrial Conciliation Act* of 1956 provided for works committees subject to employer/employee agreement. Black union's perceive that these were used, by the white minority ascendancy, to by-pass them and to establish shadow structures for pseudo-representation.⁶³ The legislation addresses union concerns by requiring that application for a forum may only be initiated by the relevant union or unions.⁶⁴ Application is to the Commission for Conciliation, Mediation and Arbitration (CCMA) and is limited either to unions "recognised by the employer for the purposes of collective bargaining" (s80(1)) or to a "representative trade union" (s81(1)) elsewhere defined as, "a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace."

Provided that formalities are fulfilled the Act provides no discretion for the Commission to decline to establish a forum. Where an application is made under s80 (by a union recognised in bargaining but not necessarily covering a workplace with majority union membership) the Commission must attempt to conciliate a forum constitution agreed between the employer and union(s) (s80(6)) describing matters which the forum may address, membership, size and election of employee representatives (which must be elected by all employees, not just union members – s82). In the event of no agreement, the other provisions of Chapter V of the Act (dealing with workplace forums) apply. Where application is made under s81(1) in respect of a workplace with majority union membership, the applicant union(s) may choose forum representatives from among union representatives at the workplace. Hence non-union employees are not represented in a forum formed on a s82 application.

60 S Godfrey and D du Toit, 'Workplace Forum Proposals, opportunity or threat?' (2000) 24 *South African Labour Bulletin* 13.

61 *Government Gazette* 16861 (1995) RSA.

62 G Wood and P Mahabir, 'South Africa's Workplace Forum System', (2001) 32 *Industrial Relations Journal* 230.

63 S Tshwete, *CCMAail*, Oct 2001; (newsletter of the Commission for Conciliation, Mediation and Arbitration, the South African labour arbitration commission).

64 Sections 80 (1) and 81(1) *Labour Relations Act* 66 of 1995.

Sections 79, 84, 85 and 86 of the Act are set out at Appendix A to this paper. Section 79 requires the forum to promote the interests of all employees and to enhance workplace efficiency. The section requires that the forum be consulted over matters included in s84 and that there be joint decision-making over matters in s86. Matters in s84 are wide-ranging and include restructuring, change to the organization of work; product development plans and export promotion. Section 85 provides that an employer must attempt to reach consensus on any matter referred to the forum, prior to implementation, including consideration of any alternative proposals put forward by employee representatives. Matters which must be jointly decided (s86) are disciplinary codes, 'rules relating to the proper conduct of the workplace in so far as they apply to conduct not related to the work performance of employees' (s86(b)), measures to advance disadvantaged persons and other matters agreed in a collective agreement between 'a representative union' and the employer as being subject to joint decision-making in the forum.

In short Chapter V of the Act (Workplace Forums) creates significant prospects for advancing co-determination in South African firms. Yet the CCMA reports that to date only 17 forums have been set up throughout South Africa⁶⁵. While initially forums could be created only in workplaces with at least 1000 employees, this was subsequently reduced to 100 and there is now discussion of removing any minimum employee number requirement from the Act. Many explanations for this sluggish start to the forums can be advanced. South Africa has no history of co-determinism or the social-democratic political culture that has characterised many of the political institutions of Western Europe. A study by Wood and Mahabir of two of the eight forums in existence in 1998, based on interviews with management, unions and workers, found that in each case the forums had been set up by the CCMA in the face of management objections and that conservative managerial attitudes persisted; the study also found 'deep-seated' opposition from within the union movement.⁶⁶ But it may be premature to judge forums a failure since the political institutions of South Africa are undergoing a much more widespread shake-up.

For example the impact of South Africa's new constitution is difficult to gauge.

The *Labour Relations Act* was enacted in part to give effect to s23 of the new constitution, dealing with labour's organisational rights including the right to engage in collective bargaining. Consistent with the radical inclinations of the black majority and the ANC, the new constitution is a far-reaching document in terms of human and civil rights⁶⁷. One of these is the right to information. Section 32 of the Constitution provides:

Everyone has the right of access to –

65 *Commission for Conciliation, Mediation and Arbitration*; <www.ccma.org.za>.

66 G Wood and P Mahabir, *supra* n62 esp. 237.

67 *Constitution of the Republic of South Africa* (Act) 108 of 1996.

THE ROLE OF EMPLOYEES IN CORPORATE GOVERNANCE IN THE ANGLO-AMERICAN MODEL: DEVELOPMENTS IN SOUTH AFRICA

- (a) *any information held by the state, and*
- (b) *any information that is held by another person and that is required for the exercise or protection of any rights.*

'Person' includes both natural and corporate persons. The question arises whether s32 effects the employer/employee relationship and the capacity of the workers to engage in collective bargaining or to enforce contractual and fiduciary rights.

There is limited case law on this provision of the Constitution but the court has, in a dictum on the identical provision of the Interim Constitution, already indicated that right to access to information is not to be limited to the exercise or protection only of rights guaranteed by the Constitution itself but extends to rights arising, for example, from the common law⁶⁸.

Section 32 in turn has given rise to the *Promotion of Access to Information Act*, 2 of 2000, s50 of which provides that a 'private body' (including any juristic person) must give a requester access to any record of that body required for the protection of any rights. However ss 63-68 provide exceptions to that general provision. Relevantly s68 provides that access may be refused by the head of a private body where the record:

- (a) *contains trade secrets of the private body;*
- (b) *contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the financial or commercial interests of the body;*
- (c) *contains information, the disclosure of which could be reasonably expected –*
 - (i) *to put the private body at a disadvantage in contractual or other negotiations; or*
 - (ii) *to prejudice the body in commercial competition ...*

As yet there is no reported case law on this section of the Act, but it is clear that the contingent right to company information (including information rights for employees) has implications for corporate governance. There is, however, potential tension between the Constitution, s68 of the *Promotion of Access to Information Act*, and the *Labour Relations Act*. Section 16(3) of the *Labour Relations Act* imposes a duty on the employer to disclose all relevant information so as to allow a union to engage effectively in collective bargaining⁶⁹. As Pimstone points out, 'disclosure duties of public companies under the Companies Act 61 of

68 *Directory-Advertising v Minister of Posts and Telecommunications* (1996) (3) SA 800 (T).

69 Section 16(2) imposes a duty to disclose information necessary for the union to carry out any statutory responsibility.

1973 are notoriously light and basically encompass an annual report with the chairperson's and director's reports and audited financial statements. These requirements are even more sparse for private companies and close corporations'.⁷⁰ The disclosure requirements in the Constitution, South Africa's supreme law, and the legislation described, open new and important avenues for company stakeholders to pursue governance matters.

This issue of the inter-relationship between the new Constitution and the law that preceded it is already beginning to have practical repercussions in company law. In *Ferreira v Levin and Others* and *Vryenhoek and Others v Powell NO and Others* the Constitutional Court dealt with provisions of the Companies Act 61 of 1973 which required disclosure of information by officers of an insolvent company to the liquidator; the court found that the Act contravened rights against self-incrimination and the right to a fair trial contained in s25(3) of the Constitution and struck down the offending provisions of the *Companies Act* ⁷¹. This was so even though those provisions had withstood challenge, prior to the new Constitution, on common law grounds. This and related cases have prompted some South African company law scholars to conclude 'the biggest challenge facing company law in the coming millennium is constitutionality'.⁷²

How, for example, will the courts come to marry a private body's right not to disclose information which would put that body at a disadvantage in contractual or other negotiations with the employer's obligations of disclosure in collective bargaining and to workplace forums, where they exist, and with the Constitution? Or, indeed, to what extent can s68 (of the *Promotion of Access to Information Act*) exceptions apply to shareholder/owners or other stakeholders seeking access to company records?

The Explanatory Memorandum accompanying the 1998 *Open Democracy Bill*, the progenitor of the Act, makes clear that the intent is to give full effect to s32(1)(a) rights in the Constitution, dealing with publicly-held information, but only partial effect to s32(1)(b), dealing with privately-held information⁷³. The result is that the Act does not identify and codify informational rights *per se* but provides contingent procedural rights to information for the discharge of other *existing substantive rights*. In this regard the Act might be said not to *augment* the right to

70 G Pimstone, 'Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill', (1995) 15 *South African Journal of Human Rights* 2 at 5.

71 (1996) (1) *BCLR* 168. The section was declared invalid to the extent that the answers given to any such question may be used in evidence against the person interrogated, except perjury offences. These issues are canvassed in some detail by J Henning and S du Toit, 'South Africa: Constitutionally Challenging the Companies Act – the Coming Millennium', (2000) 8 *Journal of Financial Crime* 181.

72 *Ibid*, 181.

73 Explanatory Memorandum, *Open Democracy Bill* (1998) <www.gov.za>.

information of employees of a workplace in which a workplace forum exists (which are prescribed in the *Labour Relations Act* and/or the constitution of the forum) but merely to provide an alternative remedy where disclosure obligations are breached by the employer. But what level of disclosure by employers is required to give effect to the protection by employees of any rights stemming from implied contractual terms and as employee-beneficiaries of employer fiduciary obligations?

The Act does have the potential to address some of the issues raised, for example, by commentators like Stone and O'Connor, and discussed in the previous chapter, regarding informational rights that may arise from implied terms of contracts, from the fiduciary nature of the employee/employer relationship or from the requirements of mutual trust and honesty in the employment relationship.

One further aspect of the industrial relations environment in South Africa since democratization, with the potential to have an impact on corporate governance, is the push to make major policy directions in economic and labour policy subject to NEDLAC consideration and with a concomitant tendency towards tiered industrial bargaining. These are tendencies consistent with the co-determinist approach. For example, Cioffi sets out the financial market, company law and labour law features associated with what he calls the 'Neo-Liberal' (eg US), 'Neo-corporatist' (German) and 'Statist' (eg Japan) models of governance. He describes neo-corporatist labour law features as including blurred boundaries between labour and company law and 'legal facilitation of sectoral/industry bargaining'.⁷⁴ Under this model company law is highly mandatory in nature, whereas company law in the neo-liberal model is permissive with few mandatory rules. A case can be put that South Africa now incorporates labour law features of the neo-corporatist model but retains the permissive features of neo-liberal company law – a hybrid of Cioffi's models.

There remains a question whether South Africa maintains the economic foundations and political culture, particularly of a 'welfarist' type, that might support the co-determinist institutions⁷⁵

The NEDLAC Act provides for a Council made up of representatives of 'organised business', 'organised labour', 'organised community and development interests' and the State⁷⁶ Although formally consultative in nature, NEDLAC has a wide remit and is widely seen as a high-powered, policy engine, well-resourced and enjoying significant sway with government.⁷⁷ The influence of NEDLAC extends to

74 J Cioffi, 'Governing Globalisation? The State, Law and Structural Change in Corporate Governance' (2000) 27 *Journal of Law and Society* 572, esp. Table 1 at 578.

75 See, eg, D Charney, 'Workers and Corporate Governance: The Role of Political Culture' in M Blair and M Roe (eds), *Employees and Corporate Governance* (1999).

76 *NEDLAC Act* 35 of 1994 s3(1).

77 *NEDLAC Act* 35 of 1994 s5:
'(1) The Council shall –

practical industrial bargaining. A core feature of the *Labour Relations Act* is the establishment of bargaining councils – on an industry-wide or sectoral basis – for collective bargaining and for the general supervision of industrial matters⁷⁸ Chapter III of the *Labour Relations Act* (“Collective Bargaining”) deals with collective agreements and bargaining councils. Section 28 deals with council registration. Councils are established on the joint application for registration to the CCMA by the relevant union(s) and employer(s). Prior to dealing with an application the CCMA receives a report from NEDLAC which, if it supports the registration, will set out demarcation lines with other councils. If NEDLAC cannot agree the Minister of Labour reports to the CCMA. Once established, one of the functions of the bargaining council include development of ‘proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector or area’ and conferring on workplace forums additional matters for consultation.⁷⁹ A council may request the Minister to appoint a

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- (a) strive to promote the goals of economic growth, participation in economic decision-making and social equity;
 - (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
 - (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
 - (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
 - (e) encourage and promote the formulation of co-ordinated policy on social and economic matters.
- (2) For the purpose of subsection (1), the Council –
- (a) may make such investigations as it may consider necessary;
 - (b) shall continually survey and analyse social and economic affairs;
 - (c) shall keep abreast of international developments in social and economic policy;
 - (d) shall continually evaluate the effectiveness of legislation and policy affecting social and economic policy;
 - (e) may conduct research into social and economic policy;
 - (f) shall work in close co-operation with departments of State, statutory bodies, programmes and other forums and non-governmental agencies engaged in the formulation and the implementation of social and economic policy.
- (3) Nothing in this section shall preclude the Council from considering any matter pertaining to social and economic policy.’

78 E Taylor, ‘The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labor Relations Act 66 of 1995’ (1996) 9 *Transnational Lawyer* 611 at 633-40.

79 ‘28. Powers and functions of bargaining council
The powers and functions of a bargaining council in relation to its registered scope include the following-

- (a) to conclude collective agreements;
- (b) to enforce those collective agreements;
- (c) to prevent and resolve labour disputes;
- (d) to perform the dispute resolution functions referred to in section 51;
- (e) to establish and administer a fund to be used for resolving disputes;
- (f) to promote and establish training and education schemes;

'designated agent' for the council and where appointed the designated agent may exercise all the powers of the CCMA except arbitration (s33). Indeed the overall thrust of the legislation is to interpose the bargaining councils between individual workplaces and enterprises. The Act encourages centralised agreement and militates against arbitration. The CCMA reports that 48 bargaining councils currently exist.

There is significant evidence, then, that the South African government has attempted to implant into that country an industrial relations and economic management system sharing features of a the neo-corporatist model – consensus-building on economic policy; centralised collective bargaining and dispute resolution; and workplace participation.⁸⁰

Rwegasira contends that this is the right approach for Africa generally.⁸¹ In making the distinction between what he terms 'institutionally based' systems (exemplified by Germany and Japan) and market-based ones (the anglo-american model), Rwegasira argues that the growth of importance of emerging markets and the central place of Africa as a continental emerging market⁸² means that Africa must now choose a governance system:

As economic liberalization spread through out the globe, emerging market share of the world stock market capitalisation rose from 3.7% in 1985 to 12.7% in 1996 ... and it is expected to increase substantially over the next decades ...[T]he ability of Africa to participate in this future growth will depend on how quickly and effectively governments can resolve issues of socio-economic and political strife, bureaucratic controls, corruption, unsupportive legal systems in general and with special reference to capital markets and corporate governance in particular.⁸³

-
- (g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;
 - (h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;
 - (i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace; and
 - (j) to confer on workplace forums additional matters for consultation.'

80 These are features identified by Cioffi as indicative of his 'neo-corporatist' model; J Cioffi, *supra* n74.

81 K Rwegasira 'Corporate Governance in Emerging Capital Markets: Whither Africa?' (2000) 8 *Corporate Governance* 258.

82 South Africa, like every other African nation (excluding Arab oil states) falls within the World Bank definition of an emerging market being one in which per capita income is below \$US 8626 per annum.

83 *Ibid*, 259.

While African countries as former colonies have inherited the legal systems of their colonizers, there is a need, says Rwegasira, to choose systems or features of systems which meet present needs. While Rwegasira notes that those African economies characterised by socialism, parastatalism and rural co-operative enterprises may have something to learn from China⁸⁴, his main contention is that the institutionally based model best meets Africa's needs given that social and political stability is paramount and since, 'it is the institutionally based model which can bring together all major stakeholders rather than focussing exclusively on the shareholders of the corporation...'.⁸⁵

The lumping together of all African countries in this way may disguise the peculiar situation of South Africa. Data cited by Rwegasira, shows that the stock market capitalization of South Africa in 1996 was \$US 242 billion compared to a combined total of \$US 31 billion for the seven other selected sub-Saharan African countries for which statistics are provided.⁸⁶ The populations of South Africa then was 38 million compared with a combined total of 277 million for the seven other selected countries. More recent World Bank data show that South Africa's per capita income at 2000 was \$US 3020 compared with a \$US 440 average for sub-Saharan Africa as a whole.⁸⁷

Even allowing that other African nations may not rely so heavily on stock-market capital, this indicates marked differences in the economic fundamentals of South Africa and other African nations which might derogate from Rwegasira's general thesis that market based governance is, on balance, not the best model for Africa. In this an important consideration is whether South Africa displays a governance culture consistent with the market approach.

Nel, King and South African Corporate Governance: From Anglo American to Anglo-American?

In 1991 one of South Africa's biggest investment houses – the Masterbond group of eighty-eight companies – collapsed in the midst of allegations of theft and fraud stemming back to the early 80's. Three of the directors of the parent company were ultimately jailed for 10 years in 1995 for fraud involving 129 million rand. The group's auditors, Ernst & Young, settled a claim by the *curator* and creditors

84 Ibid, 263.

85 Ibid 265. One area of research which arises from Rwegasira's thesis is on corporate governance systems in French Africa. It will be interesting to see whether former French colonies retain governance systems of French company law or fall subject to the anglo-american model as a trade-off for further investment.

86 The other seven countries are Nigeria, Morocco, Egypt, Ghana, Kenya, Cote d'Ivoire, Botswana and Zambia, source: Emerging Stock Markets Factbook (1997) *International Finance Corporation*, cited in K Rwegasira, *supra* n81, at 260.

87 <www.worldbank.org/data>.

for roughly 25% of around R509 million in losses resulting from alleged negligence by the auditors, the settlement taking the form of a Scheme of Arrangement under the Companies Act.⁸⁸ Masterbond financial products had been aggressively marketed, particularly to older South Africans, using unsupported claims about high prospective returns and low risk; instead investor funds were used in highly speculative ventures. Despite the resulting *furor* the then National Party government, which had allegedly strong links to the company, resisted an enquiry while criminal proceedings were extant. However the incoming ANC government established the '*Commission of Inquiry Into the Affairs of the Masterbond Group and Investor Protection in South Africa*' under Mr Justice Nel (the Nel Commission). The three-volume Final Report of the Commission was handed down in April 2001 after more than five years of proceedings.

Given the circumstances of Masterbond, the Nel Commission report shows an understandable major focus on auditors, corporate accounts, disclosure of financial information and the supervision of financial products. However the Commission's terms of reference were broad and it widely canvasses the history of, and modern developments in, corporate regulation and company law not only in South Africa but in 115 countries and 49 of the US states. The Commission also interpreted its remit to require an examination of a plethora of corporate failures in South Africa, mostly financial institutions, and allegations of corporate malfeasance. The Final Report of the Commission evinces an approach to the control of corporate conduct premised substantially on the empowerment of shareholders and stakeholders. The Commission is also scathing of 'ineffective supervision by entities such the Registrar of Companies and the JSE Securities Exchange SA, neither of whom seems to play any discernable role in the protection of investors'⁸⁹ and recommends the establishment of a single 'integrated or

88 T Betty, 'It's payback time for Masterbond victims' (1997) *Business Times*, 9 Feb.

89 Nel Commission, Final Report (2001) volume 1:

'1.9 With some notable exceptions, mainly the United States of America, investors themselves are not adequately empowered to protect their own interests, and are not enabled to make properly informed investment decisions. They have to place their trust in the efficacy of the systems of protection put in place by others, and in the honesty, reliability, and competence of the persons involved therewith

Unfortunately their trust is too often misplaced.

1.10 In South Africa, as in many other jurisdictions, fuller and more timeous disclosure of the financial affairs of the companies are often resisted by controlling shareholders, directors and management, and stultified by factors such as

- the lack of access to the books and records of companies and the minutes of the meetings of directors;
- the fact that disclosure of the financial affairs of public companies is often, for all practical purposes, restricted to the publication of bi-annual financial statements;

holistic' regulator with increased powers to take on the roles presently undertaken by a number of bodies.⁹⁰

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- the fact that the failure to publish such financial statements within the prescribed periods elicits very little, if any, response from regulating authorities;
 - the fact that auditors' reports are only required in respect of the annual financial statements;
 - the fact that when serious irregularities are discovered in the management of companies, the external auditors have no obligation to immediately bring it to the attention of shareholders and other stakeholders;
 - the fact that external auditors often allow directors to publish financial statements which do not portray the true financial position of companies;
 - the fact that Gaap (Generally Accepted Accounting Practice) has no legal backing;
 - the fact that in the application of Gaap very diverse results can be achieved by the use of subjective interpretations;
 - the fact that the duties and liabilities of directors and companies are not clearly laid down in legislation ...

1.12 In many respects the typical South African investor is also worse off than his counterparts in many other jurisdictions. He labours under

- the attention of vast hordes of unregulated, unsupervised, unethical and unqualified intermediaries whose sole purpose in life seem to be to part him from his money;
- ineffective supervision by entities such as the Registrar of Companies and the JSE Securities Exchange SA, neither of whom seems to play any discernable role in the protection of investors;
- the often illusory protection entrusted to other regulatory and supervisory authorities who lack the resources or the will to carry out the functions assigned to them by legislation;
- external auditors who are often more focussed on the protection of management than the protection of the investor;
- directors, managers, issuers of securities, intermediaries and auditors who operate with very little fear of personal repercussions in the event of fraud, negligence or incompetence;
- a criminal justice system which has broken down as a result of indifference or ineffective investigation and prosecution;
- the absence of alternative procedures (alternative to Court procedures), and the absence of effective derivative actions, dissenter actions and class actions.'

⁹⁰ Nel Commission (2001), volume 1:

'5.24 It is recommended that one regulatory authority should be established in South Africa.

It should be an autonomous body with, amongst others, the regulatory functions presently fragmented amongst the Reserve Bank, the Register of Banks, the Financial Services Board, the Department of Trade and Industry, the Registrar of Companies, the Registrar of Co-operatives, the Registrar of Medical Schemes, the Harmful Business Practice Committee, the Stock Exchange and others.'

On information for stakeholders, formal recommendations of the Commission include that –

- access to all company records by shareholders who individually or in aggregate hold 5% or more of the issued share capital and to shareholders initiating derivative or dissenter actions or whose rights could be affected by mergers, asset sales or take-overs (Volume 2, 11.31);
- such shareholders have, in person or through a lawyer, accountant or auditor, access to all the records of the company *including subsidiaries* (Volume 2, 11.33(a));
- nominated ‘interest groups’ have access to company records including:
 - Minority ordinary shareholders, holders of non-voting shares and holders of preferent shares;
 - debenture-holders;
 - depositors in banks and financial institutions;
 - contributors to pension and provident funds; and
 - the assured of long-term insurance companiesbut that this be through a trustee, being a registered financial institution appointed as trustee for the investors (Volume 2, 13.30; no process for appointment of such trustees is recommended); and
- access be given to auditors appointed by a recognised trade union at times of wage negotiations or retrenchments (Volume 2, 13.30; this is consistent with s16(3) of the *Labour Relations Act* which provides for union access to information during bargaining).

The Commission also recommends that the *Companies Act* be amended to recognise the duty of directors to have regard to the interests of employees, as part of a general codification of the duties of directors.⁹¹ While the duty is prescriptive, not permissive, unlike the UK law, it would be owed to the company alone.

91 *Nel Commission*, Volume 2, 14.35

‘It is recommended that the duties of directors should be codified as follows:

- a) A director shall perform the duties of director, including duties as a member of any committee of the board upon which the director may serve,
 - (i) Honestly and in good faith;
 - (ii) With such reasonable skill, diligence and care, including reasonable inquiry, as a reasonably prudent person in a like position would exercise under similar circumstances; and
 - (iii) In a manner the director believes to be in the best interests of the company.
- b) A Director must act fairly as between members and between different classes of members.
- c) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company’s employees

The Commission cites approvingly US provisions for dissenter, derivative and class actions. In the case of dissenter and derivative actions, Nel recommends that the *Companies Act* be amended to provide US-type provisions (Volume 3, 15.28). South African dissenter actions are, says Nel, prohibitively expensive and place the onus on dissenters to establish that majority-favoured proposals are unfair. Coupled with poor access to company information, dissenters have little prospect of protecting their interests. As for South African derivative actions, the Commission notes that applicants can be required, by an opposing company, to provide security for the cost of the proceedings in which, should they proceed, a *curator ad litem* is the plaintiff, relegating the member not just to the role of whistle-blower but to 'a whistle-blower facing enormous financial risks'. This, says Nel, is in stark contrast to modern views expressed in the American, Canadian and New Zealand company laws.⁹²

in general and the interests of creditors. The duties imposed by this subsection on the directors of a company are owed by them to the company alone.

- d) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
 - (i) One or more officers or employees of the company whom the director reasonably believes to be reliable and competent in such matters;
 - (ii) Professional advisers or other experts as to matters the director reasonably believes are within the person's professional or expert competence;
 - (iii) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.
- e) A director is not acting in good faith if he or she has knowledge concerning the matter in question which makes reliance otherwise permitted by subsection (c) unwarranted.
- f) A former director who has confidential information regarding the business affairs of the company which has come to his knowledge or has been divulged to him during his tenure as director shall not use such information to the detriment of the company. Such former director shall not disclose such information directly or indirectly to another person knowing or having reasonable cause to believe that such person will use or cause such information to be used to the detriment of the company.'

92 Nel Commission, Final Report, Volume 3:

15.16 Probably following American precedent, a statutory derivative action was introduced into the present *South African Companies Act*.

15.17 Unfortunately the timorous makers and shapers of South African company law, once having left the safe harbour of United Kingdom company law, made the derivative action so unattractive and so costly as to place it beyond the reach of the ordinary shareholder...

15.19 Section 268 of the *South African Companies Act* provides that

'...if it appears that there is reason to believe that the applicant in respect of an application under section 266(2) will be unable to pay the costs of the respondent

Finally, for present purposes, the Nel Commission recommends the introduction of class actions to South Africa, both as a matter of policy and to give effect to s38 (c) of the Constitution⁹³. The Final Report even provides a recommended draft Bill for that purpose.

The government response to Nel has been muted. It is possible that the Commission was established as an exercise in political expedience and instead has presented the government with broader challenges. The government has flagged major changes to legislation applying to auditors and audits⁹⁴ but is otherwise silent on the broad thrust of Nel.

Implicit in the Nel Commission approach is a disinclination to rely on codes of corporate governance conduct and practice such as that published by the Institute of Directors of Southern Africa: *The King Report on Corporate Governance; the Code of Corporate Practices and Conduct* (1994, King I), and the revised code (2002, King II)⁹⁵. Each draft of the code is an anodyne document with which little argument can be had.

The process of the King Committee – chaired by Mr Justice King - arriving at the King I code appears to have been to look at recommendations of the UK Cadbury Report and to make changes consistent with South African circumstances. Since 1995, adherence to the code forms part of the listing requirements of the Johannesburg Stock Exchange (JSE). The Nel Commission's view of the effectiveness of the JSE in regulating company conduct has already been noted.

company if successful in its opposition, require sufficient security to be given for those costs and costs of the provisional *curator ad litem* before a provisional order is made'.

15.20 It is noted that the order for the provision of security for costs is not dependent on the prospects of success or the contents of the report of the *curator ad litem* but solely on the financial means of the shareholder.'

93 *Constitution of the Republic of South Africa (Act)* 108 of 1996, s38 provides:

'Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief. The persons who may approach a court are –

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest;
- e) an association acting in the interest of its members' [*Nel Commission's emphasis*]

Property rights are included in the Bill of Rights.

94 See, eg, 'Budget Speech 2002' <www.gov.za/speeches/budgetspeech2002.html>.

95 Each published by the Institute of Company Directors of Southern Africa <www.iodsa.co.za>.

Only two aspects of the King Report, accompanying the 1994 code, were controversial – recommendations for amendments to the *Companies Act* to allow for indemnification insurance for directors at the company's expense and a proposal for a Business Judgement Rule.⁹⁶ The first of these was justified on the basis of the onerous duties of care and skill faced by directors, particularly non-executive ones (which are encouraged in the Report)⁹⁷ and was given effect in 1999 amendments to the *Companies Act*⁹⁸. Again the Nel Commission suggests that the duties applying to directors in practice have neither been particularly onerous nor subject to adequate scrutiny; the Commission did not recommend a Business Judgement Rule and such a recommendation would have been inconsistent with the overall tone of the Nel Final Report.

King II differs from the earlier code in providing more of a focus on stakeholder issues in governance including the welfare and fair treatment of the workforce, responsiveness to broader public interests and environmental-stakeholder engagement.⁹⁹ At any rate it is clear that the King code is now invoked by corporate South Africa as its ostensible governance ideology and has been formally adopted by the South African government as the corporate governance code for parastatals, including those being privatised, to the extent applicable.¹⁰⁰

Are governance standards, then, changing?

In a recent paper prepared for the OECD Development Centre, Malherbe and Segal chart the recent changes in corporate South Africa and in particular the diminishing role of the 'mining finance houses' - family-controlled groups 'where control was buttressed by share pyramids or differential voting shares'.¹⁰¹ Typically these groups included companies in mining, banks and financial services and manufacturing:

Of the 20 largest firms by market capitalisation in 1989 – and accounting for 51 per cent of the market's total capitalisation – 17 were controlled

96 The recommendation is '24.6 A director should not incur liability for a breach of the duty of care and skill where they [*sic*] have exercised a business judgement in good faith in a manner in which their decision is an informed and rational one and there is no self-interest'.

97 *King Report* (1994), 3.2 – 3.5 <www.iodsa.gov.za>.

98 *Companies Amendment Act* 17 of 1999.

99 This has been broadly welcomed by commentators as signifying a foothold for stakeholder culture in South Africa. See, eg, A Kakabadse and N Korac-Kakabadse, 'Corporate governance in South Africa: Evaluation of the King II report (Draft)' (2002) 2 *Journal of Change Management* 305.

100 *Protocol on Corporate Governance*, HSBC, 14/10/97

101 S Malherbe and N Segal, 'Corporate Governance in South Africa' (2001) Paper prepared for the OECD Development Centre <www.tips.org>. Stephan Malherbe was the administrator in the Masterbond receivership.

by shareholder blocs. Ten of the top twenty companies fell within the one sphere of influence, the Anglo American / De Beers grouping ...

The number of pyramid companies listed on the JSE decreased drastically between the end of 1989 and the end of 1999. In 1989 seven percent of the companies listed on the JSE, or 53 companies, were pyramid companies. By the end of 1999 only 27, or three percent of the companies listed on the JSE were pyramids. This trend reflects unbundling of conglomerates and the general disenchantment of investors in pyramid structures.¹⁰² [my emphasis]

In the ten years to 1999 the capital value of the mining houses fell from 54% to 31% of the total market value of JSE listed firms. This proportional decline will be accelerated with the privatisation of state owned enterprises. Malherbe and Segal emphasize that the changes are being wrought by market discipline – the search for international capital including the primary listing of a number of South African companies on the London exchange; the trend to greater equity financing particularly in the emerging IT and service sectors; and the influence of domestic and international institutional investment. The authors note that adherence to the King Code is not policed by the JSE and the extent of its application is unclear. Nonetheless recent trends represent a partial victory for market-governance in South Africa.

One anomaly, however, is resurgence in differential voting shares in light of the government policy of Black Economic Empowerment (BEE). In many cases BEE enterprises have been established by the sale of established companies by majority shareholders to a BEE enterprise at a discounted price. Majority shareholders in these cases are typically either union-influenced pension funds or group bloc-holders seeking a business relationship with a black enterprise in the “unbundling” of the group. In the case of the pension funds these often take up offerings in the new BEE enterprise. In this instance what is transferred is not ownership of the established enterprise – which continues to be owned by pension fund / institutional investment – but control of the enterprise from white to black management. In the case of sales arranged by existing company groups, discount finance is often arranged and secured against the true market value of the shares and/or again shares are relinquished at below market value¹⁰³

The dilemma for the black enterprise, once established, if it seeks further finance through market offerings, is that it runs the risk of dilution of black-control. This has resulted in some cases in the offering of no-vote shares (N-shares); the vehicle

102 Ibid, 45-46. In 1995 Anglo American alone admitted to controlling 25% of the stockmarket with analysts estimating the true figure at around 40%. At that time shares in group companies traded in total at 22% below the groups net asset value; see ‘Not a golden titan, more a pig in a poke’ (1995) 337 *The Economist*, Oct 7, 67

103 B Kantor, ‘Ownership and Control in South Africa Under Black Rule’, 10 *Journal of Applied Corporate Finance* 69, esp. 76-77.

once used notoriously by the pyramidal groups.¹⁰⁴ Moreover these activities raise difficult governance issues for either the 'relinquishing' company group or a pension fund, particularly regarding the interests of minority shareholders and fund beneficiaries respectively. On the face of it none of these arrangements make narrow business sense. In a wide view of directorial discretion, what is effectual subsidisation of the new enterprise may well be permitted where the objective is to establish credentials amongst investors, government and the public in view of the new political landscape.¹⁰⁵ Moreover South African pension funds, which share the joint union/employer board structure of the Taft-Hartley and Australian industry funds, are clearly motivated to advance social and economic change. The question whether employees can effectively wield pension fund financial clout in pursuit of wider social goals is again raised.

In 1999 the South African government formally adopted a policy of privatisation of state owned enterprises, followed in 2000 with the release of '*A Summary of the Policy Framework for an Accelerated Agenda for the Restructuring of State-owned Enterprises*'.¹⁰⁶ 'Restructuring' is now the recognised South African euphemism for privatisation. Part 6 of the Summary outlines a rationale for privatisation on corporate governance grounds. That Part cites a unitary board structure as 'international best practice' and is silent on a governance role for employees. An earlier agreement between the government and unions provides that any privatisation would proceed only with two relevant dispensations – payment of part of the proceeds to a National Employment Fund (NEF) for the establishment of black companies and employment/enterprise programs for disadvantaged groups; and provisions for discounted employee shares as part of an Employee Share Ownership Plan (ESOP)¹⁰⁷. Since the union movement continues to vociferously oppose privatisation, including organizing a national strike ("protest action") under the *Labour Relations Act*¹⁰⁸, little progress on these lines has been made. Nonetheless South African unions are able, should they choose, to pursue a formal employee role in SOE governance, whether in the form of ESOPs or otherwise, as a condition of co-operation in the 'restructuring' of SOEs. Such a role is otherwise consistent with government philosophy and South African unions hold a strong bargaining hand.

104 S Malherbe and N Segal, supra n101, 72.

105 Malherbe and Segal, supra n101; and Kantor, supra n103. Each of the authors make the point that 'white' business is motivated in this to establish an accommodation with the new order and in recognition of the ANC adoption of market economics.

106 <www.dpe.gov.za/docs/policy/summary.htm>.

107 S Nicholas, 'Privatizing South Africa's Industries; the Law and Economics of a New Socialist Utopia' (1999) 30 *Law and Policy in International Business* 721.

108 Section 77 of the Act provides that unions may take industrial protest action, similar to protected action in Australian legislation, subject to notice to NEDLAC and review by the Labour Court. Nationwide protest action against government plans was taken in June 2001.

Each of the above developments – recommendations by the Nel Commission; greater stakeholder/employee emphasis by the King Committee; the breakdown of the pyramids groups; black economic empowerment facilitated in part by union-influenced pension funds; and possible union input into the governance structures of privatised SOEs – together indicate opportunities for an employee role in South African corporate culture (even excluding workplace forums and labour law) at least in public companies. This is particularly so since the present government has close historical and ideological ties to the union movement, the ANC's allies in the anti-apartheid struggle, and the central role that unionists continue to play in the party structure of the ANC. Moreover, as seen in NEDLAC, the government has shown a readiness to adopt a tripartite approach to economic management and entrepreneurial development. The confluence of a number of streams creates a political landscape conducive to the advance of moral claims for greater worker participation in corporate governance.

The extent to which the labour movement in South Africa either pursues or achieves this goal remains to be seen.

Conclusion: Converging in the Opposite Direction?

In the wealth of material on the Western European, particularly German, model of governance, authors from the anglo-american world focus on the two-tiered board as the point of most stark distinction between the anglo-american and European approaches. While the 'Aufsichtsrat' (supervisory board) and its other European equivalents are unknown in the anglo-american world, it is but one of the 'two pillars' of German co-determinism; the other is the 'Betriebsrat' (works council)¹⁰⁹. While the role of works councils in the European Union remains problematic, reports of the diminishing role of co-determinism there are probably exaggerated. For example, regardless of the status of the Directive on European Works Councils in Britain¹¹⁰, many companies there affected by the Directive are implementing it¹¹¹. Worker participation mechanisms remain a mainstay of European governance practices, which 'clearly conflict with a (presumed) convergence trend in Europe towards the Anglo-Saxon model'¹¹².

109 A Reberieux, 'European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement' (2002) 40 *JCMS* 111.

110 Directive 94/95 EC, the directive mandates works councils for multinational companies operating in the EU with over 1000 employees. Britain is not required to implement the Directive due to an opt out provision of the EU's Agreement on Social Policy.

111 S Wheeler, 'Works Councils: Towards Stakeholding?' (1997) 24 *Journal of Law and Society* 44.

112 A Reberieux, *supra*, n109, 129. Reberieux cites two recent developments – European Council agreement that there be a directive covering worker participation in the European Company (*Societas Europaea*) and the Commission's amended text on

South Africa has its own version of works councils - workplace forums - within an anglo-american model of governance and company law. In doing so it has, perhaps, set for itself no more difficult a task than the UK given that Britains need to ultimately reconcile its own governance practice with co-determinist tendencies within the EU generally.

South Africa also faces pressures to adopt features of US company law, as found in the Nel Report. Such reform would enhance the 'neo-liberal' nature of company law; could this co-exist with 'neo-corporate' labour law? There are pressures, too, to privatize, to economically liberalize and to open the country to global competition. All this while the country faces major internal pressures for redistribution of wealth, including corporate wealth, and the wider task of social reconciliation. Against this backdrop it is not surprising that the nation seeks out stabilizing mechanisms for co-operation, consensus building and participation including in corporate governance. In this environment, too, it might be expected that a jurisprudence of employment centred on implied contractual terms of mutual honesty, loyalty and trust or of more general fiduciary obligation, would gain ground. This might be fostered further by constitutionalism.

Nevertheless there is evidence that reform of company and labour law in South Africa (including prospective reform) is poorly integrated. This can be seen in the mechanics of reform. Economic agenda-setting and labour reform proceeds through the tripartite NEDLAC. Recommendations on company law reform are via the 'expert' SAC. There is no formal relationship between the two. Neither has a reference to consider the recommendations of the Nel Commission. In circumstances where an employee governance role is legally explicit – both in statutory and constitutional terms – this makes no sense. Undoubtedly the failure of workplace forums to make deep inroads into South African companies has dampened any urgency here. Employer ambivalence about the forums is expected, union ambivalence less so. Yet other features of a co-determined or neo-corporatist model, like sectoral bargaining councils, are established.

It would be disappointing if the forum concept failed because unions remained captured by an earlier industrial culture or opted for US-style shareholder activism as a blunt, perhaps ineffective, employee-governance tool.

Despite these caveats, South Africa represents an experiment in the convergence of the anglo-american and co-determined models of governance. In some recent governance literature, 'convergence' appears a synonym for the displacement of co-determinism with the US approach – a one-way process. More circumspect

national-level consultation codes for workers, first issued in 1998 and amended in 2000. 'It is hard to exaggerate the importance of these decisions in corporate governance matters: they mark the explicit recognition of a European model, as opposed to the Anglo-Saxon one', 126.

analysis suggests this is unlikely¹¹³. South Africa appears willing to borrow elements from each model to meet its needs.

South Africa features not one economy but two; the former industrial, developed, corporate and predominantly white; the other underdeveloped, historically under-skilled, underemployed and predominantly black. The task set by the government is to extend to the latter the benefits of the former, not just through redistribution, but through education, wealth creation and growth. This dual economy disguises, too, the fact that the industrial economy, at least, is a developed, not emerging, market, albeit retarded by isolation during the apartheid era.

When Judge King, in his second report, congratulates South African business in developing a governance code that is the best in the emerging economies, he sets the bar discouragingly low. The development of an employee governance role in South Africa, might prove a positive force in the further development of a social-democratic polity in that country.

113 A good example is D Branson, 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance' (2001) 34 *Cornell International Law Journal* 321. One of the several interesting points made by Branson is that *family capitalism* remains the world's dominant form of economic organisation.

APPENDIX A

SECTIONS 79, 84, 85 and 86, LABOUR RELATIONS ACT 66 OF 1995 (SOUTH AFRICA)

“79. General Functions of Workplace Forum

A workplace, forum established in terms of this Chapter-

- (a) must seek to promote the interests of all employees in the workplace, whether or not they are trade union members;
- (b) must seek to enhance efficiency in the workplace;
- (c) is entitled to be consulted by the employer, with a view to reaching consensus, about the matters referred to in section 84; and
- (d) is entitled to participate in joint decision-making about the matters referred to in section 86

84. Specific Matters for Consultation

- (1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters-
 - (a) restructuring the workplace, including the introduction of new technology and new work methods;
 - (b) changes in the organisation of work;
 - (c) partial or total plant closures;
 - (d) mergers and transfers of ownership in so far as they have an impact on the employees;
 - (e) the dismissal of employees for reasons based on operational requirements;
 - (f) exemptions from any collective agreement or any law;
 - (g) job grading;
 - (h) criteria for merit increases or the payment of discretionary bonuses;
 - (i) education and training;
 - (j) product development plans; and
 - (k) export promotion.
- (2) A bargaining council may confer on a workplace forum the right to be consulted about additional matters in workplaces that fall within the registered scope of the bargaining council.

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- (3) A representative trade union and an employer may conclude a collective agreement conferring on the workplace forum the right to be consulted about any additional matters in that workplace.
- (4) Any other law may confer on a workplace forum the right to be consulted about additional matters.
- (5) Subject to any applicable occupational health and safety legislation, a representative trade union and an employer may agree-
 - (a) that the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work;
 - (b) that a meeting between the workplace forum and the employer constitutes a meeting of a health and safety committee required to be established in the workplace by that legislation; and
 - (c) that one or more members of the workplace forum are health and safety representatives for the purposes of that legislation.
- (6) For the purposes of workplace forums in the public service-
 - (a) the collective agreement referred to in subsection (1) is a collective agreement concluded in a bargaining council;
 - (b) a bargaining council may remove any matter from the list of matters referred to in subsection (1) in respect of workplaces that fall within its registered scope; and
 - (c) subsection (3) does not apply.”

85. Consultation

- (1) Before an employer may implement a proposal in relation to any matter referred to in section 84(l), the employer must consult the workplace forum and attempt to reach consensus with it.
- (2) The employer must allow the workplace forum an opportunity during the consultation to make representations and to advance alternative proposals.
- (3) The employer must consider and respond to the representations or alternative proposals made by the workplace forum and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (4) If the employer and the workplace forum do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer's proposal.

86. Joint Decision-Making

- (1) Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning-
 - (a) disciplinary codes and procedures;
 - (b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
 - (c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and
 - (d) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.
- (2) A representative trade union and an employer may conclude a collective agreement-
 - (a) conferring on the workplace forum the right to joint decision-making in respect of additional matters in that workplace;
 - (b) removing any matter referred to in subsection (1)(a) to (d) from the list of matters requiring joint decision-making.
- (3) Any other law may confer on a workplace forum the right to participate in joint decision-making about additional matters.
- (4) If the employer does not reach consensus with the workplace forum, the employer may-
 - (a) refer the dispute to arbitration in terms of any agreed procedure; or
 - (b) if there is no agreed procedure, refer the dispute to the Commission.
- (5) The employer must satisfy the Commission that a copy of the referral has been served on the chairperson of the workplace forum.
- (6) The Commission must attempt to resolve the dispute through conciliation.
- (7) If the dispute remains unresolved, the employer may request that the dispute be resolved through arbitration.
- (8)
 - (a) An arbitration award is about a proposal referred to in subsection (1)(d) takes effect 30 days after the date of the award.

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- (b) Any representative on the trust or board may apply to the Labour Court for an order declaring that the implementation of the award constitutes a breach of a fiduciary duty on the part of that representative.
 - (c) Despite paragraph (a), the award will not take effect pending the determination by the Labour Court of an application made in terms of paragraph (b).
- (9) For the purposes of workplace forums in the public service, a collective agreement referred to in subsections (1) and (2) is a collective agreement concluded in a bargaining council.”