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CHAPTER 4

A LEGAL PERSPECTIVE ON EMPLOYEE PARTICIPATION*

GLENN PATMORE

INTRODUCTION

IN Western countries, employee participation in workplace decision making is regulated by the law. Legally prescribed rules, and voluntary and customary standards (norms) operate side by side in a system of regulation (Fudge, 2008: 3). Different forms of regulation may coexist, but one form often dominates; and this may change over time (Fudge, 2008: 3). There are typically three types of regulation (Fudge, 2008: 4; Lee, 2004: 31).

First, there is market-based regulation, through agreements between employees and employers at the individual or enterprise level. Such agreements typically govern forms of direct participation by employees in the organization of work, such as face-to-face consultation with a manager, participating in a workplace team with other employees or attending a plant or company-wide meeting. Voluntary agreements may regulate indirect participation in workplace decision making, by providing for representative participation schemes, for instance.

The second form of regulation is negotiated collective agreements at the plant and industrial level. Trade unions have traditionally acted as the representative

of employees who collectively negotiate with employers over pay and working conditions.

Third, there is regulation by state-initiated intervention via statutes or Acts of parliament. Laws may specify conditions of employment that apply throughout the labour market. Legislation often protects employees against the power imbalance that is inherent in the employment relationship. For example, anti-discrimination law may protect the participation of disadvantaged groups, such as women and people with disabilities, in the labour market.

Governance structured by various forms of regulation is central to employee participation in complex human structures like companies. Employee voice is important for the governance of the workplace, the efficiency of enterprise, and the development and enhancement of employee interests (Kaufman et al., 2000: 260; Rogers and Streeck, 1995: 3–5).

This chapter examines a specific aspect of regulation: that covering indirect participation at the workplace through employee committees. The purpose of these committees is to provide representative consultation or structured communication between employee representatives and management (Rogers and Streeck, 1995: 3–5). This form of participation is regulated through voluntary and collective agreements as well as through legislation.

There is a legal spectrum of regulation of representative consultation. At one end of the spectrum, representative councils are legally required or supported ‘through collective agreement or legislation giving the entire workforce of a plant or enterprise some form of institutionalized voice in relation to management’ (Rogers and Streeck, 1995: 10). Such bodies, known as works councils, exist in Europe. Works councils provide employees with a general right of consultation and representation. Employees are generally elected to a committee which must be consulted by management about important workplace decisions on such topics as redundancies, transfers of the business, investment in the company, and threats to employment. Works councils are well-established workplace institutions in Western continental EU countries.

Towards the middle of the spectrum are consultative councils. These may be voluntarily established by management to improve communication between themselves and labour (Rogers and Streeck, 1995: 10). In Australia, these sorts of arrangements exist in the form of joint consultative committees, which are ‘formal ongoing consultative committees, comprised of managers and representatives of employees’ (Marchington, 1992: 533).

At the other end of the spectrum are laws that prohibit councils formed by employers or government from forestalling or undoing unionization (Rogers and Streeck, 1995: 10). Such a legal prohibition exists in the United States.

Each of these schemes of regulation will be explored in this chapter, to highlight the range of legal relationships that exist between labour and management. My purpose is to show that these different forms of regulation are not simply directives

issued by workplace authorities but rather have a profound impact on the relations among the industrial parties. The diversity of these legal arrangements illuminates our understanding of the role law plays in relationships between managers and representatives. Each of these modes of regulation has problems, particularly concerning their practical operation, and these problems seem to reduce the role of the employee voice. The focus of my analysis will be on the regulation that institutionalizes consultation through workplace representatives. At the same time, though to a lesser extent, attention will be given to the important relationships between employee representatives, managers, and trade unions.

This chapter will describe the spectrum of legal regulation, from legal rights, through voluntary entitlements to prohibitions. A brief history of each jurisdiction's legal arrangements, and the legal and practical operation of its laws, will be examined. It will be shown that the law has had both intended and unintended consequences, and that these have both advanced and defeated its purposes in various jurisdictions.

THE EUROPEAN UNION

There has been a long tradition of legally requiring management to inform and consult employee representatives in European firms, but the EU has adopted a gradualist approach to mandating employee participation. There remains some uncertainty about the entitlements of employees, though, because of the terms of the EU laws themselves and because of their impact on industrial relations practice in Europe. One challenge arises because of the difficulty of transposing EU directives into the domestic law of Member States and the potential conflict over the interpretation of that transposition.

Making Representative Consultation Universal

The EU began issuing Directives requiring laws for workplace consultation over specific situations: such as redundancies in 1975 (CRD, 1975, amended 1998), and over mergers in 1977 (TUBD, 1977, amended 1998). It promulgated general rules for information and consultation in large multinational companies in 1994 and 1997 (EWCD, 1994, 1997).

In March 2002, the EU went further and adopted a Directive establishing a general framework for improving participation rights of employees in large nationally-based enterprises (hereafter 'ICED 2002'). The Directive applies to all undertakings with more than fifty employees or establishments with more than

twenty employees (ICED 2002: arts. 3(1)(a) and (b)). It is estimated that the ICED 2002 would cover about 60 per cent of employees within the EU (Burns, 2000). In the United Kingdom, it is estimated that three-quarters of the labour force would be covered—the Directive came into full implementation in 2007 (Gospel and Willman, 2003).

The Directive seeks to comprehensively set down an employment standard throughout Europe, which may be conveniently described as ‘universalism’ (Ahlering and Deakin, 2005). EU legislation is the ‘traditional instrument’ of EU social policy used to set standards when existing member state laws are unclear, insufficient, or not uniform, and to support the common market (Quintin, 2003: 5). EU legislation for participation was required because ‘in practice ... no common minimum rules applied to European companies for timely and appropriate information and consultation’ (Quintin, 2003: 5). By setting a minimum standard, the law lessens competition between firms over information and consultation arrangements. It creates a baseline standard which contributes to a single or universalist regulatory environment (Streeck, 1995: 340). As a result, many of these minimum standards take effect as a form of ‘social rights’.

These ‘social rights’ exist in the EU labour market in tiers of regulation, at the supranational, nation state, and firm levels. Supranational and nation state laws set employment standards in the labour market, and provide for corporate governance and worker participation at the level of the firm (Ahlering and Deakin, 2005).

Supranational Law

The ICED 2002 is a public legal statement which proclaims a pan-European right to representative consultation. The Directive’s minimum standards impose a general legal obligation on management to inform and consult employee representatives in national enterprises (Commission of the European Communities, 2006: 102).

Article 2 defines one of the most important employees’ entitlements as representative consultation. Information and consultation are to occur between the employer and employee representatives. The following definitions are specified:

Information’ means ‘transmission by the employer to the employees’ representatives of data. (ICED 2002: art. 2(f))

Consultation’ means ‘an exchange of views and establishment of dialogue between the employees’ representatives and the employer. (ICED 2002: art. 2(g))

There are two distinct kinds of entitlement: a right and a freedom. Article 4 provides the right for employee representatives to be informed and consulted, and specifies the level, timing, procedure, and topics for information and consultation.

The topics are:

- information on the future development of the enterprise's activities and its economic situation (ICED 2002: art. 4(2)(a));
- information and consultation about employment, particularly where there is a threat to employment within the business (ICED 2002: art. 4(2)(b)); and
- information and consultation, with a view to reaching an agreement on issues of substantial change in work organization or contractual relations, especially issues directly affecting job security, such as collective redundancies and business transfers (ICED 2002: art. 4(2)(c)).

Article 4 imposes on management an obligation to inform (ICED 2002: art. 4.3), consult (ICED 2002: art. 4.4), engage in reasoned dialogue and seek to reach agreement over change in work organization or contractual relations (ICED 2002: arts. 4(c) and 4(d)). It also requires the level and timing of information and consultation to be at the appropriate level of management (ICED 2002: arts. 4.3 and 4.4).

Three rights for employee representatives are provided for in Article 4: the right to be a recipient of information, an adviser and a negotiator:

- the right to information allows for an informed view;
- the right to consultation allows representatives to counsel, advise, and warn; and
- the right to negotiate provides for a form of power-sharing between management and representatives.

The gravamen of Article 4 is the protection of employee interests, particularly regarding risks to employment. Employee voice is to be achieved through dialogue and representation. Article 4 is therefore intended to enhance employee rights, and to increase employee involvement over a range of enterprise issues (Gollan and Wilkinson, 2007: 1146).

The rights in Article 4 are without prejudice to any provisions and/or practices in force in Member States that are more favourable to employees (ICED 2002: art. 4 (1); recital 18). It is assumed that more favourable provisions would include practices and laws which provide for increased representation. Article 4 is therefore not meant to alter more favourable laws and practices.

Article 4 is a right, norm, and minimum employment standard. As a right, the Article provides an enforceable entitlement to employee representatives. As an employment standard it provides a public benchmark according to which conduct can be scrutinized and checked. As a norm, it influences the behaviour and conduct of the industrial parties.

Article 5 provides a freedom: for management and labour to negotiate an alternative form of representative consultation to the right given in Article 4. Article 5 states:

Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees.

The UK regulations, for instance, permit such voluntary agreements. Article 5 provides for a negotiated agreement that assumes a process of representation by labour to management. Arguably this article does not permit labour and management to agree to abandon the process of representative consultation itself in reaching an agreement.

While Article 5 grants a freedom to labour and management to negotiate the practical arrangements for informing and consulting employees it does not empower them to define the meaning of these terms. Article 5 is subject to Articles 1 and 2. Article 1 states that the employer and the employees' representatives shall work in a spirit of cooperation when defining or implementing practical arrangements for information and consultation. Article 2 defines 'information' and 'consultation' to be between management and employee representatives. While the process of negotiation to establish employee information and consultation assumes employee representation it does not explicitly require it. However, the definition of the information and consultation procedure itself uses mandatory language, 'means', in defining 'information' and 'consultation' (see also ICED 2002: recital 23). Thus in all Member States a procedure must be established whereby representatives must be informed and consulted.

Management and labour may depart from the topics, timetable, and procedure to be applied in Article 4; this is expressly permitted by Article 5. This potentially lowers the levels of protection provided by the Directive, to the extent that Article 4 does not operate as a default rule. Any departure from the minimum standards set in Article 4 means that there will no longer be common standards. But the Directive does place some limits on negotiated agreements: the arrangements in Article 5 do not, after all, allow employers to avoid or defer their legal obligations to inform or consult.

The Directive also permits direct forms of communication between employees and management, where 'employees "represent" themselves without any intermediation' (Davies and Kilpatrick, 2004: 134).

Recital 16 provides that the Directive is 'without prejudice to those systems which provide for the direct involvement of employees'. Thus systems of direct communication are not prejudiced by the Directive. However, this protective clause is qualified by a proviso: 'as long as employees are always free to exercise the right to be informed and consulted through their representatives'. Accordingly, employees' freedom to seek representative consultation remains, whether or not systems of direct communication are being used.

Questions have arisen over whether or not direct forms of communication in fact satisfy the requirements in the Directive. Some have suggested that direct communication might simply take the form of an email (Davies and Kilpatrick, 2004: 134). Critics of this view have pointed out that email communication seems a barely adequate structure to address issues of organizational change and redundancies (Davies and Kilpatrick, 2004: 134). The Directive may place some limits on

the email option. It requires that Member States provide arrangements for informing and consulting employees that are practical (ICED 2002: arts. 4 and 5) and effective (ICED 2002: art. 1(2)). While email communication may be a practical tool for conveying information, it may not be effective, as it strains the meaning of genuine 'consultation'.

However, one difficulty in assessing this option is that neither 'effective' nor 'practical' is defined by the ICED. The interpretation of these terms may well be determined in litigation, as is envisaged by Article 8, which requires Member States to ensure that adequate administrative or judicial procedures are available to enable the obligations derived from the Directive to be enforced.

It remains to be seen whether in countries like the United Kingdom, where negotiated information and consultation arrangements are permitted under Article 5, these terms will be defined by the parties purely by their agreement, or determined according to an objective standard in a court of law. In the United Kingdom there are numerous legal uncertainties about the content of negotiated agreements and about whether or not direct forms of communication will satisfy the Directive. Concerns have been expressed that negotiated agreements may give rise to more individualized arrangements through direct communication rather than promoting collective employee rights envisaged by Article 4 (Gollan and Wilkinson, 2007: 1151).

The freedom given in Article 5 entitles labour and management to negotiate their own employment standards in the absence of externally imposed restraints. In other words, employment standards are fixed by the parties themselves. Voluntary agreements mean that negotiated standards apply for the duration of the agreement. The freedom is granted and limited by the law: some limits imposed on the negotiations may be enforced and cannot be abandoned.

Overall, the Directive preserves representative consultation, or a right to negotiate about the adoption of arrangements for representative consultation. Article 4 does not alter more favourable employee rights that exist in Member States.

National Laws and Practice

While EU Directives do not form part of Member States' national laws, they must be defined and implemented by the national legislatures (Lingemann et al., 2003: 6; see ICED 2002: art. 1). This is achieved through giving a domestic legal basis to the employee rights and freedom in the ICED 2002. The legal obligations imposed on management by the Directive will therefore in effect continue to be found in a 'patchwork' of different forms of laws in EU Member States (including collective agreements and legislation) (Industrial Relations in Europe, 2006: 77).

According to the Directive, the rights and freedoms contained in the Directive must be integrated into existing laws and practices of employee representation

(ICED 2002: art. 2(e)). This has important implications for the Directive's application:

- Information and consultation rights are typically conferred by Member States' laws on union representatives or works councils; there are many variations in the way these rights are exercised.
- Information and consultation rights in Member States' laws are designed to complement rather than substitute for trade union rights (Industrial Relations in Europe, 2006: 88–9).
- Employee representatives within many EU countries enjoyed most or all of the information and consultation rights under Article 4 before the promulgation of the Directive.
- Information and consultation procedures in Member States are typically triggered by a request of a certain number of employees or union members, and are not automatically imposed on management.

Thus, compliance with the Directive may be satisfied by existing laws or may require new laws. In any event, a legal representative consultation employment standard is now to be found in all Member States' laws. In other words, no option remains for Member States to adopt a purely voluntary standard.

Overall, employees—wherever they are in Europe, and whether they are bound by legislation or collective agreements, or represented by trade unions or works councils—are at least entitled to initiate or enjoy similar rights of representative consultation in all companies operating within the EU (Industrial Relations in Europe, 2006: 11).

Modernizing the EU Labour Market

The role of law in supporting information and consultation procedures may be better understood in light of the EU Commission's objectives. The European Commission's aim in encouraging representative consultation is to develop a framework for the modernization of the organization of work. It seems, though, that there will be different qualities of information and consultation procedures in different Member States (Gollan and Wilkinson, 2007: 1146).

In those states where legally-based representative consultation has been established for a long time, one recent report noted: 'Cumulating evidence from north-western Europe shows that a well functioning employee representation system can play an important role in the modernisation and performance of a workplace' (Industrial Relations in Europe, 2006: 102). In states where non-statutory systems did not exist previously, such as the United Kingdom and Ireland and some Eastern European countries, it might take much longer for a framework for the modernization of the performance and organization of work to be developed.

A July 2005 survey provides a snapshot of employees' knowledge of UK Information and Consultation Regulations (CHA, 2005). The survey of 1,002 employees below director level found that only 12 per cent of employees had been informed of the Directive's requirements by their employer, only 6 per cent had been told about these requirements from their trade union,¹ and only 13 per cent were aware that the requirements gave them a right to ask their employer about the future of their organization (CHA 2005: 4–5).

Ignorance of the provisions is certainly not conducive to their adoption. Workplace cultures that have not previously had such legal arrangements and practices implemented through law may be resistant to change. It may be that unions are uncertain about supporting consultative bodies. Employers may be ambivalent or hostile to them (Cox et al., 2006: 262). These possible problems may in part explain why according to the survey trade unions and employers have not started to initiate the process of establishing representative consultation.

Overall, the right to establish representative consultation recognized in the ICED is aimed at modernizing the EU labour market. This right is intended to support a pan-European employment standard. Importantly this builds on existing rights enshrined in national laws. Many Member States' laws already comply with the ICED requirements, and consequently little, if any, amendment is required. This ensures constancy in arrangements for representative consultation, which, in turn, provides stability and predictability of workplace institutions for employers, unions, and employees (Rogers and Streeck, 1995: 20–21). However, in countries where there is not an established legislative tradition of supporting works councils or union representation the status quo of diminished representation may continue, due to an entrenched workplace culture. The challenge in these countries may be to address through new laws, the conservatism of the parties to change by striking a new political bargain over legally required representative arrangements (Rogers and Streeck, 1995: 20–21).

AUSTRALIA

Australia has taken two distinct approaches to regulation of representative consultation. Legislatures and industrial tribunals partially mandated representative consultation in the later part of the twentieth century. At other times the legislature has adopted a voluntarist approach, leaving it up to management and labour to work out their own agreements for consultation. The two approaches have important implications for the practice and development of consultation in Australia today.

Unlike the governments of the United States and many European countries, Australian Governments have engaged in significant legislative changes to existing industrial relations laws over the past two decades. The zest for reform has been regardless of changes in political majorities. Governments of both political persuasions, Labor and Conservative, have been motivated by the need to change economic and organizational conditions to meet the challenges of globalization. The most profound change was a shift of Australia's industrial relations system from one in which wage fixing was conducted centrally by a national tribunal to a system based on enterprise bargaining. The shift to enterprise bargaining is supported by organized labour and capital. Charting the history of legal regulation in Australia reveals the reasons and policy agendas of both Conservative and Labor Governments. But political and ideological differences exist, for example, over joint consultation.

The History of Legal Regulation of Information and Consultation in Australia

The role of law in promoting consultation between labour and management has evolved over time. Traditionally, industrial tribunals, supported by the courts, treated managerial prerogative as sacrosanct in areas outside a narrow conception of 'industrial issues' (essentially wages and hours) (Markey, 1987). Other matters, such as productivity, technological change, and redundancy issues were therefore effectively excluded from the jurisdiction of industrial relations tribunals in Australia (Markey, 1987).

Legal support was provided for information sharing and consultation over a limited range of topics for a short period of time. Consultation procedures were required over proposed redundancies and other workplace changes in the late 1980s, and over 'efficiency and productivity' in the early 1990s. These procedures were made conditions of employment through orders of state and federal centralized tribunals. Such orders are known as arbitrated awards. The federal body was known as the Australian Conciliation and Arbitration Commission, and is now referred to as the Australian Industrial Relations Commission (AIRC). The spread of joint consultative committees between employee representatives and management, set up to deal with issues of 'efficiency and productivity', was a result of the National Wage Case of April 1991 (Combet, 2003).

In the early 1990s, the Keating Government introduced legislative provisions which mandated a consultative process for issues concerning changes to the organization or performance of work. These provisions established a mechanism for employee consultation, and went a significant distance beyond the terms of the enterprise bargaining process itself. The legislation, which facilitated enterprise bargaining, required that enterprise bargaining agreements establish 'a process for

the parties to the agreement to consult each other about matters involving changes to the organization or performance of work in any place of work to which the agreement relates' unless 'the parties have agreed that it is not appropriate for an agreement to provide' such a process² (Campling and Gollan, 1999).

Underlying the Keating Government's approach to consultation was a view of enterprise bargaining that was deeply committed to consultation as a means of providing sustainable economic reform (Brown, 1992, see Australia, House of Representatives: 3794; Cook, 1992a: 2518, see Australia Senate). The government promoted enterprise bargaining that encouraged 'an effective partnership at work and a highly skilled, adaptable, and committed workforce' (Sherry, 1992b: 3580, see Australia Senate).

However, these Keating Government initiatives to promote efficiency and productivity were removed by the Conservative Federal Government after it won office in 1996 (*Workplace Relations Act 1996* (Cth), s. 89A; *Re Award Simplification Decision* (1997) 75 IR 72).³ While the Conservative Howard Government supported enterprise bargaining, it opposed the enforcement of employee participation by legislation (Liberal-National Party Coalition 1996). It argued that the Keating Government's 'complex consultation provisions' were unnecessary because of the general requirement that certified agreements under the *Workplace Relations Act 1996* (Cth) (determining wages and conditions) would be required to be genuinely endorsed by a majority of employees at the workplace' (Mitchell et al., 1997: 198). Subsequent legislation by the Howard Government also removed the requirement to use consultative mechanisms to deal with proposed redundancies, productivity and other workplace changes from the awards system (see *The Workplace Relations Act 1996* (Cth); the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)).

After the Howard Government's electoral victory in 2004, it introduced further dramatic changes to Australian labour law in its *Work Choices Act 2005* (Cth). The effect of the Act was to consolidate 'voluntary bargaining between the parties in the interests of "co operative workplace relations"' (Jones and Mitchell, 2006: 9; *Workplace Relations Act 1996* (Cth) s. 3). The Act reduced the influence of collectively determined working conditions by reducing the influence of trade unions, and diminished worker entitlements under awards (s. 513 of the *Workplace Relations Act 1996* (Cth), as amended in 2005).

Thus the Howard Government legislation simply allowed the establishment of consultative committees through agreement at the workplace level.⁴ The Howard Government regarded workplace representation in the same way it did other workplace institutions; it preferred voluntaristic arrangements.

In 2007, the Conservative Government lost the federal election to the Australian Labor Party (ALP), partly due to its 'radical' industrial relations agenda. The new government's emphasis on creating minimum workplace standards and recognizing an enhanced role for trade unions suggests a 'protectionist' approach, quite a contrast to the more voluntarist, 'free market approach' of the Liberal Party. However, the Rudd Government appears to have adopted a narrow definition of participation in

the workplace, seeming to focus on persons' *access* to the workforce rather than on dialogue between employer and employees.⁵

The policies of the Labor Government do, however, address in a modest way the concept of consultation at work. The new government has introduced new award conditions. Section 576J(1)(j) includes 'procedures for consultation, representation and dispute settlement' as a term which may be included in a 'modern award'.

The ALP policy also refers to the concept of democracy in the workplace (in conjunction with freedom of association) (Rudd and Gillard, 2007: 12). It appears, though, that the new government's approach (like the old) simply permits voluntarist representative consultation through workplace agreement making and reinstates an award right to representative consultation that was removed by the Howard Government. There is no suggestion that the ALP will create legislative support for a new system of workplace participation and consultation. No mention is made of joint consultation or works councils in government documentation.

Overall, the Rudd Labor Government's approach to reforming the Howard Government's Work Choices legislation appears to be fairly modest in comparison with the attitudes to workplace reform in the European Union. The focus in Australia is on bargaining for wages and narrowly defined conditions (such as pay, entitlements, etc.), rather than on facilitating, through law, an ongoing dialogue between employers and employees at the workplace.

Legally Supported Joint Consultation in Australia

The role of law in supporting joint consultation may be better understood in light of empirical data. There are only a small number of studies about joint consultative committees in Australia. The Australian Workplace Industrial Relations Surveys in the 1990s showed an increase in the number of joint consultative committees of employers and employees from 14 per cent of surveyed workplaces in 1991 to 33 per cent in 1996. The ADAM database maintained by the Workplace Research Centre, at the University of Sydney,⁶ indicates that from 1991 to 2003 there was 'a steady rise in the number of consultative committees provided for in [registered] Federal agreements ... reaching a height of close to 58 per cent in 1999 and declining thereafter' to 33.3 per cent in 2003 (Forsyth et al., 2006: 12).⁷ These surveys seem at first to indicate a correlation between legislative support and increase in joint consultation. However, interestingly, the statistics also show that the number of joint consultative committees continued to increase even when legislative support had been removed by the Conservative Government in 1996. Even so, later their numbers ultimately declined. It seems that the link between laws supporting voluntary joint consultative initiatives and their effects are not straightforward, and perhaps that their impact is delayed (Forsyth et al., 2006: 29).

The Keating Government's support of such committees nonetheless apparently brought the parties together to craft suitable arrangements. Some of the representatives were appointed by the unions, others were elected by the employers. Some forms of representative consultation included information, consultation, and co-decision making. In practice, employers, trade unions, and employee representatives were able to work cooperatively to draft these arrangements. However, the Keating provisions have been criticized, on the grounds that the procedures they sought to establish did not 'prescribe the means (structure or processes) through which such consultation was to occur' (Mitchell et al., 1997: 203). The provisions were vague, it was said, and failed to give any guidance on the frequency or make-up of this 'process' (Mitchell et al., 1997: 204). In sum, the Keating Government's approach provided an impetus but not a suitable structure for joint consultation in Australia.

The Voluntarist Approach to Joint Consultation

Purely voluntarist joint consultation was ushered in by the Howard Government's removal of the Keating Government's initiative. The new Rudd Labor Government's decision not to reconsider this issue defers to purely voluntarist arrangements, leaving it to employees and employers to work out their own agreements. It is unclear from government documentation as to why it has chosen this course of action and whether it is likely to continue along this path into the future. Nonetheless, this paradigm has resulted in a decline in representative consultation in Australia. What then are the possible reasons for the decline in representative consultation, and what kind of joint consultation exists in a voluntaristic system?

First, one might well expect diminished workplace representation if there is no legal support for it. Employees and employers may be reluctant to establish such bodies because of the difficulty in setting up and structuring a joint consultative committee. Second, in an unregulated environment, representative consultation may be seen as a challenge to the inviolable principle of managerial prerogative. Trade unions may fear that unregulated representative consultation may interfere with their legitimate activities and that workplace organizations will be used as union substitutes.

Workplace representation remains at risk of leading a precarious existence if it is not supported by the law. Employers may fear that workplace committees will be used for bargaining over the distribution of company earnings (Rogers and Streeck, 1995: 16). Unions may need legal protection to organize, and employees may require legal protection to exercise the managerial prerogative (Rogers and Streeck, 1995: 21). All these, taken together, indicate that legal intervention for workplace representation is desirable, because it would protect the interests of both employers and employees.

Widespread employee representation seems impossible for employers and unions to achieve without the assistance of a legal framework. Trade unions are not able to achieve widespread representative consultation on their own because they do not have the power to establish a continuing general right to information and consultation for all employees. Union density was 20.3 per cent for all employees in 2006.⁸ Non-union employees also have an interest in the right to be informed and consulted in their workplaces.

Employers have not created widespread schemes of representative consultation. Under today's voluntaristic approach, representative consultation in Australia can only be based on an employer's (enlightened) self-interest or sense of obligation (Streeck, 1995: 339), because the institutionalization of workplace representation has been left to them. Once an employer has created a joint consultative committee, he or she may equally demand or bring about the committee's disbandment (Streeck and Vitols, 1995: 278). Employer-based 'voluntarism' is an insecure basis for joint consultation because it gives employers, rather than employee representatives, the right to establish joint consultation committees and more control over the committee's agenda (Streeck and Vitols, 1995: 278). Under the doctrine of managerial prerogative, employees have to obey the reasonable commands of their employer at common law.

While these reasons might explain the decline in joint consultation committees in Australia, the quality of existing information and consultation committees can be discerned from survey data. Although paternalistic councils apparently exist, (Gollan, 2006: 268, 282) 'union and nonunion voice practices do not [generally] operate as substitutes in Australia' (Teiocher et al., 2007: 126, 136). Teiocher et al. have found that '[u]nion presence is positively associated with the presence of several non-union voice arrangements in Australia' (Teiocher et al., 2007: 138). Therefore non-union arrangements complement rather than compete with union voice (Teiocher et al., 2007: 138). In addition, employer-initiated consultative committees offer positive forums for ongoing dialogue and cooperative work relations in the workplace. However, multiple channels of voice (union, non-union, and direct) have greater benefits for employee job control and job rewards (Teiocher et al., 2007: 139).

Overall, joint consultation is flourishing where there are multiple channels of voice in Australian workplaces. However, without legal support, representative consultation may not flourish, and there is a risk that its effectiveness may be undermined in the long term (Streeck and Vitols, 1995: 277). Workplace representation institutions increased under the Keating Labor Government's policy of legal support, then decreased under the Howard Government's conservative voluntaristic policies. It remains to be seen whether the current Labor Government will take an interest in the issue, or leave the voluntarist approach as the dominant one. In any event, legal intervention has promoted the growth of representative consultation in Australian workplaces.

THE UNITED STATES

The regulation of representative consultation in the United States contrasts starkly with the other two jurisdictions. There has been a long history of schemes of non-union representation in North America, but schemes of non-union representative consultation are today mostly prohibited by federal laws. These laws were passed in the 1930s, and were born out of intense conflict between management and trade unions. Employee representation diminished dramatically under this legislation, and the law continues to have a profound impact on corporate governance in the United States.

The History

The United States has never required non-union worker representation (Rogers, 1995: 389). But such schemes did exist in US enterprises in the nineteenth and twentieth centuries. ‘U.S. shop committees’, for instance, ‘date back to 1833’ (Rogers, 1995: 390). Employee representation committees or plans were encouraged by the US Government during the First World War (Gorman and Finkin, 2004: 257). Many employer-initiated committees folded during the Great Depression, but others were more long lasting (Gorman and Finkin, 2004: 257; Rogers, 1995: 391). Some of these schemes formed part of ‘welfare capitalism’ and had benefits for employees at the workplace (Gorman and Finkin, 2004: 257).⁹

In the 1930s there was a growth of company unions, given impetus by the *National Industrial Recovery Act* in 1933, which required employee representation.¹⁰ Company unions, though, had one very significant disadvantage: while these unions, and other employee representation plans, purported to provide representation for employees, employer domination and control of them meant that they were widely seen as shams (Senator Wagner, quoted in *Electromation Inc.* 1992, NLRB, 309, *enfd*, 35 F.3d 1148 (7th Cir, 1994), 992–3 (*Electromation*); Estlund, 2007: 597; Rogers, 1995: 392). Accordingly, in the mid-1930s, federal legislation was passed to prohibit employee representation plans and company unions; that prohibition continues today.

The Current Law

The *National Labor Relations (Wagner) Act 1935* (‘NLRA’) (NLRA s. 8; Gorman and Finkin, 2004: 257; Patmore, 2003: 178–86; Taras and Kaufman, 2006: 516), as amended by the *Labor Management Relations (Taft-Hartley) Act 1947*, prohibits unfair labour practices. These provisions are enforced through judicial-type

proceedings administered by the National Labor Relations Board (NLRB) (Gorman and Finkin, 2004: 6).

Section 8(a) makes it an unfair labour practice for an employer to dominate or interfere with the formation or administration or contribute financial or other support to a labour organization (*EI du Pont de Nemours & Co*, 311 NLRB 893 (1993), 895–6 (*du Pont*); *Electromation*: 995–6). A ‘labor organization’ is defined in s. 2(5) as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The NLRB has been faithful to the legislative intent of the NLRA, which was to exclude company unions and employee representation plans from American workplaces but to permit some forms of representation. Two key steps have informed the analysis of the NLRB.

First, the Act restricts the activities of company unions and employee representation plans by defining them as labour organizations and then prohibiting employer domination, interference, or support of them as an unfair labour practice. Each statutory definition—‘labour organization’ and ‘unfair labour practice’—is interpreted broadly by the NLRB.

In *Electromation* the NLRB defined a labour organization in s. 2(5) to cover:

- (1) an organization in which employees participate; [and]
- (2) that exists, at least in part, for purposes of ‘dealing with’ the employer; and
- (3) where these dealings involve the prohibited subject areas of ‘conditions of employment’.

The term ‘dealing with’ has been interpreted to exclude a wide range of bilateral mechanisms between management and employees. In *du Pont* the NLRB explained:

[t]hat ‘bilateral mechanism’ ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.¹¹

In sum, a bilateral mechanism includes a pattern or practice of bargaining, negotiation, or consultation between employees and management.

The prohibition of bilateral communication is limited to the subjects listed in s. 2 (5), which include the traditional topics of collective bargaining: conditions of work, grievances, labour disputes, hours of employment. These subjects have been interpreted broadly. The following topics discussed by non-union employee representatives have been held to fall within the meaning of s. 5(2): bonuses, no smoking policies, raises, incentive awards for safety, and workers’ recreation and fitness (Gorman and Finkin, 2004: 258–62).

For there to be an unfair labour practice, an employee representation or participation scheme must fall within the definition of a labour organization in s. 2 (5), and the practice must violate the s. 8(a)(2) prohibition regarding employer 'domination'. 'Domination' and 'interference' include the appearance of employer control over the formation or administration of a labour organization (*du Pont*: 895–6; *Electromotion*: 995–6). But a violation does not require hostility towards a union, or a specific intention to exclude a labour organization (*Electromotion*: 996–7). Financial support to the committee or other forms of lesser assistance, such as paying employees for missed work time as a result of attending the employer's committee meetings (*Electromotion*: 997–8) are also prohibited by s. 8(a)(2). Overall, s. 8(a)(2) prohibits employer activity that establishes or is conducive to the operating of a non-independent labour organization.

Second, the Wagner Act provides the means to establish independent labour organizations: these are trade unions, not company unions, or employee representation plans. The Act protects the rights of employees to self-organization, to form, join, and assist trade unions, to collectively bargain and engage in other concerted activities (NLRA (1935): s. 7). It also provides exclusive union bargaining rights over rates of pay, wages, hours of employment, and other working conditions (NLRA (1935) s. 9(a)). The purpose of the Act was to create independent trade unions free of management interference. Trade union independence was guaranteed by trade union representatives being chosen by employees through secret ballot elections (Rogers, 1995: 95; Weiler, 1993). Exclusivity—cutting out other bargaining organizations—provided a guarantee of a single collective voice (Rogers, 1995: 399). The purpose of the Act was to promote independent labour organizations that would help deliver growth in real incomes as well as productivity and act as a 'counter-vailing power' to 'otherwise overwhelming business domination' (Rogers, 1995: 376).

Various provisions in the Act would almost certainly be infringed by the kind of works council of employee representatives that is common in Europe. Such a council would satisfy the definitional elements of s. 2(5). A committee or group that is representational in nature clearly meets the criterion of 'employees participate in' (*Electromotion*: 994; Kaufman et al., 2000: 263). Also, a representative committee would be dealing with management, and would constitute a bilateral mechanism, assuming that the purpose of the committee was to deal with conditions of employment (such as incentives for health and safety issues, or the use of a new technology) (Rogers, 1995: 377). In addition, a works council would be likely to be in violation of the s. 8(a)(2) prohibition on domination or support of a labour organization if the employer specified the purposes and powers of a committee, funded that committee, provided meeting rooms, or paid employees for missed work time at council meetings, or appointed some managers to the committee (Kaufman et al., 2000: 264; Rogers, 1995: 377). Such a committee would also likely contravene the exclusive union bargaining rights over rates of pay, wages, hours of employment, and other working conditions. A works

council would infringe the prohibition even where there was no finding of hostility towards unions or exclusion of union activity.¹²

Employee Representation in the American Workplace

Overall, the Act rules out a 'wide swath of potentially valuable forms of employee involvement' (Estlund 2007: 597). Estlund argues that the Act makes it unlawful for 'employers to sponsor or support institutionalized forms of give-and-take, consultation, cooperation, or negotiation' which are not conducted with a trade union (Estlund, 2007: 597). Rogers points out that 'for at least some non-union employers, this imposes a legal restraint on desired innovations in worker participation and "empowerment" in workplace governance' (Rogers, 1995: 377). Thus, non-union employers and their employees are legally restricted in the design, support, and topics covered by employee representation committees because of the NLRA.

However, the sanctions for breach of the prohibition are largely regarded as ineffective. Only limited sanctions are available; the most typical is a 'cease and desist' order (Kaufman et al., 2000: 278). As the NLRB is an administrative body, it cannot provide judicial relief such as compensatory or punitive damages (Estlund, 2007: 598). Estlund explains that 'as things stand, employers can treat the small and confined risk of an unfair labor practice charge as a minor cost of doing business' (Estlund, 2007: 599). The scope of the prohibition is broad but it is limited in its effectiveness.

Unilateralism in US Firms

The broader impact of the Act on corporate governance in the United States today is that it has permitted the diminishing of employee representation. Trade union representation has been severely curtailed by employers despite the legislative support provided in the NLRA, and there is a legal prohibition on most forms of non-union representative consultation.

Unilateral communication on employment conditions flourishes in US workplaces: decisions are made by management without the advice or involvement of employee representatives (Wever, 1995: 139). Managerial responsibility and autonomy is maximized at senior, middle, and junior management levels. Also, it is individualized, thus minimizing hierarchy (Wever, 1995: 139). Input from individual or certain groups of employees may be welcomed and encouraged, but the ultimate decision rests with management.

US labour law permits unilateral communications about employment conditions. The NLRA requires that workers be represented by 'an organization wholly

independent of employer influence or not at all' (Summers, 1987: 338). Most US employers have chosen no representation. They have found ways to use labour laws and other tools to reduce trade union presence in their companies. Anti-union employers are in part motivated by the higher costs that union membership entails—in wages and, more particularly, in conditions, such as health care and pension plans (Rogers, 1995). These benefits are provided by the firm, not the individual or the state, as occurs in some other Western countries.

US labour law scholars have pointed out that most US trade unions are denied their right to organize and collectively bargain on behalf of workers (Rogers, 1995: 376–7; Summers, 1987: 336). Employer opposition threatens the existence of trade unions in US workplaces and in public life. The decline in union density has also, of course, reduced their political impact (Rogers, 1995: 394).¹³

But there are some employers who do deal with independent labour organizations. In those firms, managers and trade unions may agree to establish a union management information and consultation committee through the process of collective bargaining. While there are some of these Labour–Management Cooperation Committees in unionized workplaces in the United States,¹⁴ trade unions cover a very small percentage of US workplaces. Today, only 7.5 per cent of US employees in the private sector are represented by a trade union (Bureau of Labor Statistics, 2008).¹⁵ Thus, 92.5 per cent of private sector workers are not represented by a union, have no union worker representative and no right to participation in their union.

For non-union employers, a decision to establish and support an employee representation committee discussing working conditions would be unlawful under the NLRA. However, there is a proviso to the prohibition in s. 8(a)(2) that stipulates that 'subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him [sic] during working hours without loss of time or pay' (NLRA: s. 8(a)(2)). But this too is limited.

Gorman and Finkin note that the 'proviso makes it clear that adjustment of grievances by an employee group while drawing pay does not constitute illegal "financial support" of that group by the employer' (Gorman and Finkin, 2004: 258). Only very limited forms of non-union employee involvement are legally permitted—ad hoc mechanisms or ongoing mechanisms focusing exclusively on productivity, efficiency, and quality, for instance. Thus conversations about productivity or quality issues may take place between management and groups of employees. Managers may certainly provide information to their employees; employees may provide information to their managers; managers may meet with employee representatives to discuss quality or efficiency issues. Thus, employee committees which are mere 'communication devices'—used for topics other than employment conditions—are protected under the Act (*Electromation*: 997).

There is little empirical data about the spread and significance of joint consultation procedures in the United States. Lipset and Meltz in 2000 found in their survey that coverage of such schemes amounted to 20 per cent for firms without unions (Lipset and Meltz, 2000: 226). Richard Freeman and Joel Rogers reported in 1999 that over a third of the workplaces they surveyed had an established employee participation committee that discussed problems with management on a regular basis (Freeman and Rogers, 1999: 92). Both Freeman and Rogers and Lipset and Meltz found that a large proportion of non-unionized committees regularly discuss issues such as wages and benefits—this was an unexpected result, because this type of interaction is prohibited by s. 2(5), 8(a)(2) of the Wagner Act (Taras and Kaufmann, 2006: 516). Thus, many committees operate in the shadow of illegality (Lobel, 2006: 1547).

Where schemes of representative consultation are operated, legally or illegally, ultimately, they can be terminated by a unilateral decision of management.¹⁶ Unilateral communication on employment conditions has become the default choice, an inexorable choice, for the vast majority of US private sector employers. Yet it is not simply an economic preference; it has been forged through US labour law.

Reforming Unlawful Representative Consultation

Reformers were active in the mid-1990s, when ‘the Teamwork for Employees and Managers Bill’ (TEAM Bill) was passed. Its aim was to loosen the ban on employer-sponsored employee representation plans. The TEAM Bill would have permitted employee committees to ‘discuss “matters of mutual interest”’, including terms and conditions of employment, ‘as long as the committees [did] not take on the role of bargaining agent for employees’ (Estlund, 2007: 595; Kaufman et al., 2000: 260, 283).¹⁷ The Bill passed both houses of Congress but was ultimately vetoed by President Clinton (Estlund, 2007: 595; Lobel, 2001: 158). It was opposed because of concerns that it would be a form of ‘subtle employer coercion and [would place] additional weapons in employers’ already sizable arsenal of anti-union tactics’ (Estlund, 2007: 595; see also Kaufman et al., 2000: 260) It appears that the TEAM Bill provided insufficient protection for legitimate trade union activity. The spectre of US labour history and unhappy management union relations forestalled the success of the reform.

There are at least two possibilities for reform now. It may be that a limited amendment to the NLRA permitting a wider variety of representative consultation schemes in US firms will spur the development of representative consultation. But such a reform would need to be seen as a fair and acceptable accommodation of the interests of labour and capital (see, for example, Kaufman et al., 2000: 283–5). Alternatively, more far-reaching reform may be necessary to address the problems inherent in the overall NLRA scheme. To even allow participatory

schemes, it would be necessary, in the words of Charles Hecksher, to '[turn] the Wagner Act upside down' (Hecksher, 1988: 254–6).

To go further and address the challenge of unilateralism may require a rethinking of the whole scheme of labour relations law in the United States. It would require consideration of the totality of economic and social pressures on US firms as well as the appropriateness of the legal arrangements.

In sum, the protective prohibition in the United States limits the capacity for representative consultation to be used to avoid trade union activity. Yet it has placed some forms of representative consultation in the realm of illegality which would otherwise be regarded as legitimate. Given the previous experience, it will take patience, skill, and effort to reform the NLRA to address the fundamental problems of employee representation.

CONCLUSION

In each jurisdiction committees of managers and employees exist. Ultimately, there is a common underlying legislative purpose in each jurisdiction of framing and facilitating consultation. The law provides a framework that crafts the engagement among managers and employee representatives. However, the constitution, operation and effectiveness of these committees will vary according to a legal spectrum of representative consultation.

Examining the legal spectrum illustrates the diversity of regulatory regimes governing relationships between managers and employee representatives. Legislatures have adopted a number of responses to the role of representation in advancing structured communication in larger organizations. As we have seen, they range from a right to a voluntary entitlement to a prohibition on representative consultation. Each of these modes of regulation reflects different purposes, entitlements, and problems involved with various employee participation schemes and highlights the role of law as a form of social regulation.

The legal right to representative consultation in the ICED is now implemented in Member States' laws and is a form of universalist regulation. Through the institutionalizing of employee rights in national industrial laws and practice the EU Directive may develop a value consensus for representative consultation. Common assumptions have been forged by a long history of works council legislation in many Western European countries. However, where new legislative schemes have been enacted it will be a challenge to fill the gap between the law in the statutes and the law in action in the workplace. It may take some time for representative consultation procedures to be widely accepted by labour and capital

in some Member States. In the end, successful implementation may depend upon both legislative direction and the perceived legitimacy of these processes in the workplaces of the European Union. Even so, the option adopted by a small number of Member States for individualized negotiated agreements provided for in Article 5, may have a centrifugal force that erodes the ICED's universalist aspirations, by displacing the minimum standards in Article 4.

As in Europe, the purpose of legally supported representative consultation in Australia in the 1980s and 1990s was to promote cooperative communication between labour and capital. The right to representative consultation covered a more limited range of topics than in Europe, yet these laws correlated with an increase in the number of joint consultative committees in Australian workplaces. Management and labour, in negotiating workplace agreements, had to consider whether such committees would be appropriate in their workplace. Their acceptance depended upon the extent to which the industrial parties agreed to their adoption. Arguably, their adoption depended upon their perceived legitimacy and effectiveness as communication devices within the workplace. However, the lack of legislative direction as to structure which hampered their implementation was one practical problem. Another, the removal of legislative support has been associated with a decline in the number of joint consultative committees in Australia.

In Australia, the policy of voluntarism has left it to employees and employers to work out their own agreements. Voluntarism protects managerial prerogative because it leaves representative participation in the grasp and the release of those whose hands wield authority. Voluntarism provides maximum choice for management over the initiation and structure of representative consultation arrangements. Representative schemes have been initiated by management to enhance communication about productivity and flexibility; these schemes may also in part redress the imbalance of power inherent in the employment relationship. One problem is that voluntary bodies are less reliable than legislatively supported schemes because they can be terminated at the will of the employer. Yet union voice generally operates in a complementary way with joint consultative committees. The legislative trend has been to move away from collective representation to individual representation at least until the election of the Rudd Labor Government.

In the United States, a culture of workplace unilateralism has developed, in which management operates without the advice of workplace representatives about employment conditions. This was not the expected outcome of the NLRA, it was intended to promote collective bargaining between management and independent labour organizations. The prohibition in the NLRA on employee representation plans or company unions, for example, was supposed to limit employer domination and control of employee labour organizations.

Yet labour laws must be seen in their practical operation if we are to discern their regulatory effects. Legal prohibitions act to constrain choices which are seen as socially or economically undesirable. However, employers' choices may be

structured by the law in unexpected ways. The NLRA's ban on bilateral mechanisms, which prevents employers from dealing with a non-union employee representation plan, contributes to unilateral communications. In addition, under the NLRA, management is given a choice: to negotiate with an independent labour organization or not at all. Many employers have chosen the latter option.

While the prohibition on employee representation plans has reduced the number of employer non-union schemes, it has not removed them entirely. This is because the sanctions in the NLRA are weak. The NLRA was intended to limit the activities of powerful employers for the good of the employees and the economy, and to provide a means of adjusting and reconciling conflicting interests (Rogers, 1995). But the Act seems no longer to be serving this purpose. Rather, the NLRA is now supported by powerful employers because it is used to guard their interests. Other employers are hampered in their development of genuine non-union employee representation schemes. Some forms of representative consultation now operate in the realm of illegality. Yet many of these employee involvement schemes are no longer regarded as sham forms of representation, rather they are seen as a legitimate voice in workplace decision making (Kaufman et al., 2000: 260, 279–81). Trade unions are caught in a dilemma: the law has supported their interests but played a role in perpetuating their decline.

Overall, the function of legal intervention is to brace or stabilize employment relations. The inherent inequality in the employment relationship whereby employees must obey the reasonable commands of their employer remains a feature of Western IR systems. Experience in Australia and the EU highlights the fact that legal support is needed if representative consultation is to spread throughout an economy. Voluntarist representative consultation will continue to be driven by economic and social pressures, which means its adoption could be spurred at some times and in some enterprises, and deterred in others. The legal prohibition in the United States hinders harmful and helpful schemes of representation alike. The prohibition on employer workplace representation schemes there contributes to a workplace culture of unilateralism.

NOTES

- * The information in this chapter is current as of December 2008.
1. Please note that the survey did not reveal the coverage of unions of surveyed employees. This information would have been useful to assess the effectiveness of trade unions in providing information about the Information and Consultation Regulations.
 2. See the Keating Labor Government's *Industrial Relations Reform Act 1993* (Cth) ss. 170MC(1)(d) and 170NC(1)(f).
 3. The Howard Government introduced these legislative changes to limit or remove consultation mechanisms introduced by the operation of the TCR case and the National Wage case.

4. Provisions establishing joint consultative committees are not matters that must not be included in a workplace agreement, namely falling under the 'prohibited content' prescribed by *Workplace Relations Act 1996* (Cth) s. 356 and the *Workplace Relations Regulations 1996* (Cth) 8.4–8.7.
5. '[W]orkforce participation' in government documentation refers to the need to maximize inclusion and participation in the workforce per se (Gillard and Wong, 2007: 3–4; Rudd and Gillard, 2007: 12).
6. Formerly known as Australian Centre for Industrial Relations Research and Training (ACIRRT).
7. The Australian Worker Representation and Participation Survey (AWRPS) (2004) conducted in 2003–2004 reported a higher figure of 38.9 per cent of companies with committees of employees (Teiocher et al., 2007: 137).
8. ABS, *Employee Earnings, Benefits and Trade Union Membership*, 6310.0, August 2006: 35. Union density refers to the proportion of the workforce organized in trade unions, ABS, *Employee Earnings, Benefits and Trade Union Membership*, 6310.0, August 2006: 35.
9. Welfare capitalism meant social benefits were 'administered through attachment to the workplace rather than the state' (Lobel, 2006: 1548).
10. The enactment of the *National Industrial Recovery Act* in 1933, s. 7(a) of which required employee representation, resulted in employer-established 'company unions' being widely created (Gorman and Finkin, 2004: 257; see also Rogers, 1995: 391).
11. *EI du Pont de Nemours & Co* 1993, NLRB, 311, 894. The concept of 'dealing' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties.
12. For a review of the relevant case law see Gorman and Finkin, 2004: 257–76.
13. Lobel notes that 'Both Stone and Hogler view the decline of unionism as a complex development, which should be linked to both the changes in market production and the inadequacies of the legal regime' (Lobel, 2006: 1544).
14. See Lobel, 2001: 152.
15. Under the *Wagner Act* trade union membership of non-agricultural employees reached 33.2 per cent in 1955 (Summers, 1987: 336).
16. Legal employee involvement schemes appear to be widespread but 1992 data indicates that employee participation in these schemes appears to be low and often terminated at the will of management (Lawler et al., 1992: 30).
17. *Teamwork for Employees and Managers Act* of 1995, H.R. 743, 104th Cong. (1996).

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