

*Corporate Governance and Labour Relations: A sustainable partnership.*

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*"Successful workplace relationships are made by all people inside the  
workplace and not by the laws created outside..."<sup>1</sup>*

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<sup>1</sup> Isrealstam, I and Marais, P *Making Workplace Forums Work* (1996)

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### 1. Introduction:

Although the LRA and the Constitution understand that conflict is inevitable in the relationship between employer and employee, it is not conflict of such a violent nature, as has become associated with the process of striking in recent times, which they are referring to and intending to permit. Despite how it has been perceived by the courts and by commentators generally, the threat which conflict under the LRA aimed to allow is the threat of the peaceful with-holding of labour.<sup>2</sup> Strike related violence and bad faith negotiation tactics have been on the rise in South Africa and it is not unusual for parties across the negotiation table from each other to accuse their opposition of some form of misdirection and bad faith, or for animosity to become even more prevalent once an agreement has been reached due to the manner in which the negotiations were conducted.<sup>3</sup> Cheadle states that “it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict.”<sup>4</sup> He does go on to add that the difference to international standards and expectations comes in how the LRA requires no implicit need for strikes to be preceded by good faith negotiations whereas conventional labour relations does.

The LRA seeks to give effect, *inter alia*, to the right to fair labour practices.<sup>5</sup> It was developed as the role of the modern day working environment progressed and the common law could no longer accommodate the inherent inequality which was evident in the relationship between employer and employee.<sup>6</sup> Not only does it recognise the needs and wants of employees, and their representative trade unions, but it also recognises the inevitable conflict of interests between these needs and those of the employer which would be exposed if no regulatory system was in place.<sup>7</sup> At its core, the LRA states that its purpose, amongst others, is to advance labour peace and the democratisation of the workplace; which it does through an attempt to preserve equality between labour and management based on voluntaristic collective platforms and an

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<sup>2</sup> Brand, J *Strike Avoidance: How to Develop an Effective Strike Avoidance Strategy* (2010) at 6.

<sup>3</sup> *Ibid* at 6-7.

<sup>4</sup> Brassey, M Cameron, E Cheadle, H and Oliver, M *The New Labour Law* (1987).

<sup>5</sup> As seen in Section 23 of the Constitution.

<sup>6</sup> *Sidumo v Rustenburg Platinum Mines* (2007) 28 ILJ 2405 (CC).

<sup>7</sup> Grogan, J *Workplace Law (10<sup>th</sup> Ed.)* (2010) at 307.

implied sense of fairness into these.<sup>8</sup> As stated by the judges in *Murray v Minister of Defence*<sup>9</sup>, there contains within all contracts of employment an obligation of fair dealings between parties where reasonable behaviour is required and confidence is expected.

This ‘bigger picture’ of labour peace and workplace democratisation would be realised through certain structural objectives which would “promote orderly collective bargaining”, employee participation and “the effective resolution of labour disputes”.<sup>10</sup> To develop this concept, the LRA provides for the structures which the legal system uses in an attempt to impose certain values and democratic processes into the workplace which are achieved through the development of dispute resolution platforms promoting a system of self-governance based on interests and power.<sup>11</sup> Despite how the LRA is incredibly thorough in its attempt to create means through which labour disputes are resolved and the collective bargaining process takes place, it remains incredibly silent with regards to what should be up for discussion, what *level* it should be discussed at and in what *manner* it should be discussed.<sup>12</sup>

The general process of collective bargaining, through its intention, has benefits for both employer and employee. An employer sees benefit through the maintenance of industrial peace and employees through the guarantee of consistent standards and the platform from where they may assert some power. Collective Labour Law provides the basis from where employees may now collectively use their might to seek a desired change. The law therefore aims to protect the structures of collective bargaining and maintains a hand-off approach towards how and what is debated. Whilst this projection of ‘autonomy’ may be considered the more important description and aligned option to the aims of the LRA, the South African context might mean that it not as feasible in practice. The collective law processes have been developed from foreign and international regulations and laws developed by countries which differ from the South African context in that they may be deemed more economically stable and at the forefront of world politics, amongst other things. Despite implementing systems which are comparable with world leaders, in the hope of developing along such lines, this paper believes that greater notice needs to be given to internal conflict-causing issues such as a faltering economy, structural inequality, a

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<sup>8</sup> Du Toit, D *What is the Future of Collective Bargaining (and Labour Law) in South Africa?* (2007)p. 1405.

<sup>9</sup> *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA).

<sup>10</sup> Labour Relations Act (Act 65 of 1995). As seen in the objectives of the Act.

<sup>11</sup> Anstey, M *Negotiating Conflict* (1991) at 357-358.

<sup>12</sup> Grogan Op Cit note 7 at 346-348.

deep seated history of violence, unemployment and labour-management mistrust but to name a few.<sup>13</sup> It is the labour-management mistrust which this paper will attempt to address. As Kahn-Freund stated, the singular worker-employer relationship “is typically a relation between a bearer of power and one who is not a bearer of power... to [which] the law itself can do little to equalize [the] imbalance.”<sup>14</sup>

Du Toit and Ronnie (2012) provide for a different scenario which is equally problematic to the future of collective bargaining. They state that collective bargaining bears its roots in a period where collectivised employment was prolific and law was needed to rectify the inequality which was evident within the working relationship. The issue comes in the potential inability for labour law to continue to maintain its function in the ‘globalisation’ period.<sup>15</sup> The issues which raise themselves within this framework might include technological developments, the need for greater flexibility and externalization, the disintegration of the individual workplace and an increase in non-standard forms of employment.<sup>16</sup> This decrease in collective organisation, around which the LRA revolves, may call for “new, more appropriate forms of collective representation... to place workers... in a position to bargain effectively.”<sup>17</sup> Although this does not pertain directly to the subject of this paper, it provides a necessary insight into the changing layout of the labour force. In order for differing systems of collective participation and representation to be developed, this paper first needs to understand the purposes of the company and understand the base as seen from a financially beneficial point of view.

The Corporation, as represented by the institution of a company, is the meeting point for the Companies Act 71 of 2008 (CA). It provides the base platform for this paper’s reference to analysing the perception of the corporation and its conflicting approach to satisfying the needs of stakeholders and those of shareholders. In terms of satisfying needs, the previous Companies Act of 1973 was based predominately on a shareholder model whereas the newer model developed through the CA places greater emphasis of the needs and interests of internal stakeholders with

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<sup>13</sup> Du Toit Op Cit note 8 at 1417-1421.

<sup>14</sup> Davis, P and Friedland, M *Kahn-Freund’s Labour and the Law*.(1983).

<sup>15</sup> Globalisation in this context refers to the globalisation specific to the labour force and factors which affect them such as increased externalization, increased competition, the lowering of global standards to be more competitive, increased non-standard employment and the global decrease in those belonging to trade union.

<sup>16</sup> Du Toit, D. and Ronnie, R. The Necessary Evolution of Strike Law in Le Roux, R and Rycroft, A’s *Reinventing Labour Law* (2012) at 197.

<sup>17</sup> Ibid at 199.

specific emphasis on employee and management mutual interests. It therefore is necessary for this paper to analyse the impact which company law plays on a corporation through understanding the nature of the CA. This will be done through highlighting its purposes, developments from previous acts and alignment to international standards. From this position, this paper can analyse the implications of company law on corporate governance.

Although it remains challenging to sum up the essence of ‘the company’, for the sake of this paper the approach adopted by Davis and L Roux will be followed. They define the company as a system of contracts formulated and driven by economic participants including investors, management, employees and creditors who formulate direction for personally motivated reasons.<sup>18</sup> Although, this summation may not grasp the true understanding of the company in depth due to the complexity of the context within which it functions owing to the conflicting interests that are apparent between labour and capital. Davis and Le Roux see the company defined as “the possessor of distinctive attributes that amount to the more than the total resources as computed by a simple addition of the contracts into which they are entered.”<sup>19</sup> In plain text, this means that investment of ‘human capital’ by an employee is seen as far more valuable when seen under the banner of the organisation and, likewise, that the capital investments made by investors is equally favoured in its outcomes under the same banner. Dodd expands on this train of thought by stating that taking “into consideration the welfare of employees... will in the long run increase the profits of [shareholders].”<sup>20</sup> Whilst this ‘ethical’ manner in which leadership should be conducted is vital, the primary purpose of the company still remains for profit maximization of the shareholder and it has maintained the duty of the director to maximize long-term profits whilst at the same time preserving stakeholder trust and assurance. Company law and corporate governance play an equally vital role as the LRA in labour relations due to their focus on, amongst other aspects, risk management, sustainability and directors duties.

Former minister of the Department of Trade and Industry, Mandisi Mphahla, believed that “company law provides the legal basis for one of the most important institutions organising

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<sup>18</sup>Davis, D. & Le Roux, M. Changing the Role of the Corporation in Le Roux, R. and Rycroft, A.’s *Reinventing Labour Law* at 307.

<sup>19</sup> Ibid at 307.

<sup>20</sup> Dodd, E *For Whom Are Corporate Managers Trustees?* (1931) at 1156.

and galvanizing the economy, namely, corporate business... Corporations, in various forms, are central to the country's economy and its prosperity - for wealth creation and social renewal."<sup>21</sup> He goes on to state that the choice for the development of the act was seen as necessary to keep up to date with international trends in company law and corporate governance as well as to mirror and adapt to the altering nature of the South African environment. Within the Department of Trade and Industry's review of the CA, it is stated that the paper is issued "to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy."<sup>22</sup> The CA and corporate governance have the ability to influence the resultant relationship and it is therefore imperative that we understand the nature of how it influences and in what way the two statutes, the LRA and CA, and corporate governance are able to interact to bring about a more favourable labour relations environment where multiple factors are seen as important for the existence and desired outcomes of the company. Understanding and developing policies surrounding risk and sustainability promote a sense of unity going forward and allow the manner in which labour issues are addressed to be preventative rather than symptomatic.

The concepts of corporate governance and labour law, despite the overlapping of their greater concerns, have been distinctly separate in their application within the history of South African business and the general economy. From an international perspective, many commentators have voiced their opinion that the traditional view on labour relations, and it being limited to the contract of employment, may not be sufficient to accommodate the shift, due to various external factors, and should rather focus on establishing a basis for "labour market regulation" where it would "incorporate into the analysis... certain features of commercial, competition and company law."<sup>23</sup> This extension of the foundation upon which labour regulations exist is understood to be of significance due to the understanding of business purposes which have now been developed to incorporate the interests of further stakeholders.<sup>24</sup> Additionally, they see the continued separation of the fields as an unsustainable option<sup>25</sup> with

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<sup>21</sup> The Department of Trade and Industry of South Africa. *South African Company Law for the 21<sup>st</sup> century- Guidelines for Corporate Law Reform (May, 2004)* at 3.

<sup>22</sup> *Ibid* at 7.

<sup>23</sup> Deakin and Wilkinson *The Law of the Labour Market (2004)* at 2-4.

<sup>24</sup> As seen in the Triple Bottom line of King III.

<sup>25</sup> Jones, M Mashall, S and Mitchell, R *Corporate Social Responsibility and the Management of Labour in two Australian mining industry companies (2007)* at 4.

commentators in the United Kingdom taking the view that there should be understood “economic advantages which flow from cooperation between labour and management.”<sup>26</sup> Australian scholars have also attempted to seek clarity on these points through the funding of a project titled “Corporate Governance and the Workplace” where potential balances are sought between management practices, economics and human resources aligned to the scope of labour law.<sup>27</sup>

Fredman believes that developmental policy thought needs to extend to “face modern challenges”, and aligned to this, he stresses the concept that “transformative labour law finds itself in social democratic debate”.<sup>28</sup> Despite its significance, very little attention is given to the functioning of labour relations as part of the larger, holistic and more integrated model of an organisation. In general terms, the purpose of management is to realise goals specific to their company with the final outcome being product-maximization and wealth creation. Whilst labour relations forms only a functional role within this strategy framework, it has become increasingly recognised through not only its link to the maintenance of human capital but also the perception surrounding sustainable relations and their positive financial implications. Strategy according to Slabbert et al, “comprises [of] an examination of the factors, methods and principles that enable a business to function as productively as possible to maximize its profits”<sup>29</sup>; This would include the process of aligning an organisation and its objectives with the external environment; this aforementioned process being one which is continually adapting and developing to accommodate the complex nature of an organisations external environment. As stated within King III: “Corporate governance is, in essence, a company’s practical expression of its ethical standards.”<sup>30</sup> Within this frame of reference, the view of sustainable labour relations needs to be incorporated into a means for achieving competitive advantage for an organisation through extendable labour related policies and platforms.

When determining how sustainable proportions might be achieved with regard to the LRA and company law, this paper sought not to find a means through which the laws surrounding labour management could be changed but rather attempted show an altered approach

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<sup>26</sup>Deakin and Wilkinson Op Cit note 23 at 12.

<sup>27</sup> Project run through the *Centre for Corporate Social Responsibility* and the *Centre for Employment and Labour Relations Law* at the University of Melbourne.

<sup>28</sup> Freedman, S *The Ideology of New Labour Law* (1995) at 9, 39.

<sup>29</sup> Slabbert, J., Prinsloo, J., Swanepoel, B., Backer, W *Managing employment relations in South Africa* (2006) at 114

<sup>30</sup> King III: Point 12.

to how the mechanisms may be implemented and developed so as to moderate their currently conflictual outcomes. As stated by Du Toit and Ronnie, the potential which lies behind altering the way in which labour and management communicate and trust one another “may mitigate some of the worst problems associated with strikes in South Africa.”<sup>31</sup> As stated by Thompson, and aligned to the direction of this paper, “the core case for any system of collective bargaining is that structured dialogue is the best method of appropriately and fairly maximising the shared interests and reconciling interests of the primary workplace stakeholder.”<sup>32</sup> With this in mind, this paper sought to understand not only the internal context within which labour relations exists in South Africa but also differing regulatory approaches and best practices from a foreign perspective.

When analysing foreign systems and practices, this paper chooses not to attempt to determine overarching systems which may be effective in other countries but will rather attempt to determine the more subtle approaches they may have adopted towards stakeholder inclusivity which are producing results of positive proportions and the mitigation of adversarial relations between labour and management. In doing so, Ireland’s *Sustainable Partnership Agreement*, the Advisory, Conciliation and Arbitration Services (ACAS) *Model Workplace* in the United Kingdom and the statutory duty to bargain in good faith in Australia, will be analysed and developed in an attempt at understanding how they might be amalgamated and built into labour-management related best practice principles locally so as to achieve outcomes of sustainable proportions.

Whilst it remains necessary to gauge the South African labour relations system against that of foreign policies and practices, it remains imperative to first understand the foundation of the system and in doing so determine what may or may not be considered effective and aligned to the desired direction of sustainable relations. For this paper to understand how the voluntarism and the right to bargain collectively have manifested themselves within the South African regulatory system, it is imperative that this paper understand their bases and how these platforms allowed them to develop along these paths. The roots of the South African collective bargaining

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<sup>31</sup> Du Toit and Ronnie Op Cit note 16 at 216.

<sup>32</sup> Thompson, C *Dispute Prevention and Resolution in Public Services Labour Relations: Good Policy and Practice* (2010) at 35.

system can be found in two separate channels; the policies of the International Labour Organisation (ILO), and the Constitution of South Africa.

## 2. *The Constitution.*

### 2.1. *Section 23: The right to bargain, and fair labour practices.*

Whilst other aspects of the Constitution may be applicable to the context of labour such as those pertaining to discrimination, child labour and hazardous environments, section 23 dealing with Labour Relations will be the focus of this chapter. Not only does the Constitution, finalized in 1996, provide the base of rights around which labour relations is construed, it also contains within it policies as to how legislation should be interpreted and the manner in which this will be done. Through provisions in the Constitution, not only does it invite the use of foreign and international law in interpretations but it also aims to “promote the values which underlie an open and democratic society based on human dignity, equality and freedom.”<sup>33</sup> Within this, it can be seen the creation of an open-ended right to strike as well as no indication by the constitutional assembly as to the form and level which collective bargaining should take; emphasizing these intentions by disallowing the development of any form of legislation surrounding the determination of these.

The role of the Constitution is not to regulate the behaviour of actors but rather to act in conference with the legislation which is developed to give effect to it; to be a lens through which it is viewed. The main focus of section 23 is to allow an ability to organise and take part in the process of collective bargaining whilst being treated fairly and in a manner consistent with the Bill of Rights. The right to organise, *inter alia*, contains within it the freedom of formation, of joining and of participation of activities associated with industrial action whilst “fairness” within this context means the assurance that all the positive freedoms contained within the section will be respected and that it will not be unduly limited by a narrow interpretation of the law.<sup>34</sup>

The line “right to engage in collective bargaining”<sup>35</sup> and in essence the extent of the right to organise for industrial relations purposes has been subject to much contentious debate as symbolized by the SANDU cases which reached the Constitutional Court. The Constitutional Court upheld the verdict reached by the Supreme Court of Appeal in *SANDU v Minister of*

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<sup>33</sup> S. 39 (a), (b), (c).

<sup>34</sup> *NEHAWU v University of Cape Town*; para 33-35.

<sup>35</sup> Section 23 (5) of the Constitution.

*Defence & Other*<sup>36</sup> that the Constitution, although it placed no limitation on the right to organise, held within it no implied duty to bargain and that because the LRA was formed to provide expression of section 23 of the Constitution, and it contained no clause regarding a duty to bargain, the Constitution itself could not have intended to have an implied interpretation either.<sup>37</sup>

The court came to this conclusion by drawing on the inclusion of the word “engage” in the statute, which differed from the interim constitution, stating that the deliberate inclusion of the word must have emphasized the desired distinction and direction, by those who developed the statute, between the choice to make it a freedom rather than a right.<sup>38</sup> The difference, as stated by the court, is that to create a duty to bargain involves fundamental changes to the collective bargaining process which would need to establish the manner in which bargaining would take place, the subject of the bargaining, and the establishment of thresholds within a system committed to workplace level bargaining.<sup>39</sup> Along with focusing on the wording of the Constitution, the court also relied on the emphasis which international authorities placed on creating a voluntaristic system with no implied duty to bargain.<sup>40</sup> Lastly, the court found that in seeking to give effect to section 23 (5)<sup>41</sup> of the Constitution, the LRA establishes rights, obligations, processes and institutions through which parties are able to realise effective collective bargaining. This can be seen through the second sentence of section 23 (5) which states that “[n]ational legislation may be enacted to regulate collective bargaining”<sup>42</sup> which is consistent with section 36 (1) of the Constitution; allowing for the limitation of a right so long as it can be justified and considered reasonable within an open and democratic society. It goes on to state that it could not have been the intention of the drafters to establish a system of policies and procedures, i.e. the LRA, only for the content of collective labour law to be constitutionalised and for two seemingly contradictory systems to exist. This would contradict section 39 (3) of the

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<sup>36</sup> *SANDU v Minister of Defence & Other* (1999) 20 ILJ 2265 (CC).

<sup>37</sup> Grogan Op Cit note 7 at 347.

<sup>38</sup> Cheadle, H. *Collective Bargaining and the LRA*. at 149.

<sup>39</sup> Ibid at 150.

<sup>40</sup> “Measures appropriate to national conditions shall be taken, where necessary, to *encourage* and *promote* the full deployment and utilization of machinery for *voluntary* negotiations between employer and employer organisations and worker organisations with a view to regulation of terms and conditions of employment by means of collective bargaining.” ILO Convention 98.

<sup>41</sup> S.23 (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

<sup>42</sup> Labour Relations Act (65 of 1995) of the Republic of South Africa.

Constitution which states that, *inter alia*, the legislative extensions will only be recognised if they are consistent with its objectives and purposes. When questioned on where the “right to exert economic pressure” fitted in, the judgment in the final appeal stated that although it formed a crucial aspect of the collective bargaining system, it was by no means the only avenue through which a desired outcome could be achieved. This ties into the essence of implying fairness into the industrial relations processes by understanding that it is the interests of both parties which need to be understood if the system is to be effective.

## *2.2. Section 233 and section 39 (1) (b) of the constitution and international law.*

Section 1 (b) of the LRA states that one of the purposes of the Act, amongst other aspects, is to “give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation” and section 3 that the LRA should be interpreted with the primary objectives in mind as well as in compliance with international obligations. Aligned to this are section 39 (1) (b)<sup>43</sup> and section 233<sup>44</sup> of the Constitution with consideration to its interpretation. International standards, as will be explained below, are recognised and replicated through the Constitution of South Africa under section 23 allowing it to remain an important reference point for employment relations.<sup>45</sup> With regards to the application of international law, courts within South Africa have expressed through numerous cases the fundamental importance

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<sup>43</sup> S. 39(1)(b): When interpreting the bill of rights, a court... must consider international law.

<sup>44</sup> S.233: When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

<sup>45</sup> *\*only those which are applicable to the 'right to bargain' scenario.*

(2) Every worker has the right-

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) To strike.

(4) Every trade union and every employers' organisation has the right-

- (b) to organise; and
- (c) To form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in Collective bargaining. National legislation may be enacted to regulate collective bargaining. TO the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

of using international law when considering section 23 of the Constitution.<sup>46</sup> The ILO constitution states that it “reaffirms the fundamental principles on which the organisation is based and, in particular, that a) labour is not a commodity [and] b) freedom of expression and association are essential to sustained progress.” Convention 87<sup>47</sup> and convention 98<sup>48</sup> of the ILO charter remain the most important for the purposes of this paper. Convention 87 maintains the general protection of the right to organise as well as protects the freedom of association. Convention 98 outlines the right to organise and collective bargaining; developing on this, article 4 within this convention states that “measures appropriate to national conditions shall be taken... to encourage and promote the full development and utilization of machinery for voluntary negotiations... with the view to the regulation of terms and conditions of employment by means of collective agreements.” The ILO committee of Freedom of Association also states that collective bargaining can only be effective if it commands a voluntaristic nature.

The ILO provides a definite direction towards how its members should treat the labour force; many of these are also aligned to the desired direction of the Constitution of South Africa with regards to labour practices. This is again reaffirmed through stating that successful collective bargaining must command a voluntary character and not demand procedures of compulsion which would modify this voluntary nature. In summation of the international approach to collective bargaining, it aims to promote a voluntary system where collective bargaining is seen as a freedom as opposed to a judicially enforceable right and where they expressly do not distinguish what form collective bargaining should take. The main aim from an international perspective is to allow a base framework from where member states are able to adopt policies which allow them to effectively implement collective bargaining structures, of a voluntaristic nature, into their laws.

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<sup>46</sup> See (National Union of Metal Workers of South Africa and Others vs. Bader Bop (Pty) Ltd. and the Minister of Labour)

<sup>47</sup> Convention 87: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

<sup>48</sup> Convention 98: The Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

### 3. *The LRA.*

#### 3.1. *Voluntarism and the right to bargain.*

To understand the relationship between employer and employee, it is necessary to appreciate the purpose and structures of the labour market regulator that is the Labour Relations Act 66 of 1995 (LRA). The Reconstruction and Development Program (RDP), entered into by the tripartite alliance, saw the creation of a “single set of statutes that would provide equal rights for all workers, basic organising rights... [and] a system of collective bargaining at national, industrial and workplace levels with industrial councils empowered to negotiate industrial policy.”<sup>49</sup> Not only was this statute required to be aligned to the Constitution, it was also seen as a means through which the government could show its commitment to labour-involvement within future goals and strategy development. On a broad level, the primary focus of Labour Law in general is to make available protection for employees through the imposition of regulation and standards.<sup>50</sup> American labour commentator Klare saw this purpose as fulfilling four goals; these included the “promotion of economic growth, macroeconomic management, the protection of fundamental rights and the redistribution of wealth and power within the employment context”.<sup>51</sup>

Without spending too much time on the matter, as it is not the intention of this paper, the LRA’s implementation of the joint-decision making processes has been highly criticized and wide-spread. These ventures took the form of workplace forums which were intended to provide a counter to the adversarial nature of the LRA by providing a platform from where employees and trade unions could have their voices heard on matters where joint-problem solving and participation could have been efficient in the resolution of internal conflicts; in essence creating a link between the understanding of management and its labour force. All things considered, the general perception is that the institution and implementation of workplace forums has largely been unsuccessful with numerous criticisms.<sup>52</sup> The general aim of providing a platform for greater participation represents one of the areas which might alleviate the tension and conflict

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<sup>49</sup> <http://www.polity.org.za/polity/govdocs/rdp/rdp4.html> (accessed 27/03/2014).

<sup>50</sup> Benjamin, P. Labour Law beyond Employment in: *Reinventing Labour Law*. (2012) at 22.

<sup>51</sup> Klare, K “Countervailing workers' powers as a regulatory strategy” in Collins, H et al *Legal Regulation of the Employment Relation* (2000) at 68.

<sup>52</sup> Godfrey, S *The State of Collective Bargaining in South Africa: An empirical and Conceptual Study of Collective Bargaining* (2007) at 5-6. In fact, very few workplace forums have ever been established since the inception of the clause.

which is currently evident between labour and management and would be worth serious consideration for future commentators.

In a broad sense, the preferred outcome of the collective bargaining process is for parties to reach agreement; the means through which this is made possible is through demands and compromise. Similar to the international benchmarks mentioned in above paragraphs and our Constitution, the LRA provides no explicit duty to bargain upon an employer. It instead promotes the concept of collective bargaining through a voluntaristic approach by providing rights and freedoms to trade unions according to their level of representation within a certain workplace or at a sectoral level.

The collective law aspect of the LRA provides these alternative avenues through which desired outcomes may be achieved and in doing so, provides a means via which employers, employers' organisations and trade unions are able to attempt to settle their conflictual desires through intended compromise and understanding. The LRA mirrors the Constitution in granting the labour force the right to freedom of association and the freedom of participation.<sup>53</sup> The LRA's approach to collective bargaining can be broken down into two pillars which represent the rights and freedoms associated with the 'right to bargain'. The first is the "right to engage in collective bargaining". This is a negative right, meaning that there is no judicially enforceable policy compelling any duty upon any party but rather a system where collective bargaining is encouraged and allowed to take its own direction. The primary aim to its construction as a negative right is generally to avoid a scenario where legislation or the Constitution is enacted to make the process of collective bargaining unlawful.<sup>54</sup> This 'encouragement' takes the form of the

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<sup>53</sup> LRA S.4.(1) Every employee has the right-

- (a) to participate in forming a trade union or federation of trade unions; and
- (b) to join a trade union, subject to its constitution.

(2) Every member of a trade union has the right, subject to the constitution of that trade union-

- (a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers, officials or trade union representatives;
- (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and
- (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-

- (a) to participate in its lawful activities;

<sup>54</sup>Deakin and Wilkinson Op Cit Note 23 at 147.

protection of the freedom of association, the freedom of formation, and the foundations of numerous structures and institutes revolving around tools for dispute resolution, negotiation and conciliation.

The next pillar involves the implied use of economic force, through the collective bargaining structures, in the attempt to gain a desired goal. The Constitutional Court stated that “once a right to collective bargaining is recognised, implicit within it will be the right to exercise some economic power against partners in collective bargaining.”<sup>55</sup> Within the LRA, the ‘right to bargain’, therefore the right to use economic force, is symbolic of a range of rights and freedoms which aim to develop a structure within which orderly collective bargaining can take place at sectoral level and where joint-decision making and effective dispute resolution are evident in the formulation of industrial policies.<sup>56</sup> As stated before, although the LRA does not contain within it anything with regards to a duty to bargain, it affords registered trade unions the ability to gain organisational rights through achieving levels of representation and, in spite of these rights, it does not compel an employer to engage in collective bargaining, instead it merely facilitates collective bargaining. As stated by Du Toit, the aim of organisational rights is to allow “unions to build up a sufficient degree of power to persuade employers to negotiate.”<sup>57</sup> Developing this thought, they create an entitlement by which recognition is generally achieved and agreed upon although Godfrey *et al*, state that “organisational rights have not been an adequate substitute for the duty to bargain.”<sup>58</sup> Organisational rights are attained through the LRA by the formulation of a recognition agreement with an employer or through being a constituent of a bargaining or statutory council.

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<sup>55</sup> Constitution of the Republic of South Africa, no. 108 of 1996.

<sup>56</sup> LRA Section 1 (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes

<sup>57</sup> Deakin and Wilkinson Op Cit note 23 at 198.

<sup>58</sup> The outcome of what is occurring in this statement being the decline in plant-level bargaining.

These organisational rights have been deemed fundamental to the ‘correct’ functioning of collective bargaining. The courts in the case of *NUMSA v. Bader Bop* were set with the task of determining whether trade unions who did not meet statutory representation levels could strike in support of organisational rights as per sections 12 to 15 of the LRA and therefore satisfying their claim to a right to engage in collective action. The court<sup>59</sup> spelt out an expansive understanding of the provisions contained within section 23 stating that it was imperative to recognise the “dynamic nature of the wage-work bargain and the context within which it takes place.” In developing this concept of context specific relationships, the court added that *any* reading and application of section 23 of the Constitution should start with the consideration of the significance of these rights in the endorsement of a fair-working environment. The key consideration, with regards to negotiation, is the constitutional “right to engage in collective bargaining” which is granted to every trade union, employers’ organisation and employer.<sup>60</sup>

The organisational rights contained within the LRA fall between section 12 and section 16. Sections 12, 13 and 15 allow thresholds for sufficiently represented<sup>61</sup> trade unions to be granted access to the workplace by means of a representative, the deduction of levies and leave for trade union officials. Sections 14 and 16 are granted to registered trade unions or trade unions acting jointly who enjoy a majority representation. These allow for trade union representation as well as the disclosure of information subject to certain provisions. Despite allowing for these rights, the LRA provides no support beyond what these hold and the legislation has refrained from attempting to create a ‘one size fits all’ framework. Channels are left open for parties to determine what level they choose to bargain at, what the subjects shall be during the negotiations and the manner in which parties conduct themselves. This ‘hands-off’ approach taken by the courts can be seen in the judgment of *Entertainment Commercial Catering & Allied Workers Union v. Southern Sun Hotel Interests (Pty) Ltd*<sup>62</sup> where the court held that it was not able to provide quantitative levels to determine whether a trade union was eligible for rights, however it saw no statutory provisions which barred it from engaging in collective bargaining in the process

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<sup>59</sup> *National Union of Metal Workers of South Africa and Others vs. Bader Bop (Pty) Ltd. and the Minister of Labour.*

<sup>60</sup> Constitution of the Republic of South Africa S. 23 (5).

<sup>61</sup> The LRA and the courts have refrained from placing a figure on “sufficiently represented” and have rather chosen to allow parties to determine these levels on their own accord. Despite this, certain levels of reasonableness are seen within good faith practices and negotiations.

<sup>62</sup> *Entertainment Commercial Catering & Allied Workers Union v. Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC).

of seeking organisational rights whilst at the same time placed no obligation for employers to bargain. The judge extended this view by emphasizing the importance of the ability to strike within the process of collective bargaining and by stating that because there contained no negative right within the LRA, it could not have been the intention of the constitution to limit the right to strike for such a scenario.

The gaining of organisational rights represents a crucial role in the collective bargaining process and allows the ability of trade unions and the labour force to exercise their right to engage in industrial action. With collective bargaining taking place at both workplace and sectoral level, it remains an essential component of representing the interests of employees. Mischke depicts this role of, and necessity for organisational rights when he states that “organisational rights for trade unions are a pivotal part of the LRA’s scheme of promoting and protecting collective bargaining: they are a necessary corollary to the LRA’s voluntaristic collective bargaining approach, and provide trade unions with the essential elements for not only securing an organisational foothold in the employer’s business, but also laying the foundation for a future collective bargaining relationship... without organisational rights, it would be difficult indeed for a trade union to gain the power it needs to function effectively in representing the interests of its members.”<sup>63</sup>

In Kahn-Freund’s statement we are able to understand the essence of this when he states that “the effectiveness of the law depends on the unions more than the unions depend on the effectiveness of the law.”<sup>64</sup> To develop this thought, for effective collective bargaining to take place other issues of social, political, economic and psychological parameters need to be understood within the labour regulatory framework. Therefore, if collective labour law’s primary purpose is to be seen only as the platform from where effective collective bargaining can take place and evolve, it may be limiting and unable to capture the true depth of what is really encased within this working relationship.<sup>65</sup> As stated by Du Toit and Ronnie (2012), the effectiveness of the legal framework will depend on how it is able to meet the continually

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<sup>63</sup> Mischke, C *Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA* (2004) at 51.

<sup>64</sup> Davis and Friedland Op Cit note 14 at 868.

<sup>65</sup> Du Toit Op Cit note 8 at 22.

changing social dynamics and realities which it faces within a South African context.<sup>66</sup> They believe that the “disjuncture between law and reality is perhaps reflected most starkly in the heavy emphasis placed on voluntarism in the statutory framework.”<sup>67</sup> The collective bargaining system which South Africa has implemented is one which works. Unfortunately, it is not one which seems to work within the context of South Africa where the economy continues to depreciate, the numbers of strikes exponentially increase and an inordinate amount of days are lost to the strike process each year.<sup>68</sup>

### *3.2. Adversarialism and the lack of a duty to bargain in Good Faith.*

Despite the intentions of the drafters of the LRA, South African employment relations have increasingly become adversarial in nature. During the construction of the LRA, as stated in above paragraphs, the drafters opted for the act to represent a voluntary nature where trade unions and employers alike were given the option of whether they wanted to engage in the process of collective bargaining or not. Let it be stated that this desired approach to sectoral level bargaining has many positive aspects which include the uniformity of standards, the avoidance of a lowering of standards by organisations to increase competitiveness and a sense of equality throughout the sectors with the promotion of fair labour practices being essential. Not only does it have its positive intentions but it was also formed during a period where trade unions were much more mature and stable, when social dialogue was more apparent and it was assumed that it would only be registered trade unions that would possess the necessary control and representivity to engage in industrial action.<sup>69</sup> The refusal to impose a judicial duty to bargain and the lack of an imposition to bargain in good faith has resulted in an uncontrolled environment where power based bargaining is seen as the most efficient means to an end with trade unions having developed an over dependence on their ability to strike.

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<sup>66</sup> Du Toit and Ronnie Op Cit note 16 at 196.

<sup>67</sup> Ibid at 200.

<sup>68</sup> Semono, M *Annual Industrial Action Report*. 2012 at 5-7. Industrial action accounted for over 3 million working days lost over the year where 99 strikes took place, 45 which were unprotected, resulting in R6,6 billion loss in wages and even greater loss to business.

<sup>69</sup> Godfrey, S Theron, J and Visser, M *The State of Collective Bargaining in South Africa: An empirical Study of Collective Bargaining*. (2007).

It is unfortunate that the nature of these strikes have become misaligned to the intentions of their implementation. Picket lines now represent an area of major conflict, private security firms are quickly called in to the scene and trade unions take no responsibility and accountability for those who participate in unlawful action. As stated by the judge in *FAWU v. Premier Foods Limited and Others*,<sup>70</sup> “Strikes that are marred by... violent and unruly behaviour are extremely detrimental to the legal foundation upon which labour relations in this country rests.” Not only is this violent outcome not the intention of the LRA<sup>71</sup> but it also means that costs to strikers, trade unions, organisations and the economy are often neglected and replaced by a need to assert and display power.

The court in *Stuttaford Department Stores v. SACTWU*<sup>72</sup> stated that “the policy is that the courts should stay away from the collective bargaining arena and should not be available for assistance to any one of the parties who may seek the assistance of a court when it feels the pinch. If one of the parties cannot bear the pain in the fight, it can do one of three things: (I) it can conclude a compromised agreement with the other party in settlement of the dispute and ensure its own survival; (II) it can capitulate and accede to the other party’s demands; (III) it can continue with the fight and risk destruction-annihilation.” This statement allows us a platform to understand how the perception of industrial action has taken on an unintended connotation with the judge using descriptions such as “fight”, “pain”, “survival” and “compromised agreement” to describe the process of collective action.

From all angles of looking upon the current labour relations environment in South Africa, it can be seen that it is under pressure to adapt. No statement is more symbolic of this dispensation than that of a COSATU member who stated that “in South Africa, there is no other way that the workers can be heard. Violence and strike is the language that [bosses] hear better” in wake of the proclamation made by the trade union umbrella organisation that as many as half of their members believed that violence was necessary in the process of strikes if it was to be considered

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<sup>70</sup> *FAWU v. Premier Foods Limited and Others* (2012) 34 ILJ 1171 (LC).

<sup>71</sup> The LRA aims to promote the labour peace, effective resolution of labour disputes and to promote orderly collective bargaining through systems of stability.

<sup>72</sup> *Stuttaford Department Stores v. SACTWU* (2001) 22 ILJ 414 (LAC).

effective.<sup>73</sup> It is evident that the current system is not having the desired effects of sustainable relationships within an open and democratic society which it intended, as is evident from the inclusion of violence into strike action which has become endemic. It is time that the system be re-envisaged on a societal, business or legislative level to counteract, if not avoid, the adversarial nature which has led us down this road.

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<sup>73</sup> IOL article *Violence is Necessary, Say COSATU members* (7 September 2012) accessed at <http://www.iol.co.za/news/crime-courts/violence-necessary-say-cosat-members-1.1377869#.Uzk3OfmSySo> (accessed 29/03/2014).

#### 4. *Company Law and Corporate Governance.*

##### 4.1. *Company Law*

##### 4.1.1. *The Companies Act 71 of 2008: Past and Present.*

Company law in South Africa dates back to the mid-nineteenth century where it adopted an exact replica of the equivalent English legislation. Despite the transition to alternative company law, the Companies Act 61 of 1973 (The 1973 Act) was based predominately on the foundation set by English law where the shareholder is seen as the imperative interest of the company and where many of the changes which the new CA incurred were of a technical nature.<sup>74</sup> This approach is aptly noted by Milton Friedman when he stated that “there is but one and only one social responsibility of business- to use resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”<sup>75</sup> The shareholder model is one which places emphasis on subjecting the role of directors so as to benefit those who place capital in their stocks. Within this system of thought, the primary focus is on profit maximization for the shareholder group and the interests of other stakeholders are engaged with only when they result in profit maximization for the company and for the shareholders.<sup>76</sup>

Despite Friedman’s sentiments, on an international stage, company law has been largely dynamic and flexible according to the demands of the market and broader society. However, the South African law has remained largely rigid in its approach.<sup>77</sup> Whatever the reasons were in the past for the rigidity, there seems to have been an understanding between all parties concerned that companies in South Africa and its context can have an impact on the community within which it develops itself. The aim of this approach is therefore to promote that whilst searching for economic success, directors and those involved in the day to day running of the company should align themselves to the Constitution and its intended outcomes. Therefore, the interests should be equally weighted as suitable and necessary for the context. This direction is similarly recognised in King III where it refers to this desired approach as the triple-bottom line that encapsulates economic, social and environmental concerns.

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<sup>74</sup> Olson, J *South Africa moves to a global model of corporate governance but with important national Variations* (2010) at 219-222.

<sup>75</sup> Friedman, Milton (1978) *Milton Friedman Speaks* (Video). *The Idea Channel*. Extract available at: [www.youtube.com/watch?v=ev\\_Uph\\_TLLo](http://www.youtube.com/watch?v=ev_Uph_TLLo). (Accessed 22/04/2014).

<sup>76</sup> Department of Trade and Industry at 24.

<sup>77</sup> King III 446-448. Up until 2008 when new models were introduced and the focus of the business began to alter.

Within the formal sector of employment, company law and labour law represent the legal parameters within which the corporation attempts to balance and direct the resultant relationship where labour and capital come together.<sup>78</sup> It does so by allowing the formation of companies and organisations, which exist in conformity with the Bill of Rights, within a “predictable and effective environment”.<sup>79</sup> In line with the Constitution of the Republic of South Africa, the CA explicitly identifies that it intends to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”<sup>80</sup>. Not only does this apply to the interpretation but it also indicates an instruction that human rights should feature at the forefront of policy considerations and should be viewed as a crucial element of the integrated purpose and function of the corporation. This is emphasized again through section 158 (a) of the CA which states that courts should extend the common law to allow for the realization and accordance of rights established by the act.<sup>81</sup> There are numerous provisions which emphasise the need for the CA to be interpreted with the Constitution in mind and therefore aligned to the purposes of section 7. The judge in *Nedbank Ltd. v Bestvest (Pty) Ltd.*<sup>82</sup> depicts this aptly when he states that “corporate law too must now be considered in a constitutional setting”<sup>83</sup> and that the Act must be interpreted so as to promote the development of the economy as a whole while encouraging entrepreneurship and efficiency, flexibility and relative simplicity in the maintenance of companies and, importantly, promoting transparency and high standards of corporate governance.

These purposes provide a clear indication of the role that drafters envisaged which organisations can play in South Africa; an indication which sees businesses as a crucial component of achieving a desired effect of economic growth, responsible management and sustainable relations. These purposes, as a whole, are consistent with a common perception of company law in that it aims for “the facilitation of profit maximization and risk taking in an environment that provides statutory protection for outside contracting parties and

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<sup>78</sup> Department of Trade and Industry at 3 .

<sup>79</sup> Promulgated in April 2009 and came into force in April 2011. S. 7 (1) .

<sup>80</sup> Constitution of South Africa: Section 39 (2) which intends to “promote the spirit, purport and objects of the Bill of Rights.”

<sup>81</sup> Constitution of South Africa: Section 158 (a).

<sup>82</sup> *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest and Another* [2012] 4 All SA 103 (WCC) (12 June 2012).

<sup>83</sup> *Ibid*; p. 8, Point 18.

shareholders.”<sup>84</sup> Throughout the purposes, this paper recognises that long term profit maximization and the promotion of human rights are both seen as desired outcomes in the emphasis that it places on sustainability, transparency and high standards of corporate governance. Two purposes of the act stress the broader role of the corporations; firstly in section 7 (b) (iii) where it incorporates the “significant role of enterprises within the social and economic life of the nation” and secondly in 7 (d) where it “reaffirm[s] the concept of the company as a means of achieving economic and social benefits.” As per comments made by Mervyn King<sup>85</sup>, the statute extends the obligations of the corporate sphere outside the linear approach which it has so traditionally adopted under the 1973 Act. Additional to those purposes mentioned above, it includes encouraging entrepreneurship, enterprise efficiency<sup>86</sup>, active participation<sup>87</sup> and a balance between the rights of shareholders and directors.<sup>88</sup> The change in company law alters the very essence of the shareholder model and requires future contemplation as to the purpose of the enterprise and for whose benefit it exists.

Whilst this may not mean that there has been an outright transition away from the shareholder model of company law, the inclusion of factors such as corporate social responsibility, recognition of alternative stakeholders and the development of codes of good corporate governance<sup>89</sup> show a growing sense of the greater considerations which need to be amalgamated into the internal functioning of a company’s business model. Section 7 of the CA has a drastic effect on the long-standing perceptions of company law in its movement away from the age old thought process’ of the company existing for the benefit of the shareholder. As stated by Katzew, this transition, with regards to the new purposes and the alignment with the Constitution, will require a “re-evaluation of the principles that underpin the very basis of the South African Company Law”<sup>90</sup> through its ability to require a director to act in good faith and for the best interests of the organisation. In developing this concept, directors duties have a received a major boost through the CA. By recognizing someone as a director, company law believes that a certain standard of ethical conduct needs to be attained. This is in accordance with

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<sup>84</sup> Katzew, J. *Crossing the Divide Between the Business of the Corporation and the Imperatives of Humans Rights- The Impact of Section 7 of the Companies Act of 2008*. Johannesburg: University of Witwatersrand. at 690.

<sup>85</sup> Taken from a speech given by King at the University of Witwatersrand on 8<sup>th</sup> March 2010.

<sup>86</sup> The Companies Act, 71 of 2008. section 7 (b)(i).

<sup>87</sup> Ibid, Section 7 (f).

<sup>88</sup> Ibid, section 7 (i).

<sup>89</sup> As seen in the bottom-line approach taken throughout King III (see subsequent paragraphs).

<sup>90</sup> Katzew Op Cit note 94 at 691.

section 76 of the CA which deals with the obligation for directors to deal with company matters in good faith, for its best interest and with a thorough and reasonable level of skill, experience and knowledge as per the position.<sup>91</sup> In synopsis, the CA makes it apparent that the interests of shareholders are prioritized ahead of those of stakeholders, it does however create the possibility of the company allowing itself to exist for the benefit of its employees and the greater society within which it exists.

#### *4.2. Corporate Governance.*

##### *4.2.1. The Nature and Purpose of Corporate Governance.*

On corporate governance, Sir Cadbury stated that “[it] is concerned with holding the balance between economic and social goals and between individual and communal goals... The aim is to align as nearly as possible the interests of individuals, corporations and society.”<sup>92</sup> Despite how this report was released in 1992, and may thus be behind on where corporate governance lies at present, it still provides a very real indication as to the desired direction and outcomes which corporate governance and its implementation aim to achieve. Accordingly, King III states that “good governance is not something that exists separately from the law and it is entirely inappropriate to unhinge governance from [it].”<sup>93</sup> It therefore remains imperative for this paper to first understand the relationship between the CA, as discussed above, and corporate governance as represented by King III, and how they complement one another thus creating a need for its implementation.

Corporate governance has been described as the way in which companies are controlled and managed according to principles of responsible directorship focusing on transparency, accountability and the alignment to the interests of stakeholders.<sup>94</sup> The need, on an internal level, therefore comes in allowing corporate governance to go one step further than Company Law by providing internal platforms for integrated assessment and for showing greater concern for the interaction which occurs between economic and social actors allowing companies to become

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<sup>91</sup> Companies Act; Section 76 (3)(b).

<sup>92</sup> Cabury, A. 2000. *Global Corporate Governance Forum*. Washington DC: World Bank Report.

<sup>93</sup> King Code of Governance for South Africa 2009: Institute of Directors in South Africa at 6.

<sup>94</sup> Naidoo, R. 2009. *Corporate Governance: An Essential Guide for South African Companies*. Pietermaritzburg: Juta & Co. Pty. Ltd. at 3.

greater corporate citizens where the preservation of relationships is used for financial continuation reasons. Compliance with corporate governance standards therefore implies good business as properly managed organisations are more investable and therefore are more likely to achieve sustained growth. One of the desired objectives of corporate governance is to create a base from where investors feel confident to supply their capital and thus contribute to the development of business and the economy.<sup>95</sup> But this confidence is created through having a consistently stable reputation where disclosure of information is high, accounting standards are rigid and director accountability is well enforced, amongst other aspects. Accordingly, examples show support for firms with good governance. For one, 80% of investors who took part in a survey conducted by McKinsey stated that they “would pay more for the shares of a well governed company than for those of a poorly governed company with comparable financial performance.”<sup>96</sup>

Discussion surrounding corporate governance has previously taken place in a sphere of academic talk and discussions on voluntary codes of good practice but over the past few decades, its development surrounding liable leadership and responsibility towards broader implications of business has transformed the global perception of corporate governance into something with greater scope and an aspect at the forefront of business development. As mentioned in the discussion on Company Law, this scope includes greater recognition by business actors that there needs to be enhanced interdependence between business and society as well as superior standards of ethics for mutual long-term success to be a viable option. The CA is the first act, produced as a South African statute, to integrate issues of corporate governance which revolve around strategy, risk management and sustainability<sup>97</sup> as seen in section 76 which dealt with a director’s fiduciary duty surrounding acting in good faith and acting for the best interests of the company.<sup>98</sup>

The 1973 Act contained within it no compulsion with regards to matters of corporate governance and they were thus implemented on a voluntary basis under the previous King

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<sup>95</sup> Olson Op Cit note 74 at 220.

<sup>96</sup> McKinsey and Company; Investor Opinion Survey. Conducted June 2000. at 1.

<sup>97</sup> Reform consisted predominantly on shareholder and investor protection, responsibilities of the board of directors and disclosure. Accountability of managers towards shareholders and stakeholders was also given preference but more on a broad level of dialogue.

<sup>98</sup> See prior-chapter on Company Law for this explanation.

guidelines.<sup>99</sup> King III now represents standards a rung above the Companies Act, meaning that compliance with its requirements for corporate governance support and build upon legal compliance contained within the act. Essentially, the method of governance is now represented by a hybrid system which is partly legislated and partly voluntary.<sup>100</sup>

Due to its ever dynamic nature and need to be aligned to a societal context, the definition of corporate governance has generally not been rigid in how commentators have defined it. At a narrow level, according to King III, corporate governance is the “system by which companies are directed and controlled.” A broader understanding includes this same component of control through guidelines but includes the role which stakeholders and strategy play when interacting with various regulators such as company law, labour relations, environmental considerations and social implications. Owen believes that corporate governance “describes the framework rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations.”<sup>101</sup> Developing on this understanding, corporate governance not only represents the controls and guidelines for directors but also the practices and actions which are exercised by the previously mentioned authority. As Naidoo, with regards to the manner of management, states “effective leadership is characterized by ethical values of responsibility, accountability and transparency” with regards to risk management and sustainability.<sup>102</sup> It is therefore not about *creating* trust as much as it is about *preserving* trust.

For reasons mentioned above, it is evident that company law and corporate governance both have a role to play in the manifestation of business within the context of South Africa. Company Law provides the framework within which business exists while corporate governance sets the guidelines and standards which leaders must adhere to in the process of conducting business. Although it has been a relatively recent development in South Africa for Company law to be amalgamating issues of societal and environmental proportions into its route, corporate governance has for some time been concerned with these issues and it can be seen as a victory for the future of the economy and its ability to effect change on a broader scale that these have been included. Both the voluntary and obligatory aspects combine to expose the path forward for

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<sup>99</sup> Code of Corporate Practices and Conduct and King II.

<sup>100</sup> King III at 447.

<sup>101</sup> Report of the HH Royal Commission (Owen report) (2003).

<sup>102</sup> Naidoo Op Cit note 94 at 10.

South African business as a whole which is one where its particular socio-political needs are taken into account and the future is seen as a great consideration when determining what we do today.

#### 4.2.2. *King III*

Corporate governance found its voice in South Africa through the formation of the King Report on Corporate Governance (King I) which was first released in 1994. Subsequently, King II and King III have been released with developments of a pioneering nature occurring in both.<sup>103</sup> As mentioned above, not only does compliance with those principles set down specifically in King III presume compliance with the CA, but it has also become a requirement for companies listed on the Johannesburg Stock Exchange. According to Banhegyi, King III<sup>104</sup> and its prior reports can be acclaimed as the “most effective summary of the best international practices in corporate governance.”<sup>105</sup> Whilst many of the principles of King II were incorporated into the CA, King III still plays a crucial role in business regulation through its “apply or explain” approach of checks and balances which apply to all businesses.

King III commands no legal backing and is used predominantly as a means against which standards of reasonableness are measured. To reiterate, it performs the voluntary component of the ‘corporate governance-company law’ relationship whilst the CA performs the obligatory functions. Whilst there has been major debate on both a national level and international level surrounding this “one size fits all” approach to governance, many South Africans have accepted it. One of the reasons for this is the increased applicability which the new King code has as seen in its comment that it “applies to all entities regardless of the manner or form of incorporation or establishment and whether in the public, private or non-profit sectors.”<sup>106</sup> In addition companies listed on the Johannesburg Stock Exchange are now required to meet the standards set within the

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<sup>103</sup> King III at forward.

<sup>104</sup> King I recommended standards of conduct for the board and directors of an organisation and contained mainly financial and regulatory principles although it did recognise the role played by stakeholders. King II paid greater attention to the need for sustainable business by focusing more on risk management and integrated reporting. Much of King II became legislated into the Companies Act 61 of 2008.

<sup>105</sup> Banhegyi, S. (2007). *Management: Fresh perspectives*. Pearson Education: South Africa. at 317.

<sup>106</sup> King III at 3.

code with full integrated reporting and a positive statement of intent a necessity if they are to trade on the exchange platforms.

Whilst consisting of separate regulations under the previous King Codes, sustainability, governance and strategy have been amalgamated and companies are now required to report on them in a joint, integrated report. More emphasis is placed on alternative dispute resolution, risk based assessment of individual and business decisions, and greater evaluation of director performance by shareholders. This is seen in principle 2.2 of The King Report III which states that “the board should appreciate that strategy, risk, performance and sustainability are inseparable” and that “... the company is seen to be a responsible corporate citizen.”<sup>107</sup> These concepts surrounding debate and alterations manifest themselves in the three broad areas which King III is based upon; namely leadership, sustainability and corporate citizenship. Whilst King III makes no mention of rigid principles surrounding exactly how stakeholders should be treated and approached, it does provide a very clear direction as to the manner and desired outcomes that it hopes to achieve through their implementation. It is around the concepts of leadership and sustainability that this sub-chapter will focus as they interact and influence closely with the manner in which negotiations and labour relations will occur.

Sustainability broadly pertains to the long-term view surrounding the creation of enduring value for both the organisation and the greater society.<sup>108</sup> According to a summary report of King III made by the Institute of Directors, sustainability represents the greatest moral and economic imperative of the modern day business and, along with this, there has been a deep-seated shift in the recognition which they have associated with its importance. For example, the Department of Environmental Affairs and Tourism recognised the environmental implications of business practices stating that unless business was able to adhere to stricter codes on greenhouse gas emissions, they would exponentially increase over the next few decades leaving South Africa as an outcast from a global perspective.<sup>109</sup>

This is where the triple-bottom-line is representative of the aims of King III which is to position business as a body which is not only able to work for the interests of its shareholders but

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<sup>107</sup> King III: Principle 1.2.

<sup>108</sup> Op Cit note 76 at 6.

<sup>109</sup> Olson Op Cit note 74 at 225.

also to recognise the context within which it exists beneath the Constitution and the best interests of society. Essentially the triple-bottom-line approach aims to extend the concern of the organisation in part to social and environmental actors and not only the economic interests which are evident with traditional business.<sup>110</sup> This can be seen in the Department of Trade and Industries statement that “a company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies.”<sup>111</sup> These stakeholders, which are so commonly referred to, include employees of the business, customers, the community of the business and the environment, but to name a few.

Strategy plays a fundamental role in achieving a long-term outcome as per King III. Wixley and Everingham states that “part of the board’s responsibility in performing an oversight role is to decide what economic, social and environmental topics are material to the company. The board then ensures that the company’s strategy addresses these topics, sets priorities, and apportions responsibilities between management and board committees.”<sup>112</sup> Under King III, the board of directors takes a fair load of responsibility for ensuring that good corporate governance standards are adhered to and that the business carries out its tasks in an ethical manner and with ethical leadership.

The development of a sustainable approach therefore revolves around the formation of a strategy, the implementation of said strategy and the reporting of it according to integrated reporting and objective measurements. Although management and the directors carry the ultimate liability for the implementation of the strategy, the board is responsible for overseeing that the implementation is aligned to the priorities and objectives set by the company. Going further than this, companies are required to submit an integrated report annually detailing, where substance is desired over form, the actions of individuals of the company and how they align to the strategy of the business. The aim of the integrated report is to show how the company affected the economic, social and environmental communities constructively and in what way they were harmful. It goes further than highlighting the three areas of the company but rather

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<sup>110</sup> Ibid: at 229.

<sup>111</sup> Op Cit 76 at Subsection 3.2.3.

<sup>112</sup> Everingham, G. and Wixley, T. 2002. *Corporate Governance* at 2-4.

aims to provide a holistic view of the forward-looking nature of the business and how frequently management is integrating and addressing the concepts.

In addition to this, sustainability is also the process by which those in leadership positions implement a holistic approach to business and societal development which will “allow for effective management of business opportunities and risks associated with corporate citizenship.”<sup>113</sup> Aligned to section 76 of the CA as explained previously, King III pertains to similar provisions<sup>114</sup> which take the form of a fiduciary duty of the director to act in the best interests of the company as a whole and for its longevity. This duty also relates to the management of power and that this should be used so as to further the interests of the company rather than the interests of the individual. In the King III report it is recognised that decisions can no longer be made only with the present context in mind. It has become required of directors and the board to now not only recognise the needs for future generations but also to take into account the legitimate interests of company stakeholders through the promotion of sustainability and risk management. With sustainability and duties in mind, the board retains much of the responsibility for overseeing the strategy and its implementation. Principle 2.2.4. of King III states that the board should not only certify that the strategy is aligned with the objectives of the company but also “ensure that the strategy will result in sustainable outcomes taking account of people, planet and profit.” Strategy therefore has a risk-minimizing approach and through its implementation aims to create accountability for those in decision making positions.

Whilst it is recognised that the very nature of business is one which requires businesses to take risks, the aim of corporate governance is to make sure that these risks are taken from a reasonable point of knowledge and understanding. As stated by Wixley and Everingham, “good corporate governance is not a guarantee against failure, but it should ensure that there is adequate disclosure of the risks undertaken and that [decisions] are handled with integrity.”<sup>115</sup> The strategic aspect of dealing with business risk and the need to have solid internal controls systems has received much recognition within the modern day business context. Many of the failures in companies occur due to gross mismanagement on behalf of the board and their lack of

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<sup>113</sup> King III 1.2.29.

<sup>114</sup> King III 2.14.1→5.

<sup>115</sup> Everingham and Wixley Op Cit note 112 at 6.

accountability to act for the best interests of the company and its stakeholders. There is no way to avoid risk but there are ways to better manage it and this is what the processes, pertained to within King III,<sup>116</sup> aim to do through effective management and calculated risk. Although there are many different facets to the process of risk governance, this paper will only focus on board duties, the role of auditors and managing the external environment within which the business is situated.

The role of the board in understanding risks associated with the company represents one of a developmental nature and of an overseeing nature. The board of directors assumes most of the responsibility for the development of risk practices within a company whilst management assumes much of the responsibility surrounding its administration. The concept of risk governance is one which elevates the position of long-term responsibilities rather than emphasizing the day-to-day leadership through its approach to focusing on effective leadership “where ethical values of responsibility, accountability, fairness and transparency<sup>117</sup>” are evident. It must be reiterated that there lies a great association between the strategy report from the sustainability framework and the need to personalize and recognise the operational requirements and risks associated with them of the individual company.

The first task, with regards to risk governance, is for the board to identify and evaluate what risks are evident. It is required to quantify and evaluate the impact of each of these risks upon business and its alignment with the integrated report which was developed from a sustainability perspective. The risk analysis which is required needs to be thorough and encompassing on both internal and external contextual aspects if it is to truly understand the areas of weakness of the company and to truly gage the risk tolerance of the business. Only once risk governance practices have been developed, and all parties to the board are satisfied that it is representative of the needs of the company as well as meeting the statutory and regulatory requirements, will the risk management implementation phase begin. Within this phase<sup>118</sup>, the board delegates and transfers certain responsibilities across to management who in turn attempts to put the practices, which have been recognised as risk avoiding, into practice. According to

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<sup>116</sup> King III refers to both ‘risk management’ and ‘risk governance.’

<sup>117</sup> King Code of Governance for S.A. (2009) at 9.

<sup>118</sup> Principle 4.4: The board should delegate to management the responsibility to design, implement and monitor the risk management plan.

principle 4.2.2 of King III, management now takes accountability for the implementation of risk strategies into the day to day proceedings. It is this implementation which King III believes to be its primary duty of management.<sup>119</sup> Once in place, risk aversion systems should be under constant assessment, with a formal report being issued each year, to ensure that the practices are being correctly followed through with. This constant re-evaluation should be continually assessed against the integrated sustainability report and the developments which have occurred with the business.

Although the development of a risk strategy, and its alignment to the integrated sustainability report, represent the most significant aspects of King III which needs adhering to, the follow up and use of internal auditor is equally as significant for the longevity of the company through its ability to take an objective stance in assessing multiple aspects including whether the risk strategy is aligned to an accountable outcome and whether necessary risk precautions are in place. According to King III, the internal auditors should “systematically analyze and evaluate[e] business processes and associated controls”<sup>120</sup> through a method of objective appraisal. Section 94 (7)(i) reiterates this component of the King regulation in its ability to regard an internal audit body with the function of ‘oversight.’<sup>121</sup> This audit performs an alternative function in that principle’s 9.2. and 9.3 of King III states that the risk assessment and sustainability report should be disclosed with the financial report upon years end and that these should be independently assured. Not only does this go a long way to ensuring accountability due an objective assessment of funds and direction, but it opens up the doors of transparency allowing any third party to evaluate the ethical conduct of the company’s board and management.

#### *4.3. Conclusion.*

The issues and resultant relationship which occur between the labour supply and the capital, as represented by the company, is one of a conflictual nature.<sup>122</sup> It must be said that the

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<sup>119</sup> Olson Op Cit note 74 at 229.

<sup>120</sup> Principle 7.1.2.3.

<sup>121</sup> Companies Act 61 of 2008: “to perform such oversight functions as may be determined by the board.”

<sup>122</sup> Evident in the 99 strikes which occurred in 2012; in contrast with the 67 which occurred in 2011. (Semono)

traditional purpose of the company, to generate gains for its investors, is the issue which is at the centre of the relationship and is at the moment aggravating the conflict which struggles to find a resolution. Labour Law has failed in its attempts to reduce adversarialism between parties to employment relationships. While traditional Company Law has been dogged in its approach to serve the interest of its shareholders as a priority and has only recently begun to deal with the idea that there is a 'triple bottom line' to its existence. There are two issues which this sub-chapter will aim to address, the first is that neither company law nor corporate governance, as represented by the King reports, make any attempt to deal with the concept of effective negotiation directly and the second issue is that there exists no other regulatory body that achieves any form of sway within the business guidance sphere. The perception that "the view to take of corporations and corporate law is apt to depend on your assumption about how investors, employees and other players come to be associated in a venture"<sup>123</sup> shows us that in the hope of achieving more amicable outcomes through the process of negotiation, we need to set in place systems which aim to promote a more sustainable relationship whilst not detracting from the overall picture of why the company functions.

This part will attempt to sum up the interaction between business, labour relations and company law with specific reference to the nature of this in the private sector. Although this view may be altering from its past outlook, it is reasonable to say that the private sector is made up predominantly of individuals who aim to seek personal benefit through their transactions; this relates to not only the external investors and those managing the business but also to those involved, namely the employees and customers who aim to attain financial gain and lasting employment. Whilst it may be conceivable to imagine a scenario where everyone exists for the benefit of the greater good, this is not the case. Although a director or board may have fiduciary duties and may be required to act in the best interests of the company as a whole, it still remains their priority to maximize the return for the investor and to not do so would compromise the financial position of the company and ultimately result negatively on employees and other stakeholders. In a contradiction to the 'triple bottom line' as proposed by the CA, Labour Relations is based upon the assumption that the very nature of the relationship between labour and capital is adversarial and that for conflict to receive a best possible outcome, it is required

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<sup>123</sup> Fischel, F. et al. 1991. *The Economic Structures of Corporate Law* at 4.

that power be used as the primary source of negotiation determination.<sup>124</sup> In addition, despite its ability to have such a drastic effect on economic outcomes, the LRA has within it very little protecting the interests of those supplying capital.

Despite how on paper King III and the CA adopt an approach of inclusivity and well rounded regulation, the debates at a management and board level continue to revolve around stock prices and their maximization whilst seeing the concept of stakeholder inclusivity as an afterthought. There is nothing wrong with this approach due to the “apply or explain” voluntary nature of King which states that “the interests of the shareholder... may be afforded precedence based on what is believed [by the board] to serve the best interests of the company”<sup>125</sup>. This prioritization therefore has no consequences and can merely be explained through seeing it as for the benefit of the business. Additionally, courts have generally refrained from imposing their own views on what should be considered a reasonable persons decision despite how bad the outcomes may be.<sup>126</sup> Liability in such a scenario would only be attached to a director if the decision was taken outside of skill jurisdiction, applying their mind or if it was not *bona fide* for the best interest of the company. With no reasonable, objective test to scrutinize these decisions, the courts have no sway in the managerial prerogative.

Whilst King may refer to sustainability and corporate citizenship, it makes no attempt to delve into how these relationships may be developed and sustained. Trade unions remain incentivized on financial and power-based grounds under the structures of labour relations which, through their blueprint, institutionalize conflict. Although King attempts at a more inclusive role, it also creates no platform for developing trusting relationships where opposing goals are understood and mutual gains, through joint decision-making, are seen as the desirable outcomes. It is the opinion of this paper that there remains a conflict and disjuncture between the approaches and purposes of the LRA and the CA, together with corporate governance, with regards to risk management and the development of sustainable relationships.

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<sup>124</sup> Davis and Le Roux Op Cit 19 at 322-323.

<sup>125</sup> King III at 12.

<sup>126</sup> The role of the court extends no further than adjudicating whether or not the business-related decisions made by a director occurred within a bona-fide frame of reference and therefore have no authority to decide as to whether it is considered a good business decision.

## 5. *Best Workplace Practices: A domestic and foreign perspective.*

### 5.1. *Introduction.*

As explained in prior chapters, the regulation of the collective relationship which occurs where labour and capital meet is predominantly governed by statutes and rules which promote outcomes of orderly behaviour and reasonable interaction. To reiterate in brief what has already been stated, the transition of labour laws both within a South African environment, as well as on an international stage, has been one which at first viewed the relationship simply as an exchange of skills for remuneration and attempted to provide a means for dealing with the opposing conflicts which naturally emerged between labour and capital. From this, labour laws became a means for rectifying inequalities of the past and breaking down the adversarial nature of the labour relations environment which was present at the time. The aim was to align the labour relations field to broader societal objectives whilst allowing businesses to develop within a modern economy. It will again be emphasised that the role of the law is to preserve the current situation through a facilitative and protective approach which promotes the use of collective bargaining as a means to balancing the resultant power.<sup>127</sup> As stated by Davies and Friedland: “there can be no equilibrium in industrial relations” without the power which parties are able to, respectively, implement.<sup>128</sup> Additionally, this attempt to regulate the relationship is based on legal principles which at their core balance the conflicting interests with the interdependent nature of what the contract represents. Whilst this conflict was intended to be institutionalized through work-place forums and other consensus seeking platforms, it has been largely ineffectual and resulted in a system where the working relationship is enveloped in distrust and where a sense of understanding the true interests of other stakeholders is not prioritized.<sup>129</sup>

Through its objects this paper focuses on the LRA and its attempt to promote a preventative system of collaboration and communication but in essence, it has manifested itself through a symptomatic lens. The general result of this is that labour and capital only meet intermittently, within a conflict emphasizing climate, in the hopes of outlining some form of collective agreement which can subjectively be seen to be a victory for those who they represent. This symptomatic perspective on industrial relations renders itself apparent when parties fail to

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<sup>127</sup> Davis and Friedland Op Cit 14 at 291.

<sup>128</sup> Ibid at 292.

<sup>129</sup> Du Toit and Ronnie Op Cit 16 at 308-310.

understand, prior to the process of collective bargaining, what the true needs of their opposing-party are, in the short-term as well as long. Whilst this may be a manifestation of the system, the inability of organisations to align their labour relations policies to long-term, sustainable options places a potential threat on both the organisations success and, externally, the greater economy in which it exists.<sup>130</sup> As has been established, the regulations and laws surrounding industrial relations, the corporation and their link to the external environment have been adopted from, and are very similar to those of, other countries and international law where labour relations remains stable although it must be added that there remain significant difference from a historical and developmental sense as seen in the status differences of developed, from where much of the information is gathered, and developing countries. It therefore remains imperative for future research to question how this manifestation has been so divergent and ultimately negative for the economy of South Africa.<sup>131</sup>

At its foundation, labour relations in South Africa is developed through three platforms: the constitution and common law, regulatory statutes and collective agreements as well as best practices and codes. As this paper has discussed the role which the previous two play, it remains necessary to establish what practices and codes are evident and influential within the modern day South African workplace. As is perceived in international codes of best practice<sup>132</sup>, their role is seen as complimentary to, and developing on, the regulations set by foundations as represented through law. Although they may not be binding, best workplace practices (BWP) generally go over and above compliance with relevant regulations, therefore aiming to focus on achieving sustainable and feasible outcomes with regards to its employees and ultimately for the success of the organisation.<sup>133</sup> Expanding on this, the assumption is that the longevity of the organisation is inexorably tied up in the development of those who work within it, so by focusing on the durability of an organisation's employees, it inevitably ensures the sustainability and financial growth of the business. The outcomes of leadership and the manner in which companies are managed play not only a crucial role in the outcomes for labour but also have further implications on the broader society. Additionally, it is evident that the outcomes of labour

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<sup>130</sup> Evident in the detrimental impact which the strike of 2014 which occurred in the mining sector had on the economy as a whole and the loss in investor confidence in the sector.

<sup>131</sup> As seen in the economic downturn (-0,6), largely associated to the 5 month strike which occurred in the mining industry of South Africa in 2014.

<sup>132</sup> Discussed in subsequent paragraphs.

<sup>133</sup> Cheadle, H. 2006. *Regulating Flexibility: Revisiting the LRA and the BCEA*. ILJ Vol. 26, April at 663-700.

regulation should be of concern to those external to the relationship. Despite this external relevance of the functioning of the company and its greater effect on society, the shareholder model<sup>134</sup> continues to prevail with it being argued that the focus on this approach is to the disadvantage of labour standards.<sup>135</sup> Whilst this may be the case, the continual re-alignment of South Africa practices to international standards means that future development is inevitable. Accordingly, corporate governance, as mentioned in prior paragraphs, has planted deeper roots in the functioning mentality of the organisation. Whilst there may be many factors comprising the concept of corporate governance, the focus of this paper surrounds its concepts of sustainable development and ethical leadership.

King III describes CSR as “the responsibility of the company for the impacts of its decision and activities... through transparent and ethical behaviour that contributes to sustainable development... [by taking] into account the legitimate interests of stakeholders [and] in compliance with international norms of behaviour.”<sup>136</sup> Whilst sustainable development focuses on “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>137</sup> The aims of corporate governance are not aimed at detracting from the potential business success of an organisation but rather attempt to alter the strategic mentality in showing that business success need not be to the detriment of the working-environment within which it exists and that positive outcomes of sustainable economic performance may be attained through systems of high accountability, open communication with stakeholders, reasonable risk management and ethical behaviour.<sup>138</sup> The ‘triple-bottom-line’, pertained to and emphasised within King III, focuses on the optimisation and promotion of an organisations goals through a lens of leadership performance, integrated reporting, social considerations and environmental outputs.<sup>139</sup> Additionally, it states that strategy, risk

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<sup>134</sup> See above chapter on company law.

<sup>135</sup> M. Jones, S Marshall, R. Mitchell *Corporate Social Responsibility and the management of labour in two Australian Mining Industry Companies* (2007) at 57 – 67 .

<sup>136</sup> King, M *The synergies and interaction between King III and the Companies Act 71 of 2008* (2010); Although CSR has generally focused on the impact which an organisation has specifically on the environment, future developments show the increased shift towards ethical leadership and decision-making which takes a more holistic approach into account.

<sup>137</sup> King III; forward.

<sup>138</sup> In 2004, the JSE released the Social Responsibility Investment Index to allow potential investors a platform to gauge which companies were integrating sustainable practices into their strategy.

<sup>139</sup> Although this paper focuses around the decision making process of the organization, it must also be stated that due to the extension of King III to all registered entities, trade unions are also required to implement the most

management, performance and sustainability cannot be separated, with it being of the idea that leadership should make legitimate attempts to assimilate these practices into their functioning and in doing so allow a platform from where stakeholders are able to make meaningful contributions to future outcomes.

The purpose of this chapter therefore arises in attempting to understand international and foreign trends and their efforts to amalgamate the intersecting points of labour relations and corporate governance in an endeavour to achieve a desirable outcome of sustainable and positive proportions; not only labour and capital but also for the greater economy and its growth. Before examining the broader global context and trends which seem to be apparent, the subsequent paragraphs will analyse what platforms there may exist within the South African framework which promote effective communication and sustainable leadership; this will be achieved through examining what statutory provisions there may be as well as seeking out what best practices and codes may be available and generally implemented.

### *5.2. Best practices in South Africa.*

Barring the few codes which are contained within the LRA and King III, there seems to be a dearth of dialogue, formal and informal, surrounding the behaviour and manner in which labour relations, and most specifically negotiation, is conducted. Although, an air of encouragement for fair business-practices can be felt within forward-thinking business circles, through the development of BWP by private organisations, they are implemented on a voluntary basis and because of this have found little footing within the frameworks where it seems to be most needed.<sup>140</sup> Additionally, the LRA places emphasis on maintaining a voluntary perception to negotiations and, through this, allows parties to be self-establishing by means of a collective agreement.<sup>141</sup> Whilst the intentions behind this made be commendable, it is worth recognizing the other side of the coin which shows the benefit of greater involvement played in the regulation and maintenance of businesses and the way in which they are run.

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sustainable option with regards to society as a whole and not only those who they are traditionally meant to represent.

<sup>140</sup> Indicated by the high levels of strike related violence; particularly in the mining and textile industries.

<sup>141</sup> Cheadle Op Cit note 122 at 122.

As stated, South Africa's approach to BWP, with regards to labour standards and the manner in which participants conduct themselves, is contained largely within the LRA. Although there are others contained therein, for the purposes of this paper, the *Code of Good Practice on Picketing* will be referred to along with the *code of good practice on the Integration of Employment Equity into Human Resource Practices*.<sup>142</sup> Whilst the sentiments contained within the Code of Good Practice for Picketing<sup>143</sup> may be laudable on paper, in reality they have had very little influence and have failed to curtail the imposition of violence into the strike process with which it has become associated. This code sets out practical guidelines for trade unions engaging in protected strikes, or in opposition to a lock-out, to employ a peaceful and unarmed protest in an attempt to encourage an employer along desired lines. Whilst there remains no legal obligation on trade unions to adhere to these guidelines, they can be used as a reference point according to section 69 (5)(b) of the LRA which states that a commissioner may use it as a reference point when determining the merits of the case. Although the code regarding picketing may not be directly aligned to the preventative purposes of this paper due to the post-analysis nature of its policies, it does contain within it aspects which seek to promote an amicable relationship where the mutual interest of 'non-violent striking' is promoted. This is seen in the practice which suggests that management and trade union come together before the strike to develop mutual agreements on<sup>144</sup>, amongst other aspects, the conduct and nature in which the strike will be held from both sides, promoting open communication on some level and meaningful interaction between parties.

It must be stated at this point that the objects of the LRA, although they may have been deemed to have failed with regards to employee engagement, are built around not only a centralised collective bargaining platform but also a base of enabling employee participation within the workplace at plant level; seen as not simply for the benefit of the employee but also for the organisation and, indirectly, the greater economy. This participative management consisted of the establishment of a workplace forum as well as the right to information

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<sup>142</sup> These other codes include recommendations for dismissals, pregnancies and determining who constitutes an employee. This paper has drawn specific reference to these two particularly firstly due to their applicability to the direction of this paper as well as the forward thinking approach which they emphasise.

<sup>143</sup> General Notice 765 in *Government Gazette* 18887 of 15 May 1998.

<sup>144</sup> Although, there remains no regulation stating that parties have a requirement to meet but should rather do it at their own discretion. See <http://www.platinumwagene negotiations.co.za/assets/downloads/picketing-info/Implats-picketing-rules-22012014.pdf> for a show of bad faith of a continual nature by the trade union to which the CCMA intervened.

disclosure<sup>145</sup>, consultation and joint-problem-solving as its foundation.<sup>146</sup> Its intentions attempted to bring issues out of the adversarial arena of collective bargaining and “facilitate a shift... in all matters to joint problem-solving and participation.”<sup>147</sup> This was a platform to encourage information sharing and consideration in the hope that it would result in increased workplace harmony and the alignment of interaction to both sets of interests. Employees were therefore given a voice in factory-level issues concerning their greater needs irrespective of their affiliation to a trade union.<sup>148</sup> Its failure has largely been put down to the lack of buy in from management and the scepticism displayed by trade unions.<sup>149</sup> Although attention may be drawn to the role which these structures play within the framework, this paper will not attempt to critique why they may have been ineffective in their implementation and results.

It is necessary to continue delving into the platforms which represent the crux of factory-level employee participation in South Africa. According to section 79 of the LRA, the general functions of a workplace forum should be to promote the interests of employees particular to that workplace, enhance the efficiency and productivity as well as voice the interests of employees through consultative and joint decision-making processes as prescribed by section 84 and 86 respectively. According to section 84, forums are required to consult with employers “with a view to reaching consensus” about matters which are out of the ordinary and significant to the functioning of the organisation.<sup>150</sup> Although courts have avoided forming guidelines as to what should be discussed within the realm of ‘managerial prerogative’, the process of consultation is should arguably be required to be undertaken in good faith. Section 86 provides provisions for the “[participation] in joint decision-making” which extends further than the aforementioned process of consultation and collective bargaining. The act stipulates that an employer may not execute a plan without the consent of a forum with whom they engage in joint decision-making. Although they may be extended by collective agreement, matters which employers are required

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<sup>145</sup> The same provisions which apply to the disclosure of information for majority unions in a workplace apply here. See section 16 of the LRA.

<sup>146</sup> LRA, Sections 84 and 86.

<sup>147</sup> Grogan Op Cit note 7 at 330

<sup>148</sup> Although it must be a trade union which sets up a workplace forum, this forums role is to promote the interests of all employees of the workplace and not only those who belong to their trade union. (Grogan; *Workplace Law* 2010) at 330.

<sup>149</sup> Believing that the result of this ‘voice’ would render the position of trade unions redundant.

<sup>150</sup> Section 84 provides an extensive list; it is not intended for the employer to consult over trivial decisions but those which affect its employees significantly.

to engage in during joint decision-making are limited to those which affect the terms and conditions of employees within the workplace.<sup>151</sup> Additional to these two sections, section 83 (3)(b) provides that employers are obliged to consult with forums annually to discuss current financial and employment situations as well as anticipated performance outcomes; the aim of this provision being to allow forums to engage effectively and to allow the process of employee participation to be of value. Disputes arising from a lack of consensus between parties are to be dealt with through a self-established dispute resolution process, but generally either via arbitration or through the CCMA.

Moving away from the legal parameters which attempt to develop employee participation and sustainable solutions in South Africa the *Code of Good practice on the Integration of Employment Equity into Human Resources Policies and Practices* established in 1998 is found.<sup>152</sup> Whilst the focus of this code, as evident, revolves around the imposition of equity into the workplace, it consists of many policies which would be transferable with any publication or code with similar intent and which aimed to impart a sustainable direction into the workplace through its focus on inclusive and ethical governance. The code begins by stating that it is, amongst other things, a framework for advancement where employers should develop “realistic plans that are workplace specific.”<sup>153</sup> It states that research has shown that investment in one’s employees, and treating them with fairness and equity, results in “increased productivity, motivation and resourcefulness.”<sup>154</sup>

This code places priority on the process of consultation aligned to the Employment Equity Act 55 of 1998 which affirms that employers are required to consult with employees, or representatives thereof, when developing strategy surrounding employment equity and direction of the organisation. Section 5.3.3. states that the successful implementation of the strategy depends on the effectiveness of the consultation process where it is not only a select group who are conferred with, but rather that employees from all levels are consulted. The aim of the consultation process is therefore to develop structures of regular and meaningful contact between

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<sup>151</sup> The act is very specific as to what may be discussed within these forums and does not extend it to issues which would ordinarily be covered by a collective agreement, e.g. wages.

<sup>152</sup> Employment Equity Act (55/1998): *Code of Good practice on the Integration of Employment Equity into Human Resources Policies and Practices*. Government Gazette vol. 482. August, 2005. No. 27866. Government of the Republic of South Africa.

<sup>153</sup> Ibid; Section 5.3.3.

<sup>154</sup> Ibid; Forward of the Code.

employer, employees and respective representatives which will result in “a joint commitment to workplace transformation”<sup>155</sup> that has the potential to bring about increased standards of workplace democracy and employee efficiency. Consultation is deemed at the forefront of achieving realistic goals which are aligned to the interests of parties and ensuring that they are well developed and implemented. The intention of this consultative platform is not to undercut industrial relations structures or any collective agreements which exist but rather to develop on the progress made within these channels.<sup>156</sup>

This code also sees disclosure of information during the consultation processes to be of the utmost importance stating that its purpose is to make “consultation as participative and meaningful as possible to ensure good faith engagement and to develop trust between employee and employer.”<sup>157</sup> It implies that for the process of consultation to be truly effective, standards of confidentiality need to be maintained and information needs to be reasonably relevant<sup>158</sup> to the needs of the employee or representative. This code applies similar standards of conduct with regards to discipline and grievance disputes through the prioritisation of mutual respect between employer and employee. Section 20 emphasises the underlying aims of the process in its attempt to balance the employee’s right to be treated fairly with an employer’s expectations regarding performance. One of these underlying aims can be seen in section 20.3.7. where it sees the primary purpose of a company’s disciplinary process being to promote a culture of respect and the dignified treatment of others. Additionally, it sees conflict as inherent in the workplace relationship and it is these manifestations which need to be managed.<sup>159</sup> Developing this, these conflictual procedures should be handled efficiently as it believes “the manner in which discipline and grievances are managed can generate conflict in a workplace and may undermine achievements and policies.”<sup>160</sup> Whilst the sections contained within this code of good practice may not correlate directly, it is their attempt to implement measures which are sustainable and preventative, rather than merely being symptomatic, which we need to take notice of.

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<sup>155</sup> Ibid; 5.3.14.

<sup>156</sup> Ibid; Section 5.3.15.

<sup>157</sup> Ibid; 17.2.2.

<sup>158</sup> Relevance is understood through how likely the information is to influence the formulation of strategy or position by a consulting party in their consideration.

<sup>159</sup> Code of Good practice on the Integration of Employment Equity into Human Resources Policies and Practices. Section 20.4.1.

<sup>160</sup> Ibid; 20.2.1.

The recognition and understanding by industries and stakeholders of the need for self-generated and sustainable development plans specific to their area remains crucial in policies and targets being implemented and met. One such declaration was formed in 2010 between government, labour and business with interests in the mining sector entitled ‘*Stakeholders declaration on Strategy for the Sustainable growth and meaningful transformation of the South African mining Industry*’<sup>161</sup> (hereafter referred to as ‘the Declaration’). From the outset, the declaration shows clear intention for the desired course which it aims to emphasise; this seen in its commitment to upholding the “spirit of common purpose between stakeholders.”<sup>162</sup> It proposed the development and foundation of a strategy, amongst mining industry interests of South Africa, which would position it within a framework of sustainable growth and meaningful transformation. Additionally, it recognised that competitiveness and transformation are inseparable and for this reason, strategy needed to be developed so as to bring about results of mutually beneficial outcomes. This comes in line with the acknowledgment by those party to the declaration that the development of the mining industry plays a contributory role to the broader socio-economic sphere within which it functions including that it should be seen “as a means to enhance the diversification of the economy [through] corresponding with the priorities of the government.”<sup>163</sup> The understanding of these holistic capabilities and potentials, associated with the collaboration with greater stakeholders of the organisation and community, develop the understanding that much more can be achieved with regards to sustainable growth and meaningful participation. Additionally, it states as one of its policies the aim to use the platform as a means to “develop a partner approach”<sup>164</sup> between an organisation and its greater stakeholders.

This Declaration highlights ten areas, or commitments, which parties to the code need to implement and focus around. This paper will only highlight a few of these commitments, focusing on those which are aligned to the holistic impression which the declaration intends and which are relevant to this paper. The first is the “commitment to creating an environment that is

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<sup>161</sup> Parties to this declaration include the National Union of Mineworkers, the Chamber of mines, the Department of Natural Resources, the Trade Union Solidarity, and the UASA- the Union who signed the agreement in Pretoria on the 30<sup>th</sup> of June 2010.

<sup>162</sup> Stakeholders’ declaration on Strategy for the Sustainable growth and meaningful transformation of the South African mining Industry. Signed on the 30<sup>th</sup> June 2010 between key players within the mining industry.

<sup>163</sup> Ibid; at 2

<sup>164</sup> Ibid; at 6

conducive to supporting the sustainable growth and meaningful transformation”<sup>165</sup> which ties into pursuant goals of transparency and integrity. As such, they see the desired direction as being one where investment opportunities are enhanced and the comparative competitiveness of the sector is increased. In line with this holistic perspective is the statement made which states that parties to the declaration “acknowledge the importance of balancing economic benefit with social and environmental concerns without compromising the ability of future generations to meet their needs.”<sup>166</sup> This ties into the next commitment which sees the developmental role which human resources (HR) practices are able to play in the framework of increasing competitiveness and social transformation of an organisation; as seen in the statement that effective HR practices “in the workplace remain catalyst for social cohesion.”<sup>167</sup> Additionally, it emphasises the role which the organisations within the mining sector can play within the broader community and the development thereof through their significant involvement and interaction. Although this declaration contains within it no means by which companies are held accountable and monitored, it creates a commitment to the realisation of sustainable outcomes through a holistic vision of what a company represents and what it could represent for the broader society within which it exists.

The prior paragraphs intended to highlight what might exist within a South African context which aims to promote, over various platforms, a desire for sustainable solutions to be implemented. Whilst it remains imperative for us to recognise our own developments along these lines, much of what can be deemed to be successful in retrospect has been what legislation has adopted and adapted from foreign standards and platforms. The sub-chapter below aims to highlight a few of these platforms below by focusing on what exists from an international and foreign perspective with specific regard being given to country level initiatives which promote stakeholder inclusivity and the promotion of fair dealings with employees.

### *5.3. International Standards and Foreign Systems:*

#### *5.3.1. Introduction:*

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<sup>165</sup> Ibid; at 3

<sup>166</sup> Ibid; at 4, on Sustainable Development. See *King III* for replica approach.

<sup>167</sup> Ibid; at 6

Before this paper delves into attempting to understand the system which may work for systems around the world, it is worth noting that there is no one-size-fits-all pattern which would display a mutually-beneficial path and that this paper needs to recognize the range of different national trends and their practices. Despite this being said, it remains a consistent thought that industrial relations should build on already emerging new practices so that South Africa may benefit from the experience of others and utilize various platforms of knowledge which have been developed through their successes and failures. The field of employment, on a national and global scale, has faced, and faces, numerous challenges which have changed the nature within which the organisation exists.<sup>168</sup> Accordingly, the demands associated with these have extended the range within which labour relations traditionally exists through the need for strategy and practice development so as to accommodate strategic changes and mitigate against the potential negative implications of these developments. The trend is therefore to create a greater association between human resources practices and labour relations management; trying to incorporate within it ‘people-centred’ approaches including the improvement of “skills in the workforce [and] an environment which emphasises communication, cooperation and trust between managers, workers and their representatives.”<sup>169</sup> Whilst the number of factors contributing to effective labour relations may be vast, this paper will focus only on the aspects which are linked to management practices and their development of the understanding of how crucial it is to the discipline.

For the most part international standards, as represented through the framework of the ILO, have been largely silent when it comes to imposing a duty to bargain in good faith<sup>170</sup> upon its member states. Although it does require its members to adopt systems which promote utilization of collective bargaining machinery, its emphasis is on the voluntary nature of the process which may be inconsistent with the duty to bargain in good faith;<sup>171</sup> although parties are

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<sup>168</sup> Challenges may include, and are not limited to, globalisation, an increase in atypical forms of employment, increased unemployment levels, and the ‘triangular employment relationship’.

<sup>169</sup> MacDonald, D *Industrial Relations and Globalisation: Challenges for Employers and their Organisations*. (1997) Paper presented at the ILO Workshop on Employers Organisations in Italy, May 1997.

<sup>170</sup> A term used to imply standards of behaviour for selected parties e.g. the necessity for a director of a company to act in good faith when considering the interests of their organisation.

<sup>171</sup> Although the ILO Committee on Freedom of Association has emphasised the attractiveness of the requirement to force parties to bargain in good faith, it has not gone as far as to include it into its conventions and on this basis has no systems of compliance in place to enforce it.

not entitled to bargain in bad faith per say.<sup>172</sup> The Committee on Freedom of Association has supported the notion that “it is important that employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between parties”<sup>173</sup> Despite this lack of requirements to impose good faith standards upon its member states, it seems that the common trend within developed country is to impose internal measures to ensure compliance with these good faith standards.<sup>174</sup> Whilst it is generally accepted that good faith bargaining is a desirable trait for the system, there has been much difference in opinion on what it might entail; highlighted are two main cases for opposition with the first being that it is idealistic to think that two parties with fundamentally different interests can be expected to bargain in good faith and the second being the inability of the law to stipulate standards of manner and behavioural styles. On a general basis, the perception is that if parties are able to associate good faith behaviours with one another, they may be more inclined to adopt a less conflictual relationship and therefore to the field of labour disputes as a whole. Whilst the law is not able to dictate thoughts and actions, it can place parameters around their behaviour to ensure that it occurs in a reasonable manner which is consistent with good faith standards.

Subsequent paragraphs will be used to highlight how different countries and organisations have adopted stakeholder-inclusive approaches when attempting to alter the process of labour relations to mutually-beneficial outcomes of sustainable employment as well as organisational growth. The aim is therefore not to say that the theories, as mentioned below, are required for a positive labour relations environment but rather to expose the nature of various other systems. In doing so this paper is able to gauge what viable options there may be to transform the current South African system, which is fraught with conflict and adversarialism, to one which is deemed to be meeting the challenges faced by business needs, employment standards and the country as a whole. The ILO described sound labour relations as one in which relationships “are more harmonious and cooperative than conflictual..., creates an environment

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<sup>172</sup> Attempts have been made to show that the failure of member states to impose measures opposing Bad Faith bargaining, and therefore contradict the voluntary process required by the ILO, is enough to display their non-compliance with its requirements.

<sup>173</sup> The Committee on Freedom of Association: the ILO Governing Body. Para. 935-936

<sup>174</sup> Canada, Sweden, Japan, England, Ireland, Germany, Spain but to name a few.

conducive to economic growth [through] development of the employee and generates loyalty and mutual trust”<sup>175</sup> and it is this towards which South Africa should be aiming for.

### 5.3.2. Ireland- The move towards ‘Sustainable Progress’.

As will be seen below, a case study of the situation in Ireland may not be directly applicable to the development of codes of best practice but it displays a sense of common direction and understanding of the needs of others which they believe, as does this paper, is necessary for sustainable development to be an attainable option. The aim of the process of forming ‘sustainable agreements’ was not to move the state to a socialist mindset but rather to recognise that more could be achieved through joint partnership by “facilitating the evolution of a more sustainable society” based on social, environmental and economic factors.<sup>176</sup> After a period of devastating financial debt and high inflation, a plan of action for sustainable progress was developed through a tripartite alliance consisting of government representatives, leading employer’s organisations and trade union federations which consisted of “consultation with the social partners [taking] place in a spirit of good governance and [recognizing] the need to involve all appropriate stakeholders in the development of policies”.<sup>177</sup> The aim of this tripartite alliance was to create a shared long term vision and goal “of consistent economic development based on social and environmental sustainability, social inclusion and a commitment to social justice.”<sup>178</sup>

The concept of the ‘social partnership’ is one which finds its roots in a participatory and changing environment where it sees its process as being one of problem-solving proportions, capable of continued adaption, for medium to long-term success. It sees international competitiveness as imperative and only achievable in a stable economy; stating that it is important to “make the necessary adjustments towards becoming a knowledge-based society by focusing its priorities on human capital”<sup>179</sup> through the creation of regulatory provisions and measures. Since its imposition, the Social Partnership has been deemed at the forefront of change

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<sup>175</sup> De Silve, S. *Elements of Sound Industrial Relations System* at 8.

<sup>176</sup> *Sustaining Progress: Social Partnership Agreement, 2003-2005*. Government of Ireland; Dublin at 36.

<sup>177</sup> *Ibid*; point 1.7.

<sup>178</sup> *Ibid*; point 1.1.

<sup>179</sup> *Ibid*; point 4.4.1.

management through its focus on creating adaptability, job security and an increased standard of living which are seen as priority points on the development agenda. For the sake of this paper, only those aspects of the social partnership which are relevant to the development of sound industrial relations will be commented on.

On a more applicable level, the tripartite group has recommitted itself to the extension of partnerships within the workplace and believes that the development of co-operative working relationships is imperative to facilitating adaption, development, elevated performance and better workplaces; it therefore recognises the contribution which these practices can make towards the growth of a sustainable economy of elevated foreign-investment confidence to which it gauges a high correlation with internal job creation.<sup>180</sup> This approach of the organisation existing for those who work within it and *vice-versa* can be seen in two government affiliated establishments; namely the *National Centre for Partnership and Performance*<sup>181</sup> and *Excellence through People*<sup>182</sup> which tie into the employment strategy which focuses around quality employment, increased efficiency of the workplace and inclusion. Not only is the focus of human capital represented through training and development, but it also sees the benefit of stable and sound labour relations which ties into the concept of competitive strategy on a national level.<sup>183</sup> Point 19.3 states that members of the tripartite “recognise the importance of stable industrial relations and are committed to maintaining a well managed industrial relations environment to minimize disputes affecting the level of service.”<sup>184</sup> Additional to the benefit it sees in the supply of continual services, it sees specific benefit for the organisation through increased productivity, attractiveness for foreign investment and an increased, consistent sense of confidence from the greater community. Two points stand out aligned to the desired directions of this report; the first being that before parties engage in industrial action, their communication “must be meaningful and undertaken in a spirit of making every effort to reach an agreement at the earliest possible stages” and that they, in addition to this, have a responsibility to resolve problems at plant level,

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<sup>180</sup> Ireland National Employment Action Plan, 2003-2005.

<sup>181</sup> This center has multiple objectives including the development of a database of information surrounding best workplace practices within the sphere of partnership and performance; partnerships and their correlation to organisational strategy and change management; projects aimed at management training focusing on information-consultation and participation within the workplace.

<sup>182</sup> This organisation is regarded globally as one of few national programs which encourage the development of employees and show recognition when organisations meet standards regarding human resources practices.

<sup>183</sup> Sustaining Progress: Social Partnership Agreement 2003-2005 at 78.

<sup>184</sup> *Ibid*; at 90.

prior to them developing into disputes.<sup>185</sup> The second point being that negotiations must be carried out “through normal industrial relations machinery, [with] due regard being had to economic, commercial and employment circumstances of the firm, employment or industry”;<sup>186</sup> in essence, this mitigates parties from bringing outlandish demands to the table but rather brings them together in amicable circumstances where parties attempt to understand each other and form outcomes satisfying both sets of interests.

Similar to South Africa’s CCMA, Ireland has developed a statutory body entitled the Labour Relations Commission which has the “general responsibility for promoting good industrial relations in Ireland.”<sup>187</sup> Whilst it performs a similar function to that of the CCMA, its role extends to preventative measures including the production of Codes of Good Practice, to help businesses achieve voluntary best practices, and a range of journals and publications with the subject matter being that of best workplace practices and the trends surrounding it.<sup>188</sup> Additionally, it extends its functions to that of implementing change management processes for businesses developing and trying to accommodate best practices. *The Code of Best Practice: Grievance and Disciplinary Procedures (5)* highlights that “grievances are handled in accordance with principles of natural justice and fairness.”<sup>189</sup> Additionally, it holds that the manner and the priority it places on employee representatives display the perception of how important these roles are to the quality of management and labour relations.<sup>190</sup> This requires consistency with external factors as well as internal policies where the process of grievances must be fair and rational, with a sound appeals process and a broadcasted understanding of the corresponding sanctions. Aligned to the Social Partnership Agreement mentioned prior to this paragraph is the *Code of Good Practice on Voluntary Dispute Resolution* which aims to enhance the success of existing processes. Although this code is largely applicable to disputes where industrial action is not permitted, it requires parties to negotiations to “fully co-operate in

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<sup>185</sup> This stands in contradiction to South African labour regulation which promotes the use of centralised, sector-level bargaining rather than plant-level bargaining.

<sup>186</sup> *Ibid*; at 67.

<sup>187</sup> The Labour Relations Commission of Ireland, Workplace Mediation and Services. at 3.

<sup>188</sup> Whilst in reality the CCMA does not perform these roles, sections 115 (2) and (3) of the LRA show us that there is potential for the role of the CCMA to perform similar functions.

<sup>189</sup> Labour Relations Commission: Grievance and Disciplinary Procedures *Code of Good Practice 5*. at 3.

<sup>190</sup> Labour Relations Commission: Duties and Responsibilities of Employee Representatives and the Protection and Facilities afforded them by their employees. *Code of Good Practice 2*. at 2.

seeking to resolve the issues in dispute efficiently and expeditiously”<sup>191</sup> thereby providing for a more feasible and sustainable working relationship.

### 5.3.3. *ACAS- Best Workplace practices and their implications:*

In attempting to understand the correlation between best workplace practices (BWP), and its financial implications, is to assess what BWP there are associated with the Advisory Conciliation and Arbitration Service (ACAS) and how this impacts on the functioning of the individual business. At its core, ACAS aims to develop systems which promote good workplace relations through sustainable means and, in doing so, diminish the implications of conflictual interests within the workplace. It has a statutory duty to “promote the improvement of industrial relations”<sup>192</sup> and included in this is the duty to promote the settlement of such disputes. Like the CCMA, ACAS is a statutory body which receives state funding but where it differs is the role which it attempts to play in workplace development and dispute prevention.<sup>193</sup> It performs a number of roles outside of its statutory requirements<sup>194</sup> which extend to the broader aim of the organisation. These include the establishment of a helpline for employment related queries, extensive publications regarding industrial relations and human resource management, workplace training and development and, most importantly for this paper, the development of codes of best practice aligned to employment relations. As an indication of its effectiveness, ACAS has reported that 28% of those who implement their *ACAS Model Workplace* program have experienced benefit for the well-being of the organisation. The Codes of Good Practice, containing practices such as early dispute resolution, trade union rights and disclosure of information but to name a few, were intended to perform the function of being preventative rather than symptomatic and intended to curtail the threat of employment disputes through the imposition of systems of best practice.<sup>195</sup>

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<sup>191</sup> Labour Relations Commission: Voluntary Dispute Resolution *Code of Good Practice* 7 at 3.

<sup>192</sup> Ibid; at 6.

<sup>193</sup> As pertained to in previous paragraphs, the CCMA has to a lesser degree such a capacity as developed through section 115 of the LRA.

<sup>194</sup> These statutory requirements include conciliation and arbitration.

<sup>195</sup> Meadows, P *A Review of the Economic Impact of Employment Relations Services Delivered by Acas* (2007) at 5-8

It is one of the common assumptions of 21<sup>st</sup> century business that the long term viability of a business is inextricably tied up in its ability to maintain standards of sustainability, with one of the areas being through sound employment relations and its resultant employee capacity. Consequently, ACAS sees the need for people related strategies to go over and above those which are prescribed by statutory provision and legal compliance. It is this sense of exceeding compliance<sup>196</sup> which is expanded to include measures for increased fairness and a greater sense of the individual workplace having the potential to work for all stakeholders. In expansion of this, although it may seem that codes of best practice emphasise procedures which elicit higher standards, it aims even further by imparting an overall sense of integrity, value and respect for the role of others with a foundation of mutual-appreciation. In a report conducted by The National Institute for Economic and Social Research, through its analysis of the six main functions of ACAS<sup>197</sup>, found that it generated as much as £800 million on an annual basis which is representative of the mission of ACAS to not only improve workplace conditions but also to achieve measures which support economic growth through its notion of increased productivity and organisational effectiveness.<sup>198</sup> Its overarching mission statement aiming “to improve organisations and working lives through better employment relations”<sup>199</sup> is by no means a linear approach to dispute resolution with much of its focus going to the development of means through which preventative measures are emphasised. As far as the training goes, around 40 000 people attend the seminars on good practice and legislative compliance annually and, within the advisory realm of the helpline, ACAS received as many as three million advice seeking calls; additionally much of ACAS’s success stems from its release of online learning tools and open access publications which promote forward-thinking human resources practices and tools.

Outside of its role as conflict managers, it also offers services which assist voluntary workplaces in implementing measures of conflict management through strategic training and consultation processes. As Dix and Oxenbridge put it, the role of ACAS “is more comprehensive than the simple resolution of disputes and involves a range of strategies and processes which are

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<sup>196</sup> This generally denotes bare minimum standards.

<sup>197</sup> Individual conciliation, collective conciliation, a helpline, publications and communications, workplace projects and open-access training.

<sup>198</sup> Meadows Op Cit note 195 at 2-4.

<sup>199</sup> *Triennial Review of the Advisory, Conciliation and Arbitration Council*: Department of Business and Innovation; (2013) at 6.

transparent and embedded in the workplace.”<sup>200</sup> This extension of action most commonly takes the form of their ‘advisory projects’ which seek to lead discussions between labour and management where issues of conflict, co-operation and mutual interest are addressed. This course of action is one of trust facilitation where parties are required to be responsible for seeking outcome which are specific to their business and are led down a road where they are able to recognise the interests of the other representative and see how mutually beneficial outcomes could be developed and sustained. The immediate result of this is usually seen in the establishment of an internal policy which aims to address the issues at hand and the means by which this change will be achieved. ACAS’s view is that the policy outcomes may not be the most indicative benefit but rather the perspective of parties that joint-problem solving platforms can be effective which fosters an organisational-culture of fairness and trust for alternative dispute resolution.

Employee engagement has received much attention within the past two decades within the UK as is seen in the development of two regulatory and advisory documents namely the *Information and Consultation of Employees Regulation of 2004* and the *Disclosure of Information to Trade Unions for Collective Bargaining Purposes Code of Good Practice*. The requirements are straight forward and, although it aims not to detract from managerial prerogative, the *Disclosure of Information to Trade Unions for Collective Bargaining Purposes Code of Good Practice* does require that information be disclosed which “is in accordance with good industrial relations practice.”<sup>201</sup> The intention of this is not to create an open-access system to information surrounding the organisation but should rather pertain to “recent and probably development of the undertaking’s activities and economic situation” including any future dealings or predictions which may have an impact on those in employment.<sup>202</sup> The duty to provide information remains on the representative trade union to initially request and any information not disclosed which impedes the ability of a trade union to bargain effectively will be considered bad faith and in contradiction to good industrial relations practices.<sup>203</sup> Additionally, the code of good practice states in point 22 that “employers and trade unions

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<sup>200</sup> Dix, G and Oxenbridge, S *Coming to the Table: The role of ACAS in collective disputes and improving workplace relationships* (2004) at 4.

<sup>201</sup> ACAS Code of Good Practice 2; *Disclosure of Information to Trade Unions for Collective Bargaining Purposes*. 2003 at 4.

<sup>202</sup> Information and Consultation of Employees Regulation 2004 (implemented as of April, 2005).

<sup>203</sup> *Ibid*; points 9 and 16 respectively.

should endeavour to arrive at a joint understanding of how the provisions of disclosure of information can be implemented most effectively” through the contemplation of what information is most likely to be necessary in future talks.<sup>204</sup>

The financial implications of good leadership and management practices with regards to employee engagement and preventative dispute resolution processes are what make a crucial difference to the success or failure of an individual business.<sup>205</sup> Engaged employees are seen to provide a business with increased competitive edge seen in the direct correlation between leadership and management and engagement. As a tangible indication, organisations with advanced engagement policies decreased their absenteeism rate by a third, therefore resulting in a strong relationship between engagement and organisational performance.<sup>206</sup> Backing up this perception was the MacLeod Report which estimated that the number of days missed through absenteeism costed the economy as much as £13, 4 billion.<sup>207</sup> Implications of employee engagement best practices can be seen in day to day material indicators as well as its association with long term organisational survival. This is seen in the statement from the report that “at its most extreme, poor leadership and management can cause a business to fail” adding that as many as 56% of business failures occur due to the incompetency of management and the inability for long term strategy business practices.<sup>208</sup>

Ashton and Sung (2001)<sup>209</sup> believe that the relationship between organisational performance and management practice is separated by workplace commitment with the basis of this being a solid foundation of “employment relations built on high levels of trust and cooperation.”<sup>210</sup> Additionally, if this paper were to see effective labour management as providing for a competitive advantage, many commentators have expressed the ability of effective grievance processes to decrease workplace conflict and therefore the need for external involvement. The study conducted by Dix and Oxenbridge (2003) also reached a conclusion that

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<sup>204</sup> Ibid; point 22.

<sup>205</sup> *Leadership and Management in the UK- The Key to Sustainable Growth*. The Department for Business, Innovation and Skill. (2012) at 10.

<sup>206</sup> Ibid; at 12.

<sup>207</sup> Macleod, D and Clarke, N *Engaging for Success: enhancing performance through employee* (2009) at 119

<sup>208</sup> *Leadership and Management in the UK- The Key to Sustainable Growth*: The Department for Business, Innovation and Skill (2012) at 14.

<sup>209</sup> Ashton, D. and Sung, J *Supporting Workplace Learning for High Performance Working* (2002).

<sup>210</sup> Dix, G. and Oxenbridge, S. on behalf of ACAS. *Information and Consultation at Work: From challenges to good practice* (2003) at 11.

“where employers inform, on an on-going, regular basis, this has the effect of reducing the amount of time spent on negotiating annual pay increases, and results in less adversarial, more consensus-driven, negotiating behaviours.”<sup>211</sup> From a strategic change management perspective, employee engagement and consultation were deemed to be at the forefront for determining effective practice and positive outcomes. This was indicated on three levels including discussions where more informed decisions were made, a greater avoidance of retrenchments and an increase in management-employee trust.<sup>212</sup> In this same study conducted by Dix and Oxenbridge, they concluded “effective communication and consultation arrangements are more likely to develop where managers and employee representatives alike are able to demonstrate a sustained *commitment* to employee involvement.”<sup>213</sup> Aligned to this commitment is the need for ‘genuine’ consultation as represented in the ability to promote joint-decision making, open ended communication and a consultative process which seeks to address the interests and issues of both parties.

#### *5.3.4. Australia- The Duty to bargain in Good Faith and its correlation with High Performing Workplaces:*

With reference to the standards which are imposed through the international regulations of the ILO, one such nation which has recently imposed measures to ensure good faith bargaining within labour relations is Australia which sees the process of collective bargaining and good faith as being intertwined. The development of the Fair Work Act 2009 (No. 28 of 2009) (hereafter referred to as FWA) sought to institutionalize the concepts of fairness and efficiency into the process of labour negotiations through the development of legislation as well as 12 measures of best employment standards relating to differing areas. The FWA is a multifunctional body capable of performing a multitude of roles. On a broader system of dialogue, the FWA role is wider than that of prescribing standards and legislation; specifically it plays a more prominent and forward-thinking role in addressing issues of the workplace. This can be seen in the *Commonwealth of Australia: Explanatory Memorandum of the Fair Work Bill*

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<sup>211</sup> Ibid; at 25-26.

<sup>212</sup> Ibid; at 27. With regards to management-employee trust, the result was a workforce with “decreased resistance to change; and a workforce that is more adaptable, flexible and able to adapt to new working practices.”

<sup>213</sup> Ibid; at 73.

2009<sup>214</sup>. It was also added that one of the intentions of the act was to facilitate discussion at workplace level. The intention of this being to draw attention to the challenges and opportunities facing each sector in the economy which would lead to a greater understanding as to what might be current areas of poor performance and how these could be rectified.

Following a shift in national government and indications of being affected by the global recession, the FWA was implemented so as to place labour relations within a long-term vision.<sup>215</sup> In essence, practices, standards and legislation were developed which allowed all stakeholders party to the labour-management relationship a voice in determining how they could use the platform of business to develop their own interest as well as others; of special mention were the issues of how to sustain productivity whilst still maintaining employment figures and standards.<sup>216</sup> Whilst the previous system had attempted to lower labour costs to business, which resulted in a less skilled workforce who felt very little organisational commitment, the FWA sought to promote concepts of cooperation and participation which would mitigate these economically-negative outcomes. Good faith bargaining, under the banner of the FWA, was not intended to be viewed as favouring the movement of the trade unions and employees by protecting them and forcing the employer to the bargaining table but rather aimed at providing guarantees within a practical mindset for the assurance of worker productivity as would be beneficial for the organisation, the employees and the broader economy.<sup>217</sup>

Although this is not the direct focus of this sub-section, aligned to these standards is the notion that a system which is able to produce harmonious and collaborative workplace environments is one which is much more likely to be productive and beneficial to the intended outcomes of an organisation. The FWA aims to develop an effective system that is straightforward, adaptable and fair, in promoting the imposition of good faith bargaining and bargaining at shop-floor level.<sup>218</sup> This pivotal position of good faith bargaining is seen in the

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<sup>214</sup>The Parliament of the Commonwealth of Australia: Explanatory Memorandum of the Fair Work Bill 2009 (2008) [http://www.austlii.edu.au/au/legis/cth/bill\\_em/fwb2009124/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/fwb2009124/memo_0.html) (Accessed on the 12/08/2014)

<sup>215</sup> Ibid; (Accessed 13/08/2014).

<sup>216</sup> Jones, M Mashall, S and Mitchell, R *Corporate Social Responsibility and the Management of Labour in two Australian mining industry companies* (2007) at 57-67.

<sup>217</sup> Rathmell, A *Collective Bargaining After Work Choices: Will "Good Faith" Take Us Forward With Fairness?* (2008) at 182.

<sup>218</sup> FWA; section 171 (a).

objective which states that “a balanced framework for cooperative and productive workplace relations that promotes natural economic prosperity and social inclusion for all Australians” which is realized by “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial relations.”<sup>219</sup> The good faith requirements for representatives’ party to an enterprise level negotiation are as contained within section 228 (1) of the FWA area are:

- (a) attending, and participating in, meetings at reasonable times;*
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
- (c) responding to proposals made by bargaining representatives for the agreement in a timely manner;*
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;*
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;*
- (f) recognising and bargaining with the other bargaining representatives for the agreement.<sup>220</sup>*

In addition, the FWA contains within it the ability to compel employers to bargain. The first is when the council is convinced that a majority of employees want to bargain;<sup>221</sup> the second is that of scope determinations where the council steps in when it believes that the content of the bargaining process is not appropriate to its intended outcomes.<sup>222</sup> Of the most relevance for the move towards reaching an agreement unless there are grounds not to, as is the desired stance of the FWA, are the terms of “giving genuine consideration to the proposals of other bargaining representatives for the agreement [,] giving reasons for the bargaining representative’s responses to those proposals [and] refraining from capricious or unfair conduct that undermines freedom of

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<sup>219</sup> Fair Work Act of Australia (2009) Section 3 (f).

<sup>220</sup> Parties are not required to conclude an agreement if good faith requirements have been satisfied.

<sup>221</sup> FWA; section 236, 237.

<sup>222</sup> FWA; section 237 (3).

association or collective bargaining.”<sup>223</sup> This represents a more refined version of behaviour determination which Rathmell believes is a positive step for industrial relations and the process of negotiations as moves the perceptions around the process towards a result orientated approach where parties are required to “reach an agreement *unless* there is a genuine reason not to.”<sup>224</sup>

The FWA’s approach to fair labour standards is realistic in its understanding that conflict will always be present within the employment relationship; in developing this, it aims to contain this conflict and use it on a beneficial basis. The use of good faith is therefore merely a means to ensuring that parties display a sense of commitment to integrity and reasonable dealing whilst making a genuine attempt at cooperation.<sup>225</sup> With specific mention to collective bargaining, Rathmell believes that a view can be insinuated from the act that it is more likely to be successful if it makes a movement away from its traditional adversarial approach towards one of interest based bargaining giving increased regard to standards of work and the regulation thereof.<sup>226</sup> As is the nature of the employment relationship, certain issues will always be rife with conflict; the imposition of measures such as good faith requirements is not intended to dictate outcomes of collective bargaining but rather to bring parties to the table in a manner in which meaningful engagement can occur and relationships are sustained through a sense of fair dealings.

As is displayed in the report conducted by the Australian School of Business where 78 organisations across an array of industries and financial stability were analysed on leadership, cultural and management practices.<sup>227</sup> This study sought to display correlating points between the above mentioned practices and productivity. Amongst the array of conclusions which were drawn, the study showed that high-performing-workplaces (HPW) indicated levels for shared values and their practical application which were 25% higher than low performing workplaces and 18% higher on their ability to promote participation and co-operation. In addition to this was the large inverse correlation, therefore seen on a positive front, between tension and conflict and

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<sup>223</sup> FWA; section 228 .

<sup>224</sup> Rathmell Op Cit note 217 at 187.

<sup>225</sup> This concept of fair dealings is not limited to the bargaining table but includes areas such as business restructuring, dismissal and skills development.

<sup>226</sup> Rathmell Op Cit note 217 at 186-188.

<sup>227</sup> Dr. Boedker, C. et al.. *Leadership, Culture and Management Practices of High Performing Workplaces in Australia: the High Performing Workplace Index*. (2011).

participation in decision making and strategy.<sup>228</sup> As a conclusion, this study found that higher levels of employee participation in decision making were identified with HPWs; stating that “this is enabled by management practices such as: employee participation in strategy formulation, implementation and monitoring [and] employee participation in target setting and budget setting...”; including that “lower levels of conflict and tension [were] also identified as a characteristic.”<sup>229</sup>

There seems to be a central theme of preventative systems and the imposition of some form of good faith standard which runs through the regulations of all the countries mentioned above. Whilst they may differ in their stance as to how the desirable outcomes of sustainable relationships and development are attained, they no doubt concur with what is deemed the most appropriate outcome for long-term development. In contrast we can see that the measures developed within the South African system, despite their best intention, are not able to fully perpetuate and bring about an outcome of sustainable proportions. The essence of the rest of this paper will attempt to amalgamate the thought processes, which have gone into developing these parameters in foreign systems, with those of South Africa so as to develop platforms which promote sustainable outcomes, stakeholder inclusivity and ethical leadership.

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<sup>228</sup> Tension and Conflict measured (-0,507) whilst participation in decision making measured (0,759) and participation in strategy measured (0,688) at 48.

<sup>229</sup> Boedker Op Cit note 227 at 10.

## 6. Recommendations and Conclusion:

### 6.1. Introduction:

As stated by Clive Thompson in his paper on good practices for dispute resolution and dispute prevention: “the foundation for solid progress remains a basic accord between the key stakeholders and then the patient and unending cultivation of a cooperative ethos for workplace relations, geared towards the delivery of great... outcomes.”<sup>230</sup> Aligned to this is the Labour Relations Act (Act 66 of 1995) (LRA) which intended to implement policies, amongst other things, for negotiations and dispute resolution within the labour relations environment, with these systems intending to produce specific outcomes which would be efficient and valuable to the sound continuation of relationships within the workplace.<sup>231</sup> Thompson is of the view that institutionalized concepts which seem progressive and forward thinking in the present “have a remarkable propensity to become over-elaborate, unwieldy and generally burdensome.”<sup>232</sup> Developing on this, it therefore remains imperative for stakeholders and drafters to recognise the need to re-examine and adapt the rules governing the outcomes to suit current circumstances so as to guide along more applicable lines and promote standards which address our current issues.

Traditional collective bargaining, and the labour-management relationship, has generally been submerged in an adversarial context and while this may have had its benefits in times gone by, the limitations within a modern environment are evident.<sup>233</sup> The drafters of the LRA made an attempt at legislating social democracy with a view to further entrenching labour rights. Aligned to this view of the changing nature of the employment world, Thompson views the 21<sup>st</sup> century workplace as being “as much about shared as conflicting interests”<sup>234</sup> where research has shown that high performing workplaces are those where relations of trust and respect are prioritised not only between labour and management but also between greater stakeholders of the organisation.<sup>235</sup> This correlates with the views of the drafters of the LRA who believed that the imposition of a statutory duty to bargain would result in a rigid labour market and not allow parties the needed space to develop their own bargaining platforms.

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<sup>230</sup> Thompson Op Cit note 32 at 79.

<sup>231</sup> LRA; section 1 (c) and (d).

<sup>232</sup> Thompson Op cit note 32 at 78.

<sup>233</sup> Hepple, B *The Making of Labour Law in Europe* (1986) at 197.

<sup>234</sup> Thompson Op cit note 32 at 14.

<sup>235</sup> Boedker, C. *et al* Op Cit note 227 at 62.

It must be maintained that the intentions of this paper sought not to doubt the foundations of the labour-management relationship as determined by the LRA but rather to recognise that, although the traditional approach adopted by the LRA still commands some authority, the market forces and public opinion surrounding the business is altering requiring a development in the business decision making process with regards to sustainable outcomes. The aim is not to avoid conflict as a whole but to recognise that dysfunctional conflict can be avoided if parties are willing to explore options away from those currently being used within the adversarial system of labour relations at present.<sup>236</sup> In essence, all the recommendations pertained to within this paper are those which recognise the need to develop processes which precede the right to strike and, in doing so, mitigate those issues which we have come to associate with the right. Du Toit and Ronnie see the grounds for this being “that a shift away from focusing simply on the distributive aspect of the employment relationship to one which starts engaging with issues related to production and work organisation could ultimately lead to improvements” which would bring about long term benefit of relations managed in favourable conditions.<sup>237</sup> Du Toit and Ronnie place a new slant on sustainability and choose to view it through a lens of long-term potential rather than a quick-fix in the present. Aligned to this is the International Institute for Sustainable Development who believed that in order for sustainable outcomes of long-term relationships to be achieved, notions of sustainable business practices need to be developed and integrated into internal policy as well as into public debate surrounding the way forward.<sup>238</sup>

The following chapter focuses on the development of two areas; whilst both of these revolve within the realm of sustainable future solutions to current issues, they both represent different facets of governance development which are aligned to achieving improved relations and greater collaboration for mutually beneficial outcomes. It must be noted here that although they may differ as per the recommended implementation processes, with one focusing on using the CCMA as a platform for change through its development of codes of good practice and the second being the development of corporate governance standards, they both aim to promote and foster a sense of trust within the employment relationship. The first advancement would be the expansion of the role of the CCMA in South Africa; moving it away from its current position of

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<sup>236</sup> Du Toit and Ronnie Op Cit note 16 at 217.

<sup>237</sup> Ibid; at 217.

primarily dealing with dispute resolution but to a similar structure to that of ACAS in the United Kingdom and its promotion of ‘model workplaces’. This will be done by extending upon the role of the CCMA and involves the development of codes of good practice for good faith bargaining and employee engagement. The second recommendation, which is more aligned to direct governance, is the incorporation into King III of standards pertaining to management giving legitimate regard to the interests of their employees and the accountability which follows this process. This train of thought links into the expansion of management concerns allowing for greater prioritization of issues relating to sustainable performance alongside and on par with financial performance.

### *6.2. CCMA Functionality: Model Workplaces and Codes of Good Practice*

The CCMA and ACAS differ on a foundational level as is seen in the differing of their statutory objectives. Whilst ACAS’s primary function is to produce a range of services which “promote the improvement of industrial relations”, the CCMA finds its role<sup>239</sup> limited to dispute resolution and the implementation of workplace forums outside which there has been very little extension.<sup>240</sup> The outcome of this difference is that ACAS performs a largely advisory role which is seen under separate spheres of the concept of its *model workplaces*. Whilst these functions of integration include an advisory hotline and the implementation of dispute resolution processes within organisations to name a few and the main areas, this paper will be focusing on how it used its role to produce codes of good practice which promote effective governance and a preventative, rather than symptomatic, approach to the management of labour relations. Whilst this paper believes that the desired outcome is for the role of the CCMA to be similar to that of ACAS, it does recognise that small steps need to be taken and that a total revamp of the CCMA structure is not a realistic and feasible option within the present context. As far as this understanding goes, the most appropriate means may therefore be to use the CCMA, as the most credible director of labour relations in South Africa, as a platform for improved labour relations and sustainable progress.

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<sup>239</sup> See Paul Benjamin’s *Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration* for assessment of the role of the CCMA.

<sup>240</sup> Although, Section 115 (3) of the LRA does extend these functions but only “If asked...”

With this in mind, and without excluding the capacity for other options available, this paper proposes two developments with the first relating to a code to impart good faith measures into the labour negotiation process through its focus on effective information disclosure and exchange and the second relating to the inclusion of policies into corporate governance, and more specifically King III, which provide for a more holistic approach to the governance of a business through its focus on risk assessment and its link to corporate strategy.

### *6.2.1. Code of Best Practice: Negotiating in Good Faith:*

Whilst a duty to bargain in good faith was heavily contested when debating its inclusion into the LRA of 1995, the act saw it appropriate for the process to be self-determining and riding on the expression of power by parties. Additionally, this manner of determining bargaining outcomes was intended to manifest in a mature and accountable manner through the understanding that parties to a negotiation would enter with the intention of reaching a consensus. Whilst these intentions are commendable and recognizing of the need to allow the market to play its own course, the outcomes have been far from desired as seen in the inability of parties to voluntarily resolve workplace related issues with as many as 77% of workplace disputes occurring due to the lack of consensus reached regarding wages.<sup>241</sup> As Nerine Kahn,<sup>242</sup> stated, with regards to notion that a voluntary and winner-take-all approach within the LRA would imply good faith, there was “a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then.”<sup>243</sup> Additionally, the removal from the old LRA of provisions which sought to mitigate bad-faith bargaining through framing them as unfair labour practices meant that labour practitioners and the courts could no longer hold parties accountable along such lines. In agreement to this, Brassey believed that “there is nothing so subversive of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through

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<sup>241</sup> Benjamin, P *Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)* (2013) at 27

<sup>242</sup> Director of the CCMA at publishing.

<sup>243</sup> Business Day Live Report “*A Chance to Reassess our System of Industrial Relations*” Accessed 25 August 2014. Available at <http://www.bdlive.co.za/opinion/2012/10/01/a-chance-to-reassess-our-system-of-industrial-relations> 19 October 2014.

the motions with no intentions to reach agreement.”<sup>244</sup> This is reiterated by the judge in *National Union of Mineworkers v East Rand Gold and Uranium Company*<sup>245</sup> who stated that “the very stuff of collective bargaining is the duty to bargain in good faith.”<sup>246</sup> Additionally, Judge Napier in the case of *Barkhuizen v Napier* stated that “the concepts of justice, reasonableness and fairness constitute good faith” and that anything outside of these parameters would be in contradiction to the intentions of the LRA and the Constitution.<sup>247</sup>

The imposition of good faith measures and guidance upon the bargaining process is one which has the potential to be implemented along two lines. The first is a negative approach which prescribes action which would be deemed to be unfair, undermining of the process of collective bargaining and representative of actions which would fall under the banner of unfair labour practices.<sup>248</sup> The second approach is to view good faith in a positive sense and in doing so presume an onus of good faith upon parties. The advantage of choosing such an approach within a best practice platform would be that it has the ability to indicate desired behavioural standards within the ambit of an approach of reasonableness and not a rigid framework. This would tie into the developed role of the CCMA and its ability to implement an integrated *model workplace* where standards of reasonableness are promoted and parties have the ability to be self-determining with regards to accepted behaviours. The positive approach to good faith places greater emphasis on behavioural prescriptions and has a closer link to the holistic improvement of governance and the attitudes which comes along with it. In essence, this approach aims to develop what parties *should* do when engaging in the process of collective bargaining rather than prescribing what the parties *should not* do and, in doing so, allows for greater self-regulation and accountability. Some examples of what this good faith might include:

- a) Parties should agree during pre-negotiation meetings to maintain behaviour according to standards of good-faith bargaining.

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<sup>244</sup> Brassey Op Cit note 4 at 51.

<sup>245</sup> *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd.* (1992 (1) SA 700 (AD)). See *Barkhuizen v Napier* (2007 (5) SA 323 (CC) Para 80 for the use of positive good-faith notions in other areas of the law.

<sup>246</sup> *Ibid*; para 45.

<sup>248</sup> See the Unfair Labour Practices as contained within the *Old Act*.

- b) Providing opposition parties with justified and objective reasoning for demands placed on the table.
- c) Attendance and genuine participation in meetings; and giving reasonable notice of absenteeism if one is not able to attend or be adequately prepared.
- d) Providing responses within a reasonable and pre-determined timeframe.
- e) Using language which is conducive to amicable relations.
- f) Giving genuine considerations for proposals brought forward by other parties and providing them with reasonable, justified and rational reasoning for responses.
- g) Avoiding erratic and volatile behaviour.
- h) Allowing recognised representatives the respect and voice which their position mandates.
- i) Providing a framework for reasonable access to the workplace and employees within a workplace; including in this the ability to communicate effectively and confidentially with employees with regards to all matters of mutual interest.

Whilst the above mentioned recommended principles may not be able to mitigate bad-faith negotiations in their entirety, it would develop a platform from where trust relationships are promoted and outcomes of mutual-interest are discussed in an honest and open manner within a negotiating climate which is conducive to this. The essence of these recommendations remains to mitigate certain traits which have begun to creep into the current collective bargaining dispensation of South Africa and which seem to be undermining the process as a whole. As an example of how the above provisions might be effectively implemented and aligned to effective and open negotiation might be the commitment of both parties to effective disclosure of information through all the stages of negotiation.

Good-faith information disclosure in such a scenario would include the use of objective, relevant and company specific information<sup>249</sup> to determining the parameters within which an outcome would fall and what is necessary to be disclosed. As stated within the ACAS code of good practice 2, it should be information which is “in accordance with good industrial relations

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<sup>249</sup> Information such Consumer Price Index, inflation as adjudged by an agreed upon source, an agreed upon exchange rate, the rise in accommodation prices, amongst others, could be used.

practice to disclose”<sup>250</sup> and that the “absence of relevant information about an employer’s undertaking may to a material extent impede trade unions in collective bargaining.”<sup>251</sup> Within a framework of good faith information disclosure, parties would have to agree to give genuine consideration for the needs of those across from them and to make a commitment to finding a balanced outcome which suits the interests of both.<sup>252</sup>

### *6.3. The Development of King III.*

Traditional thought regarding the purpose of a business has seen its existence as for the benefit of the shareholder. In pursuit of such development, corporate governance standards have largely sought to appease shareholders to, what could be argued, the detriment of associated stakeholders. With much of the blame for the financial crisis’ being placed upon ineffective corporate governance, focus has shifted significantly towards the search for other options which provide for a more accountable and integrated model of governance. A large focus of this paper revolved around understanding the development of standards; standards which had the ability to guide and direct governance along more sustainable lines and, in doing so, alter the lens through which the organisation is managed and grown to suit multiple interests. Essentially, this paper aims to formulate a potential platform from where the legitimate interests of employees are included in the framework for effective governance and where business-management recognises the long-term benefits of maintaining sound industrial practices and relations; the thought process is therefore not that the current system should be deemed obsolete but rather to build upon what is already in place through the prioritisation of sustainability within the decision making process with specific attention paid to using it as the central focus of understanding various interests during the bargaining process.

To briefly delve into the potential for King III to play a role in sustainability this paper need go no further than its statement which states that “responsible leaders build sustainable

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<sup>250</sup> ACAS Code of Good Practice 2: *Disclosure of Information to Trade Unions for Collective Bargaining Purposes*. 2003. Point 3.

<sup>251</sup> *Ibid*; at 9.

<sup>252</sup> On a broad scale, the interests of employees here would be for a better standard of living and working whilst the interests of the employer would be on reaching financial objectives, continual growth and overcoming operating costs.

businesses by having regard to the company's economic, social and environmental impact on the community... through effective strategy and operations."<sup>253</sup> Responsible leaders here represent those who impart values of responsibility, accountability, fairness and transparency into their decision-making.<sup>254</sup> Lastly, it is worth recognising that responsible leadership involves considering the interests of all stakeholders of a company, and through this vision, assumes an outlook with trust at the centre.<sup>255</sup> Whilst these statements display a movement towards a regime which recognises the existence of the company as for the benefit of more than just the shareholders, it goes no way to determining how governance can achieve this and in what way it can rework the labour-management relationship to be less adversarial.

Looking at how King III has been implemented from a financial perspective, reporting and transparency are at the forefront of the process of creating accountability; accountability generally here pertains to determining whether those responsible made decision so as for the benefit of the company and ultimately the interests of shareholders.<sup>256</sup> It therefore remains imperative to accommodate further stakeholders into general understanding of those who management should be accountable to and in doing so create a revised system where economic value is created by focusing on the internal interests of the business thereby using sustainability as a platform to create long-term growth. Davis states that "even when workers' interest are not entirely congruent with those of the company as an institution, dialogue and participation remain the default position for resolution of differences"<sup>257</sup> when systems of open-communication are in place. The following inclusion will focus on how these outcomes of more sustainable companies can be achieved through the inclusion of standards within King III which promote accountability and transparency surrounding non-financial performance.

This paper recognises two pillars, amongst others, of how a sustainable business should be governed aligned to the principles contained within King III and its reference to integrated sustainable reporting:

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<sup>253</sup> *King III Report on Corporate Governance*. The Institute of Directors in South Africa (2009) at 15.

<sup>254</sup> *Ibid*; at 14.

<sup>255</sup> *Ibid*; at 14-16.

<sup>256</sup> Davis Op Cit note 19 at 322.

<sup>257</sup> *Ibid*; at 322.

- a) The inclusion of a member to the board of directors who is responsible for the development of a multidimensional corporate strategy which focuses on developing and integrating sustainable objectives into the manifestation of the strategy.<sup>258</sup> Linked in to this would be a remuneration package which incentivises the achievement of implementing sustainable measures and for achieving sustainable objectives as adjudged through performance indicators from all levels and consistent feedback. On the contrary, King III provides for the consideration of stakeholder interests by the board, it however holds no individual accountable and remains very vague as to how it is that they should be incorporated. Although it is a broad area and implementation may differ, such an individual might be responsible for implementing a structure of greater communication and inclusivity across the entire business matrix, developing non-financial performance reports and for continually providing risk and opportunity assessment on non-financial indicators including how risks might be mitigated against from a long-term perspective. This role need not be limited to increasing stakeholder inclusivity but should involve the five pillars<sup>259</sup> of an organisation as indicated by King. The aim of including such a standard is to increase measures of accountability so as to mitigate ill-informed decision making and to allow for greater confidence, internally and externally, in management and the decision-making process.
- b) Whilst the above recommendation considers the development of a board level management position used to further sustainable considerations, this recommendation focuses on stakeholder, and more specifically, employee inclusivity and engagement. This concept has fallen under various banners including employee voice, employee representation and industrial democracy although they all refer to a similar concepts of employee input in the decision making process and in the general functioning of the business. Employee engagement has not been seen at the forefront of South African governance standards to date despite the emphasis it receives within the LRA. Whilst there may be statutory provisions which make use of employee

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<sup>258</sup> It must be stated that the Companies Act of 2008 does allow for A social and Ethics committee (section 72(8)) who might perform a similar function but commands no authority and means of holding those in charge accountable. The recommendation mentioned above may be deemed more valuable due to the accountability which it creates and due to the nature of representation which it recommends, in a greater position for bringing about desired change.

<sup>259</sup> This includes environmental, human, social, economic, and resource governance.

engagement at their heart, such as the workplace forums and mandatory consultation for certain issues, employee input has largely been limited and not venturing into the decision making process; often symptomatic rather than preventative. Although the desired outcome is for continual engagement with employees, a starting process may be to develop a system of communication where mechanisms improve the filtering of information down the business allowing for greater understanding on an internal level and greater transparency for all stakeholders. The aim of these channels would ideally develop along open and trusting lines and would require an altered mindset to the contradictory nature of interests between management and labour in the current context. It is the belief of this paper that joint-consultation measures need to be included into governance standards of best practice. It is evident through the lack of workplace forums in South Africa that a voluntary system of implementation, as contained within the LRA, is not the correct means to bringing about the desired change allowing the search for alternatives to continue and leads this paper to the recommendation of transposing the concept of workplace forums into company law and in doing so create a responsibility on behalf of the company to ensure that such structures are in place.

#### *6.4. Conclusion*

As mentioned in above sub-sections, King III has been highly successful with regards to developing a system which recognises the need to focus on issues which pertain to the non-financial performance of an organisation. Despite this, it has been largely ineffectual due to what could be argued, a lack of specific standards which require companies to be more attentive to the interests of stakeholders specific to their business. At present, although laudable, provisions relating to sustainability within King III generally relate to an organisations commitment to improving the society within which they exist. Whilst there has definitely been a shift towards creating an environment which is more conducive towards sustainable internal policy development, there is still space for a more positive movement.<sup>260</sup> The approach which this paper

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<sup>260</sup> Katzew Op Cit note 94 at 691.

took, towards developing best practice surrounding negotiating in good faith and for focusing on developing King III through provisions of greater employee involvement and sustainability based improvements, can be seen as aligned to the vision of a collective future where parties understand each other's interests and where an organisation is seen as existing for the benefit of not only shareholders but also those stakeholders involved in its growth.

As explained in previous chapters, the concept of sustainable development and sustainable employment, which according to Le Roux “operate on the principles of trust and partnership”<sup>261</sup>, has been largely limited within the context of South African business due to the shareholder centred focus under which the majority of organisations still operate. Due to the notion of voluntarism which surrounds corporate governance and employee participation contained within the LRA, there remain very few consequences to the lack of implementation and, alternatively, incentives to their being in place. With this being said, it is this conflict which allows for the aggravation of conflicting interests and provides the foundation of the inability of parties to form long-term and mutually beneficial relationships. Whilst it was not the intention of this paper to argue that the current system within which labour relations functions is ineffectual, nor is it naive as to the needs for business growth, it is the intention to point out the flaws within it which may be deemed to have become restrictive if economic growth and sustainable employment are to be considered realistic future outcomes.

The ineffectiveness, as mentioned above, can be seen in the lack of regulation given to the manner in which striking and negotiations are managed and the labour-management relationship in general is directed. Whilst King III refers to sustainability and corporate citizenship, it makes no grasp to form guidelines or best practice indications as to how these may be achieved and sustained. Although King attempts at a more inclusive role, it also fails at creating a platform for developing trusting relationships where opposing goals are understood and mutual gains, through joint decision-making, are seen as the desirable outcomes. It is this gap which this paper sought to fill through its focus on platforms which foreign countries have implemented, and which are deemed to be working effectively, along the lines of good faith best practice, the use of the CCMA as a means for developing on internal workplace policies and the

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<sup>261</sup> Le Roux, R “The Purpose of Labour Law: Can it turn Green?” in *Labour Law into the Future*. (2012) at 245.

further incorporation into King III of principles surrounding worker representation and workplace democracy.

In developing this, whilst the objectives of both the LRA and King III remain laudable, there remains a disjunction between their purposes pertaining to how risk management and sustainable employment relationships should be handled. The framework for a sustainable organisation has shifted and it therefore remains imperative for regulation and best practice to keep abreast with what is deemed most appropriate for a viable future. Sustainable development has been described as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>262</sup> It is with this in mind that future developments, and the recommendations as seen in this chapter, need to address and incorporate greater emphasis on ethical leadership which truly attempts to understand the interests of its various stakeholders, specifically employees, allowing them to have a vested interest in the future prosperity and success of the organisation.

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<sup>262</sup> UN Agreement: “Our common future: Towards sustainable development” Point 1.

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