LABOUR LAW AND INSTITUTIONAL CONFIGURATIONS IN DIFFERENT VARIETIES OF CAPITALISM: WHAT DOES THE AUSTRALIAN CASE TELL US ABOUT THE UTILITY OF CROSS-NATIONAL TYPOLOGIES?

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1. Introduction

The Australian labour law system has undergone noteworthy change over the past few decades. The federal statute was substantially revised and rewritten in the late 1980s, 1993, 1996, 2005, and again in 2009. How to explain and characterise these statutory changes and attendant shifts in worker protection is a matter of some debate. According to one school of thought, these changes in labour law have been momentous, signalling profound, even systemic, shifts in orientation and operation.[1] Others have been more cautious in their assessment, countering that the shifts in labour law have not been as severe as is generally supposed, and that by and large the underlying model remains relatively intact.[2] All of this debate is made more complex and difficult by virtue of the fact that what appeared as a long trajectory of quite radical reform was to some extent reversed by recent changes in government. And this complexity is added to in turn by the fact that some recent studies quantifying worker protection in Australian labour law, while overall confirming the less dramatic interpretation of change in the Australian system, nevertheless offer widely differing pictures of development according to which variables are selected and focussed upon. This issue is explored in more detail later in the paper.

One alternative way of approaching an examination of the evolution of labour law, and understanding its social role, is to move away from a study of the field in isolation, to approach it as one socio-political institution among several, and to examine its interrelationships with those other social institutions. Recent analyses of the political economy of capitalism have made this point central to their inquiry. In particular, they stress the idea that institutions in one sphere — say, labour regulation — may 'complement' those in another — say, corporate governance — and that certain patterns of regulation can in turn be linked to patterns of corporate ownership and control. In effect, such approaches explore a three-way relationship between labour law (or broader social policy), corporate law and corporate ownership and control. Although theories differ as to the causal relationship between these three variables, they all tend to propose a certain coherence or 'fit' between the three that explains cross-national diversity in institutional forms and the existence of distinct national 'regimes' of economic and business organization. In short, we should be able to explain the form that labour law takes in a nation state by reference to what goes on around it in other areas of regulation. In this paper we are essentially concerned to develop an Australian perspective on the central issue of whether Australian labour law corresponds with an established type of national 'regime', and whether that might be explained by reference to broader patterns of corporate governance or share ownership.

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[1]

[2] Stewart

In much of this research, countries such as the US and the UK are commonly grouped as members of a particular type or family.[3] This so-called 'Anglo-American' or liberal model is usually identified with widely dispersed share ownership, strong securities markets and shareholder-oriented governance and regulation,[4] accompanied by relatively weak labour laws and social protection; that is to say, 'stakeholder' - relevant non-shareholder - interests are largely eschewed in this model.[5] In contrast, continental European regimes, Germany being the paradigm case, exhibit much more concentrated share ownership, less prominent shareholder rights and protections and more protective labour laws.

Perhaps not surprisingly, Australia is usually grouped with the UK and the US as part of the Anglo-American family of liberal-market, shareholder-oriented (rather than stakeholder-oriented) capitalist economy systems: its system of corporate regulation 'looks like' the UK and US systems;[6] and it is usually grouped with the US and the UK as a country of shared 'legal origin', suggesting a shared 'regulatory style'.[7] If the model is sound, it should follow that Australia's labour law system would, in keeping with its position alongside the US and the UK be relatively weak when compared with European systems generally. However, some labour law scholars have questioned the assumed congruity of the Australian labour law system with the 'liberal market' model, suggesting that, at least historically, Australia has in many respects more closely matched the stakeholder systems of the 'co-ordinated market' countries.[8] At the same time some corporate law scholars have pointed to various discrepancies in Australia's position in this categorisation.[9]

In this paper we begin by surveying the main theories that posit correlations between the form of labour law, corporate law and patterns of corporate ownership and control. We then consider how best to characterise Australian labour law and its relation to corporate law. Finally, we examine the nature of Australian corporate ownership and control. We then conclude as to how useful existing theories that align labour law with corporate law and corporate control are for understanding the Australian experience.

2. Varieties of Capitalism

The stylised division of advanced capitalist economies into two social models or varieties was first advanced by Albert who distinguished between 'Anglo Saxon' and 'Rhenish' economies, the latter based in continental Western Europe.[10] A more thorough empirical investigation of this division was undertaken by Hall and Soskice who identified two separate and distinct sets of institutional

[3] Hall and Soskice, Gospel and Pendleton
[4] Bruner p. 581, Gelter pp. 130-131.
[5] Gelter, p. 131.
[6] See, eg, von Nessen
[7] La Porta et al; Our book. O'Donnell, Marshall and Mitchell.
[8] Jones and Mitchell, our book, O'Donnell etc.
[9] Cheffins, Alan Dignam and co.
[10] Albert.

arrangements, complemented by legal systems and 'styles' of regulation, which are labelled either as 'liberal market' economies or 'co-ordinated market' economies.[11]

This 'varieties of capitalism' schema is based on national contexts of labour management, corporate governance and finance systems. These derive from the ways in which employers co-ordinate their activities: whether they do so through market mechanisms or through more co-operative means. 'Liberal market' economies (typified in the national systems of the US and the UK for example) are said to be characterised by an 'outsider' form of corporate governance and finance, a dispersed shareholder base grounded in extensive and deep equity markets, strong protective rights for investors, an active market for corporate control by shareholders (particularly through takeovers and mergers) and a business strategy focussed upon short term financial benefits for shareholders. This 'marketised' style of corporate governance is, in turn, said to be allied to a complementary style of labour management which supports the interests of capital over workers. It is argued, for example, that under the 'liberal market' model, one typically finds a more partial, less protective set of labour institutions and rights. Under such a system there is less employment security, fewer minimum standards of employment for workers, and where such standards exist, they apply to a smaller cohort of workers than in the 'co-ordinated' style of economy.[12]

By contrast, 'co-ordinated market' economies (typified in the systems of Germany, and other European countries) are said to be characterised by quite different corporate ownership and governance arrangements. In these economies, shareholding is much less widely dispersed, share markets are poorly developed, and financing is facilitated more through banks and other large lenders. The argument here is that these arrangements engender an 'insider' form of governance where financiers develop longer term relations with corporate managers and there is much weaker 'market' discipline. With a longer term view of the business able to be exercised by management there is also a longer term view able to be taken of relations with workers. Accordingly, the 'co-ordinated market' style of economic organisation is marked by better protections for workers, greater employment security, more investment in skills and training, and a higher degree of employee involvement in workplace decision making.[13]

Other comparative studies identify more than two groupings or 'families' of nations. For example, Boyer identifies four regime types; Amable identifies five; and Whitley proposes a typology of six 'business systems'.[14] To a large extent, these extended groupings open up the catch-all category of 'co-ordinated market' economies and differentiate those economies with greater precision.[15] Less

[11] See Hall and Soskice.
[12] Ahlering and Deakin
[13] Mitchell et. al.
[14]. B. Amable, *The Diversity of Modern Capitalism*, Oxford University Press, Oxford, 2003; R. Boyer, 'How and Why Capitalisms Differ'(2005) 34 *Economy and Society* 509; ; R. Whitley, *Divergent Capitalisms: The Social Structuring and Change of Business Systems*, Oxford University Press, Oxford, 1999
[15] M. Schroder, 'Integrating Welfare and Production Typologies: How Refinements of the Varieties of Capitalism Approach Call for a Combination of Welfare Typologies' (2009) 38 *Journal of Social Policy* 19.

considered in the literature, but potentially important for our inquiry, is the possibility that there are varieties of liberal markets or, at least, significant differences amongst liberal regimes.[16]

At this point it is necessary to introduce two concepts that play a key role in the varieties of capitalism literature and which also recur in some of the other causal explanations we go on to explore regarding the links between corporate governance, corporate ownership and social protection: the notion of 'path dependency' and of 'complementarity'. As noted by Deeg, notions of path dependency and some sort of institutional coherence underpin most theories of national differences.[17] Path dependency — or the fact that nations become 'locked in' to a certain form of economic organization — accounts for the persistent diversity of national systems despite global pressures for systems to converge around a single economically efficient model.[18] Yet while the persistence of cross-national diversity in forms of capitalism is explained by path dependency, path dependency itself can be explained by the complementarity or coherence of national systems.

Path dependency is often explained by reference to the cost of switching from an established (albeit less than optimal) arrangement to a more efficient arrangement which might be outweighed by the welfare gain brought about by changing.[19] While the existence of adjustment costs for an individual are often a matter of technical fact, as regards economic processes they also arise from the social aspects of institutional development: because of the sunk costs and entrenched interests of groups or coalitions of actors.[20] As Jackson and Deeg explain further, the fact that there are 'institutional linkages and complementarities' within national systems makes it difficult to introduce changes which can have the effect of transforming 'the overall institutional configuration from one type of capitalism to another'.[21] That is, from an economic perspective, the marginal cost of continuing with an established regulatory 'style' is lower than radically recasting the system, principally because the fundamental rules are embedded across regulatory institutions and populations: any change to one aspect of the system may undo or unsettle the overall coherence of the system. Alternatively, deeply ingrained cultural and social mores, which are also expressed in legal culture, may lock in a certain regulatory style.[22] Thus we might expect to see that institutions within one particular context (for example the labour market) evolve in a 'complementary' way with those in another context (for example the capital market).[23]

Deeg explains three possible forms of institutional 'fit'. Institutions might simply cohere by virtue of a 'logic of similarity' whereby 'actors adopt similar approaches and solutions across different spheres of activity'.[24] For example, in liberal market systems, firms might pursue arms-length contractual

[16] See R. Mahon, 'Varieties of Liberalism: Canadian Social Policy from the "Golden Age" to the Present' (2008) 42 *Social Policy and Administration* 343.
[17] Deeg, in *Changing Capitalisms*, p 23.
[18] Cf Hansmann and Krakman on convergence
[19] See Schmidt and Spindler; Roe 1996
[20] Schmidt and Spindler
[21] Jackson and Deeg, pp. 35-36. See also Gospel and Pendleton, pp. 8-9. However, the validity of this proposition is also under debate: see Jackson and Deeg, pp. 36-37. On path dependency, see Bebchuk and Roe
[22] See K. Zweigert and H. Kotz, *An Introduction to Comparative Law*, Clarendon Press, Oxford, 1985.
[23] See M. Aoki, *Towards a Comparative Institutional Analysis*, Stanford University Press, Stanford, 2001.
[24] In *Changing Capitalisms*.

arrangements in competitive markets as a way of organising their relationships with suppliers, creditors and employees. In contrast, firms in co-ordinated market systems might pursue more relational dealings with creditors, suppliers and employees.[25] However, the varieties of capitalism literature tends to use the notion of complementarity in a second, more nuanced way. Rather than noting mere similarity between institutions, it refers to mutually reinforcing approaches or incentive structures in different economic subsystems such that the presence of one institution increases the returns of the other.[26] Deeg terms this the 'logic of synergy'.[27] For example, regarding corporate governance and employee participation, a complementary institutional 'fit' may arise where short-term finance requires quick entry and exit from business activities and thereby provokes an industrial relations system that allows the inexpensive hiring and firing of labour which in turn attracts short term finance and so on.[28] Finally, institutional fit might also be said to exhibit a logic of complementarity where one institution makes up for the deficiencies of another. An example from the social sciences would be the 'complementarity' of Denmark's welfare and labour law systems: where minimal protection of employees against dismissal and redundancy is 'offset' by generous unemployment benefit provision and active labour market programs. Thus society gets the benefit of the former, while the latter offsets the unpalatable effects.[29] This could be called the 'logic of contrast'. Path dependency here flows from the fact that change in one of the institutions would need to be met by some sort of adaptation or change in the other, to maintain the socially desired effect of the whole. Similarly, because the parts fit together in a particular way, Jacoby observes it becomes difficult, if not impossible, to take an institution from one setting, transplant it to another, and have it achieve the same result.[30]

Ahlering and Deakin note that the development of a system of regulation based in complementary institutions that 'co-evolve' is not necessarily the result of planned or functionally devised arrangements. Undoubtedly a degree of functionality must be present in the system or the particular legal system would not persist; but path dependency, as we have noted, rules out a purely functional process of legal and institutional development. Workable 'complementarities' are thus just as likely to arise through 'unexpected contingencies or conjunctions', even accidents, as they are through design.[31]

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[25] As Amable suggests, otherwise contradictory signals might be given to actors: at 6 and 57. Goodin et al, refer to 'intelectually and pragmatically unified packages of programs, and policies, values and institutions'.
[26] Hall and Soskice (following Aoki) 17-21
[27] Crouch insists that, given its etymology, 'complementarity' must imply institutions fitting together so as to complete each other by providing useful balancing characteristics. For him, similarity of institutions will often reveal a lack of true complementarity, whilst reciprocal reinforcement, while useful in explaining how forms of path dependence may arise, does not in itself necessarily imply true complementarity: (2005) *Socio-Economic Review*. Likewise, Hopner prefers the term 'coherence' where institutions are designed according to similar principles. He adds that an institutional configuration may be stable because of complementarity, coherence, or merely because its elements are 'compatible': (2005) *Socio-Economic Review*.
[28] Aguilera & Jackson, p 500
[29] Campbell and Pedersen, 'The Varieties of Capitalism and Hybrid Success: Denmark in the Global Economy' (2007) 40 *Comparative Political Studies* 307
[30] Jacoby. cf Teubner on the value of incompatible transplants in providing 'irritants' that can foster innovation.
[31] See Ahlering and Deakin

In understanding how these sets of 'institutional configurations'[32] interrelate to produce national 'styles' of market regulation, it is necessary to have regard to both regulatory and empirical dimensions of a national political economy. These include whether labour is strongly integrated into decision-making within the nation's corporations; whether there is co-ordinated collective bargaining; whether employees and workers are widely and strongly protected against redundancies and dismissals; the main source of finance of major companies within a particular national system; whether it is mainly equity or debt finance; whether markets for finance are deep or shallow; whether shareholdings are generally consolidated or diffusely held; whether the legal protections extended to minority shareholders are strong or weak; how secure companies are against takeover and merger activity in a particular national market; how shareholder-oriented decision making is within particular companies; and so on.

Among these various factors, 'law', particularly corporate and labour regulation, is a crucial component (though by no means the only one) in both setting the 'regulatory style' of a particular national system and facilitating change in that regulatory style. Legal dimensions set a boundary between the 'liberal market/outsider governed', and the 'co-ordinated market/insider governed' systems. However, the major works in the varieties of capitalism and comparative business systems literature do not deal with law and legal systems in specific detail, nor do they deal with questions of change through legal reform.[33] More specific legal factors are explored and absorbed into the analysis by the 'legal origins' literature, which argues that law is a key determinant in the division of production regimes into two different types or styles.

3. Legal Origins

The 'legal origins' notion owes itself to the important work of Rafael La Porta and his colleagues. Through a series of major publications dealing with cross-national legal indicators on matters to do with corporate governance and finance,[34] but subsequently spreading out to the regulation of

[32] See R. Deeg and G. Jackson, 'Towards a More Dynamic Theory of Capitalist Variety' (2007) 5 *Socio-Economic Review* 149.
[33] See, for example, H. Gospel and A. Pendleton (eds.), *Corporate Governance and Labour Management: An International Comparison*, Oxford University Press, Oxford, 2005. Two contributions to P. Hall and D. Soskice, examine the role of legal regulation in some detail (S. Casper, 'The Legal Framework for Corporate Governance: The Influence of Contract Law on Company Strategies in Germany and the United States' and S. Vittols, 'Varieties of Corporate Governance: Comparing Germany and the UK'), but as Stryker has argued, law occupies a peripheral status in most institutionalist scholarship. 'Law is there but not there — mentioned in passing yet not a sustained object of inquiry in its own right': R. Stryker, 'Mind the Gap: Law, Institutional Analysis and Socioeconomics' (2003) 1 *Socio-Economic Review* 335 at p. 340.
[34] R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471; R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131; 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3.

labour markets,[35] the authors have persuasively argued that different national economic 'styles' can be explained by reference to the 'legal origin' of the country concerned.

The argument about the importance of 'legal origin' is based on the division of legal systems into two families: those originating in the common law tradition, and those which are based in the civilian legal system. This division maps fairly easily on to the divide already identified between the 'liberal market' style of capitalism and the 'co-ordinated market' type, whereby common law origin countries are most associated with the 'liberal market/outsider' model of capitalism (the Anglo/American model), while the civil law origin countries are associated with the 'co-ordinated market'/insider model of capitalism,[36]and so 'legal origin' may be used to explain the endurance of these two broad 'varieties' of capitalism. Thus La Porta and his colleagues explain that the 'liberal market type' derives from its foundation in 'common law' regulatory forms and concepts, whereas the more controlled European and Japanese style production systems owe more to civil law ideas and concepts. In short, 'the historical origin of a country's laws shapes its regulation of labour and other markets'.[37]

The primacy of law with respect to diversity in national systems of corporate ownership relates to the degree of legal protection given to minority shareholders. La Porta et al. showed that deep or liquid share markets correlated with an index of basic minority shareholder protections. Absent these protections, block holdings will persist. A potential buyer won't buy into the share market if he or she feels the value of a firm is going to be disproportionately siphoned off by a majority shareowner, or such a potential buyer will offer such a substantially reduced price for shares that the block holder won't sell and the block remains intact.[38] Key minority shareholder protections — or what the authors refer to as 'quality corporate law' — range from an efficient judiciary, through mandatory disclosure rules, the fiduciary duties of directors, proxy voting and one-share-one-vote rules. The jurisdictions that scored highly in terms of minority shareholder protections in the empirical studies tended to be common law origin countries.

Scholars have adopted this 'legal families' categorisation to explain a broad range of economic differences between countries. Notably for our inquiry, a group of scholars, including La Porta, have made a study of comparative labour market laws and social security systems and again concluded that legal traditions — that is, whether a country's legal system fell into the common law or civil law tradition — were 'a strikingly important determinant of various aspects of statutory worker

[35] J. Botero, S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Regulation of Labour' (2004) 119 *Quarterly Journal of Economics* 1339.
[36] K. Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in K. Hopt et.al. (eds.), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan and the US*, Oxford University Press, Oxford, 2005.
[37] Botero et. al, at p 1340. For an account challenging some of the underlying arguments in the legal origin typology see D. Klerman and P. Mahoney, 'Legal Origin?' (2007) 35 *Journal of Comparative Economics* 278.
[38] R. La Porta et al., 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3.

protection.'[39] Thus patterns of regulation of labour markets follow the general styles of social control utilized by each legal system more generally, with civil law countries regulating labour markets more extensively than do common law countries, while the latter preserve the freedom of contract to a greater extent and have a less generous social security systems (because they are more likely to rely on markets to provide insurance).[40]

Part of the force of this argument lies in the fact that it is not just positing the view that law is *an* important variable to be considered. Note that 'legal origin' is being identified as *the* decisive or critical factor in determining the 'regulatory style' of a particular system, and that legal influence is seen as having *persistent effects*. Thus whilst law in national systems can, and does, change, sometimes in quite radical ways, 'legal origins' theory generally seems to suggest that legal origin — even where based in colonisation and the transplant of legal systems — sets in place a form of 'social control of business' which will persist over time; in other words the systems become path dependent.[41]

There have been a number of critiques levelled at the legal origins literature. Some of these question the method used by legal origins scholars in the major empirical studies.[42] The studies tend to take a set of laws or rules within a given area of regulation and assign each rule a numerical value according to, for example, the level of protection provided to minority shareholders. But this may often mean that important forms of regulation are overlooked,[43] or fail to deal with the distinction between 'law on the books' and 'law in action', the latter focussing on actual implementation and enforcement of rules.[44] Other critiques point to the ahistoricity of the legal origins approach, which relies on cross–sectional data, and subsequent research has sought to test the legal origins hypothesis by utilising time-series-based approaches.[45] In the area of corporate governance, the purported stability of legal systems in fact contrasts with changes in ownership structure in some advanced capitalist countries across the

[39] J. Botero et al., 'The Regulation of Labor' (2004) 119 *Quarterly Journal of Economics* 1339 at 1365. The study also found that common law style of regulation led to better economic efficiency outcomes than the civil law style, which has important policy implications and was taken up by the World Bank in its *Doing Business* project to promote 'business friendly' regulation: see, eg, World Bank *Doing Business in 2010*, World Bank, Washington, 2009. We do not address this point in our study. Subsequent studies in this area can be found in D. Pozen, 'The Regulation of Labor and the Relevance of Legal Origin' (2007) 27 *Comparative Labor Law & Policy Journal* 43; S. Djankov and R. Ramalho, 'Employment Laws in Developing Countries (2009) 37 *Journal of Comparative Economics* 3; S. Deakin and P. Sarkar, 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data' (2008) 39 *Industrial Relations Journal* 453.

[40] The legal origin theorists do not explicitly use a notion of complementarity, but it is clear that they see institutional groupings cohering through a logic of similarity.

[41] Botero et. al., above n. 32; Pistor, above n. 33. See generally, P. David, 'Why are Institutions the "Carriers of History"? Path Dependence and the Evolution of Conventions, Organisations and Institutions' (1994) 5 *Structural Change and Economic Dynamics* 205; R. Schmidt and G. Spindler, 'Path Dependence, Corporate Governance and Complementarity' (2002) 5 *International Finance*. Again the issue is highly debatable: see S. Jacoby, 'Economic Ideas and the Labour Market: Origins of the Anglo-American Model and Prospects for Global Diffusion' (2003) 25 *Comparative Labor Law & Policy Journal* 43, at pp. 68-69.

[42] See, eg, S. Deakin, P. Lele and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133,

[43] For example, in many countries labour markets are not merely regulated by statute but also by collective agreements: if the latter are excluded a country may be incorrectly coded.

[44] S. Cooney, P. Gahan and R. Mitchell, 'Legal Origins, Labour Law and the Regulation of Employment Relations'

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twentieth century.[46] As Herrigel notes, the legal origins argument 'does a good job of establishing a correlation between legal traditions and corporate governance regimes in the late 20th century', but the character of corporate governance — and the density of stockholdings — has varied considerably in individual countries over time, even while legal traditions have remained constant.[47] Related to this are critiques that stress the role of politics over and above legal origins, suggesting that current differences between national systems owe more to relatively recent political decisions than to legal variables going back perhaps centuries, and this approach is set out in more detail in the following part of the paper.[48]

One final problem with the legal origins approach is that it relies on a fairly stylised distinction between common law and civil law traditions that is open to question. Many national legal systems are hybrids, deriving elements from both the civil and common law systems.[49] The distinction between systems based on judge-made law and those based on statutory codes is becoming blurred, particularly in the area of corporate law and regulation.[50]

4. The Role of Politics

Political explanations stress political differences amongst nations as the key source of national diversity. It is not that legal traditions and institutions are unimportant, but that they are themselves derived from political choices. In effect, what the legal origin theorists identify as 'quality' corporate law is really only a proxy for politics.[51]

Mark Roe gives precedence to the left wing/right wing cleavage at the level of national politics. A left wing or social democratic regime is one that favours labour over shareholders, and he shows for several countries a statistical correlation between a country's embrace of social democracy and its corporate ownership structure: in short, social democracies will have a more concentrated pattern of corporate ownership than right wing countries. By favouring employee interests — which will often align with strategies such as firm expansion, risk avoidance, limits on restructuring and so on — and by putting in place few shareholder rights or protections, social democracies in effect make it more difficult for managers to pursue shareholder value. As a result, small investors are loath to take up minority shares and owners seek to maintain large, controlling stakes in corporations so as to control managers; thus a diversified pattern of ownership fails to emerge. In this reading, corporate law and

[46] M. Goyer, 'Corporate Governance' in G. Morgan et al., at pp. 427-8; See also B. Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) *Journal of Legal Studies* 30. G. Herrigel, 'Corporate Governance: History Without Historians' in G. Jones and J. Zeitlin (eds), *Oxford Handbook of Business History*, Oxford University Press, Oxford; R. Rajan and L. Zingales, 'The Great Reversals: The Politics of Financial Development in the Twentieth Century' (2003) 69 *Journal of Financial Economics* 5. Armour et al. in BYU Law Review
[47] Herrigel p 483.
[48] M. Goyer, at p. 430. See also M. Roe, 'Legal Origins, Politics and Stock Markets' (2006) 120 *Harvard law Review* 462.
[49] Siems
[50] S. Deakin et al., above n. 76.
[51] Cioffi book, p 34.

legal systems are important, but what a country does with its legal tradition is a political question.[52]

There have been a number of empirical criticisms levelled at Roe's analysis. Brian Cheffins has suggested that the UK does not fit with the theory: arguably, a pattern of dispersed corporate ownership arose in the UK between the end of the Second World War and the late 1970s, a period when the UK is best characterised as a social democratic regime that favoured the interests of labour through a strong social welfare state, coupled with labour laws which sustained a powerful trade union movement, the reach of collective bargaining and employment security provisions. John Coffee has also taken issue with Roe's account. As Coffee has pointed out, both Roe and the legal origin theorists appear to suggest that high agency costs for investors (that is, the difficulty in controlling managers) will lead to low dispersal of ownership: it's just that they disagree on the causes of high agency costs. The legal origin theorists suggest high agency costs arise from the absence of strong minority shareholder protection; Roe suggests that the high agency costs for investors spring from political decisions to cause firms to 'subordinate' the interests of shareholders to other stakeholders, such as employees, through highly protective social/labour provisions.[53] Coffee offers a slightly different explanation of the role of politics in determining national styles of corporate governance. He suggests that under the right conditions of private ordering, diffusion of share ownership may occur. This then creates a constituency of minority shareholders which then demands that governments institute laws offering minority shareholder protection. In short, 'it is not the law that causes corporate governance, but the reverse'.[54] Again, it is political decision that is crucial in bringing about a certain style of corporate law, but the politics — and the law — kicks in *after* the diffusion of share ownership has occurred.[55]

While Roe's argument regarding the political origins of dispersed and concentrated shareholder systems is one of the most prominent, and being based on the primacy of *politics* it is clearly at odds with the legal origins argument, it is not the only political explanation of corporate governance patterns. Roe stresses a dichotomous left/right or labour/capital divide. However, other theorists who agree on the important role of politics in determining both corporate law and corporate ownership patterns offer different explanations of the importance of politics.

For example, rather than focus on a simple labour/capital divide, Gourevitch and Shinn stress the importance of cross-class coalitions. Rather than treating the interests of employees and shareholders as inevitably opposed in a zero-sum game, the model proposed in the work of Gourevitch and Shinn sketches out three possible sets of coalitions: owners and managers vs. workers; managers and workers vs. owners; and owners and workers vs. managers; known respectively as the investor coalition; the corporatist coalition; and the transparency coalition. Actual outcomes in terms of styles of regulation then depend not only on which coalition is formed, but on who wins. Importantly, coalitions and

[52] Berg, p 1832.
[53] Coffee (2001) 111 *Yale Law Journal* 1.
[54] Berg, p 1833
[55] Berg, p 1835.

compromises may dissolve and new ones formed over time.[56]

Cioffi also recognises the importance of a 'transparency coalition' between labour (represented by social democratic governments) and owners against managers, pointing out that employees bear the risk of capital market failure and share with shareholders an interest in preventing managerial opportunism and, accordingly, it was centre-left governments in the United States and Germany that pushed for securities law reform to strengthen the right of shareholders to disclosure.[57] However, he qualifies this with the observation that no single coalition dominates reform across the three fields of corporate law, securities law and labour relations law. Consequently, he argues, 'stakeholder groups may have common ground to form an alliance with respect to one legal policy area but may form alternative — and potentially opposing — coalitions regarding others'.[58] Secondly, while recognising the importance of politics and political coalitions in driving the shape of corporate and securities law, Cioffi also argues that there is a feedback loop whereby the 'juridical nexus' of corporate law, securities law and labour law itself influences political and economic action by shaping the identities, political preferences, relative power and interests of constituencies such as mangers, workers and investors.[59] This is implicit on the Varieties of Capitalism literature explored above, whereby capital and labour are not always in opposition in co-ordinated market economies but different groups may hold common interests (cross-class coalitions) as regards welfare guarantees, training systems, employee participation in management and so on.

More recently, Christopher Bruner has also argued that in certain circumstances the interests of employees and shareholders may not be opposed in a zero-sum game. Bruner's main argument concerns the shape of corporate governance in countries of dispersed ownership patterns where, he argues, more than one outcome might eventuate. Such differing outcomes are exemplified in the cases of the US and the UK. Although, as we noted at the outset, there is a tendency to group these countries together for comparative purposes, following ownership dispersal in these countries, the corporate governance systems diverged, one in the direction of strong shareholder orientation (the UK), and the other in the direction of a relatively weak shareholder orientation (the US).[60]

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[56] As an added element, Gourevitch and Shinn also incorporate the insights of Pagano and Volpin on the importance of political institutions that aggregate actors' interests: that is, whether an electoral system is proportional or majoritarian.

[57] On the apparent compatibility of strong labour and moves to increase managerial accountability to shareholders in Germany, see also Jackson, Hoepner, & Kurdelbusch, 'Corporate governance and employees in Germany: Changing linkages, complementarities, and tensions' in H. Gospel & A. Pendleton (Eds.), *Corporate governance and labour management: An international comparison*, Oxford, Oxford University Press; Fauver, L., & Fuerst, M.E. 'Does good corporate governance include employee representation? Evidence from German corporate boards' (2006) 82 *Journal of Financial Economics* 673.

[58] Cioffi book, p 32.

[59] Cioffi book, p 14.

[60] See Bruner pp. 644- 645 and Figure 3 on p. 645. The evidence shows that there are, in fact, major differences in the regulatory structures of corporate governance at least between the US and the UK, seen principally in the limits imposed on the scope of US shareholders to take unilateral action in relation to corporate governance when compared with their counterparts in the UK. US shareholders are limited in their powers to remove directors, and to initiate fundamental transactions and charter amendments, rendering the shareholder largely subject to board power. And in the context of takeover situations 'target boards are afforded substantial latitude to interfere with the shareholders' freedom to sell their stock to a hostile bidder'. Compare the powers of UK shareholders unilaterally to amend a company's constitution by special resolution, their greater capacity to remove directors, and their wide

How, then, does this divergence in UK and US shareholder protection law tie in with ownership dispersal, and in what ways does it add to our understanding of labour law as one component in a configuration of several social institutions?[61] We have already seen that the influential legal origins literature supposes that strong protection for minority shareholder interests is in fact a *pre-condition* for ownership dispersal, such protection encouraging investment by non-controlling groups.[62] In Bruner's account, dispersal of ownership in the US had largely taken place by the 1930s.[63] In the UK it is accepted that dispersal took place during the 1960s and the 1970s.[64] In neither instance does it seem to be the case that strong *legal* protections for shareholders paved the way for ownership dispersal.[65] Whatever the reasons for the dispersal of ownership might be, strong shareholder protection might yet follow, indeed might be necessary, according to the socio-political contexts operating in the particular state. Bruner suggests that the development of a highly shareholder-oriented system in the UK was the result of two corresponding factors: first, the demand by an investor constituency for stronger shareholder protection in what was, or was becoming, a widely dispersed pattern of share ownership; and secondly, pre-existing (or contemporaneously developing) high levels of stakeholder protection in the form of social democratic policies and labour standards, guaranteed through state law. In other words, strong labour protections in the form of social security provisions and labour laws have made (and continue to make) it possible to secure shareholder interests through company law without fear of political repercussions.[66] Correspondingly, the relatively weak state of shareholder security in the US, when compared with the UK, is explainable in the same way. In the US employment standards guaranteed by law, and legislated safety-net provisions are relatively weak.[67] As a consequence of this, very different, socio-political structure, it is argued that it is not possible, politically, for a highly shareholder-oriented form of corporate governance to emerge.[68]

Bruner's observations regarding the interplay of corporate law and stakeholder protection — including labour law — in concentrated ownership systems largely correspond to the analysis put forward by the varieties of capitalism literature, the legal origins theorists, and scholars such as Mark Roe who have emphasised the role of politics. Where shareholder influence is comparatively strong through concentrated ownership, one also finds comparatively strong state-based 'stakeholder' protections in the

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powers in takeover situations, which effectively sidelines the board of directors in takeover situations: 'shareholders decide on the bid, end-stop'. Most of this shareholder-oriented regulation in the UK was introduced progressively from the late 1960s onwards

[61] '[A] related though distinct subject' according to Bruner, p. 611.

[62] La Porta et al.

[63] Relying on Berle and Means and other authorities cited

[64] Bruner p. 616 and nn. 172-175.

[65] Bruner p. 613.

[66] Bruner pp. 621-635.

[67] In terms of evidence, Bruner's argument is more specific in explaining the shaping of the UK's pattern of stakeholder and shareholder regulation than the US's. The more detailed evidence of an explicit 'trade-off' between shareholder rights and worker rights in the UK offered in Bruner's paper involves legislation concerning redundancy and dismissal. In the US, the 'trade off' seems more impressionistic: one figure supplied in Bruner's argument is that in 1983 nearly 60 per cent of all Americans received their health coverage through their employers. Bruner p. 639. See also p. 643: in 2009 three major automobile manufacturers provided health cover for more than 1 million persons.

[68] Bruner pp. 635-643.

form of 'social democratic' laws providing employment security, dismissal protection, unemployment protections, health insurance and so on. This is because the core regulatory question, then, in this typical state of concentrated ownership, is 'how to counteract that innate shareholder power through various types of stakeholder protection'.[69]

Bruner also endorses the idea of institutional complementarity employed in the varieties of capitalism literature,[70] although it is clear that he is using the notion of complementarity in a quite different way from the varieties of capitalism scholars. That is, his theory posits a style of complementarity whereby aspects of one area of regulation — protection for employees — have the capacity to make up for possible deficiencies produced by another area — such as a corporate law that strongly empowers shareholders. This contrasts with the varieties of capitalism idea of complementarity which stress the logic of similarity or synergy between regulatory approaches in different domains (for example, arms-length, market-mediated relations between firms and shareholders are matched by arms-length, market-mediated employment relationships).

This points us towards a potentially important difference between Bruner's analysis and the explanations offered by theorists considered earlier. When it comes to liberal market or dispersed corporate governance systems, most of those theorists we examined match such regimes both with strong shareholder empowerment and strong minority shareholder protection *and* with relatively weak employee protection.[71] Bruner's innovation is to suggest that such a correlation is not inevitable and that it is possible for strong stakeholder protection (especially as regards workers as a class of stakeholder) to co-exist with both dispersed corporate ownership and a strongly shareholder-oriented model of corporate law, with the UK being his paradigm example.[72]

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It is clear from our discussion so far that to understand how 'institutional configurations'[73] interrelate to produce national 'styles' of regulation, it is necessary to have regard to both regulatory and empirical dimensions of a national political economy. These include whether shareholdings are generally consolidated or diffusely held; whether the legal protections extended to minority shareholders are strong or weak; how secure companies are against takeover and merger activity in a particular national market; how shareholder-oriented decision making is within particular companies; whether labour is strongly integrated into decision-making within the nation's corporations; whether

[69] Bruner pp. 644-645 and Figure 3 on p. 655.
[70] At p 261
[71]
[72] Conversely, the US example shows the possibility of a correlation between dispersed share ownership, relatively weak shareholder protection and weak labour laws. As we have seen, Cioffi and others have suggested that some of the enhanced shareholder protections that have emerged in the past decade in some countries have been championed by social democratic or left-leaning administrations, but the explanation given by these scholars differs fundamentally from the argument developed by Bruner.
[73] See R. Deeg and G. Jackson, 'Towards a More Dynamic Theory of Capitalist Variety' (2007) 5 *Socio-Economic Review* 149.

there is co-ordinated collective bargaining; whether employees and workers are widely and strongly protected against redundancies and dismissals and so on. In the following sections we will consider the extent to which Australian labour law is 'worker protective' before going on to consider the shareholder-orientation of Australian corporate law and Australia's pattern of share ownership.

5. Australian Labour Law and Worker Protection

Ahlering and Deakin have suggested a useful stylised way of understanding the distinction between labour market regulation in liberal market/common law origin and co-ordinated market/civil law origin countries. Firstly, in market/outsider (common law origin) systems the predominant form of employee voice within the enterprise, and thus the key instrument of employee influence in enterprise management (corporate governance) is 'voluntarist' in the shape of one or more forms of bargaining. Although there is great diversity in the national legal form of these bargaining systems, and the extent to which employers are obliged to recognise and to bargain with workers and unions under them, all these systems have a very limited role in relation to key areas of managerial prerogative. Secondly, this 'voluntarist' approach also tends generally to be associated with a partial, rather than an extensive, regulation of the labour market. That is to say, outside the reach of the bargaining systems, the extent of regulation governing minimum terms and conditions of employment tends to be uneven and partial amongst and between groups and classes of workers.

The relational/insider, civilian-law origin systems on the other hand, tend to feature the integration of employee voice into the decision-making structures of business through legally supported mechanisms. These include employee representation on company boards in some European countries, works councils, and laws requiring employees and their representatives to be informed and consulted about business matters. In addition, the regulation of the employment contract through legislation and/or bargained agreements also tends to be more comprehensive (what Ahlering and Deakin label 'universalism'). As a result many of these minimum standards take effect as a form of 'social rights'.

In addressing the origin and evolution of Australian labour law and labour market regulation, particular attention must be directed to the system of industrial conciliation and arbitration established federally and in most States by about 1915. This system of dispute settlement, representing an innovative departure in labour law, empowered trade unions and regulated most sectors of the labour market.
At one level the system could be analysed as a variant of the collective bargaining systems which characterised other 'liberal market' economies, and which ranged in orientation from those which were largely voluntarist to systems, such as the US, which had some elements of compulsion. In Australia, however, the compulsory aspects, rendered the system far reaching both in operational scope and

regulatory content, and thus, superficially at least, distinguishable from the systems of its most obvious comparators, the US and Britain.[74]

The compulsory application to industry and workers of awarded work conditions more or less compelled employers to recognise and bargain with trade unions, and unions occupied a statutorily supported and privileged role in representing workers, far more so than unions in Britain and the US where recognition often had to be fought for through industrial campaigns. The compulsory application of awards also meant a very high level of application of prescribed employment conditions: compared with some other similar countries, such as the US and Canada, Australian employers found it difficult to escape the regulatory net.[75] A further dimension of this regulation concerned the depth of detail in awards: these were not short simple documents in the shape of many British collective agreements. Rather, they were fully fledged sets of regulations governing everything from wages, annual and sick leave, overtime and penalty rates and the settlement of disputes between the parties. Whilst they rarely went so far as to specify work procedure, they embodied an understanding of job content and fixed the use of labour temporally and administratively, thus impacting considerably on the organisation of the labour process.[76]

In certain respects then, there is some basis to suggest that Australian labour market regulation, at least for a significant period of its history, and perhaps until relatively recently, was more 'like' a 'co-ordinated' market system than a 'liberal' market system of capitalist economy. Employee representation at the workplace seems to have been more compulsory than voluntary, and the regulation of the labour market appears to have been more universalist than partial. Prior to the 1990s, as a consequence of its relatively comprehensive coverage of labour standards, in international studies Australia's system of bargaining tended to be ranked closer to those with centralised arrangements than with the de-centralised systems of the UK and the USA.[77]

Yet assuming a legal origins effect to have force, it would follow that Australian labour law would resemble the regulatory 'style' of other countries with a legal system of common law origin, such as the United Kingdom, the United States, a number of Asian countries including India, and so on. It would also follow that there would be a certain 'path dependency' in the evolution of Australian labour law fixed by certain 'ground rules' and 'institutions' and that any development in the regulatory regime would be basically in accord with comparable systems. But it is clear that the Australian system of labour law, while it may have had some antecedents in various British, Canadian and European ideas, in essence was a path-breaking legal innovation.[78] On its face, then, the emergence of the compulsory arbitration system seems to confront legal origins theory with a puzzle. Notwithstanding its common law inheritance, by about 1920 the Australian labour law system had few important legal or

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77 Clegg 1976; Traxler 1996
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institutional antecedents adopted from its country of legal origin, apart from various private law principles which were incorporated into the developing contract of employment. In various respects its elements seem, in retrospect, to have placed it closer to the supposed character of the civil law system than to the common law system: greater government intervention through legislation, less reliance on freedom of contract, and more centralised state control over the economy, including pay and working conditions.[79]

However, at the same time there are also reasons for distinguishing Australian labour market regulation from many 'co-ordinated' market systems. These have to do with the nature of employer-union relations and the influence of formalised employee voice within enterprises. Historically Australian labour law and its institutions were organised around the idea of fundamental conflict between employers and workers.[80] The system did not empower unions and employees with much influence over managerial prerogatives, nor did the system develop into a kind of 'corporatist' co-operative-style of capital/labour relations that has characterised many European systems.[81] Whilst unions were highly integrated within the system overall, arbitration in operation narrowed the scope of collective bargaining to a legalistic interpretation of 'industrial matters' which effectively excluded employee voice from many aspects of managerial decision making.

As noted in the Introduction to this paper, Australian labour law has undergone a period of near continuous reformulation over the past two decades, and this inevitably calls into question any characterisation of the Australian system. It would be accurate to say that neo-liberalism, with its emphasis on deregulation, flexibility and decentralisation in employment relations, has come to dominate debate over industrial regulation in Australia as elsewhere. The 'de-collectivisation' of Australian employment relations in large part has mirrored the experience of other liberalising states, such as the UK and the US, with the substantial diminution of the role of trade unions as co-regulators in the industrial relations process. Equally importantly, the de-collectivisation process has also involved the wholesale reduction in influence of the compulsory arbitration tribunals which historically characterised the Australian system. This has brought about a revolution in employment standard setting, shifting the process from a centralised one based on externally mandated reasonably uniform national, industry- or occupational-wide standards to market-based, self-regulated standards particular to single enterprises or individual persons.

On the other hand one recent study has noted a marked continuity in Australian labour law, when evaluated against a set of 'worker protective' criteria, rather than fundamental change.[82] In that

[79] Mitchell and Scherer.
[80] See Macintyre and Mitchell, above n. 76; K. Walker, *Australian Industrial Relations Systems*, Harvard University Press, Cambridge, 1970, pp. 8-11.
[81] See Wright, above n. 102, p. 109; A. McIvor and C. Wright, 'Managing Labour: UK and Australian Lawyers in Comparative Perspective, 1900-1950' (2005) 88 *Labour History* 45; G. Palmer, 'Corporatism and Australian Arbitration' in Macintyre and Mitchell, above n. 76, 313.
[82] Mitchell et.al.

research, when the data for five sets of variables measuring labour protection were consolidated into an aggregate measure, a picture of relative stability emerges, notwithstanding obvious important changes in the law over the period 1993–1997,[83] and then what appeared to be a radical shift in policy in 2005.[84] In other words, and allowing for some possible understatement in the level of protection, the present state of Australian labour law appears in a quantitative sense to be little different in levels of protective content from where it was positioned at the commencement of the measured period some 40 years earlier, and (apart from one confined period) relatively stable in its trajectory.[85]

Assessed in general terms, we would argue that the Australian system is comparatively worker protective, particularly when measured against the US as a key example of a 'liberal market'/common law origin country, and, at various times, more worker protective than the UK.[86] Perhaps, as we have suggested, in some important respects, it has similarities with the highly worker protective systems of Continental Europe. Furthermore, it is useful to factor in not only the laws and regulations associated with labour law, but other forms of stakeholder protection, such as social policy directed at people of workforce age. Again, the contrast with the United States is most marked. First, a key feature of the US system is that unemployment and health benefits are overwhelmingly occupational benefits, linked to continued labour market attachment to a particular employer.[87] In contrast, the Australian - and UK - welfare states offer a safety net, however imperfect, that is independent of a citizen's occupational standing. Secondly, over the past 40 years Australia has in important ways enhanced elements of its social safety net, especially as regards the institution of a comprehensive free health-care system in the early 1980s and the extension of a system of contributory retirement benefits as a supplement to the old age pension, along with a strengthening of payments to low- to middle-income households with children.

We suggest that it is necessary to view employment legislation and welfare state provisions as operating as complementary mechanisms[88] acting in combination 'to contain the socially disruptive character of free markets under industrial capitalism'.[89] Such an approach has marked the study of the

[83] The Labor government in 1994 created a right to engage in industrial action and mandated procedural fairness in dismissal decisions, notably enhancing the overall protective nature of the system; the Coalition government in 1996 curtailed union representation rights and altered the application of the unfair dismissal laws, creating a notable decline in the level of worker protection.

[84] WorkChoices

[85] Problem re relative weighting: potential distortions that may flow from treating all variables as carrying equal weight in each sub-index; the use of binary variables makes it difficult to capture gradations in the effect of legal rules. In effect, the stability in the aggregate measure of 'worker protection' might hide important changes in the protection afforded by particular aspects of the Australian labour law system. Thus whilst the regulation of working time and alternative labour hire arrangements has shown little change, the protection of employee representation rights have undergone a marked decline over the past 40 years, but this has been 'offset' by a rise in individual employment rights, particularly associated with dismissals.

[86] Over the past 40 years, UK labour law has varied to an appreciable degree in its level of protection This appears to be explainable principally by political effects (changes of government), and the impact of transnational harmonisation through the directives of the European Union: see Deakin, Liele and Siems.

[87] In terms of Bruner's argument this makes the worker particularly vulnerable in the case of corporate restructuring: Bruner p. 638.

[88] Although Bruner focusses on social welfare policy, it is clear that he includes both labour law and social security as markers of stakeholder protection (and in his references to Gourevitch and Shinn).

[89] G. Bonoli, 'Too Narrow and Too Wide at Once: The "Welfare State" as Dependent Variable in Policy Analysis' in J. Clasen and N. A. Siegel (eds.), *Investigating Welfare State Change*, Edward Elgar, London, 2007.

post-war system of welfare in Australia. Taking a longer range view, Castles and Mitchell, for example, have argued that despite the absence of generous and universal income transfers, functionally equivalent welfare guarantees were in fact embedded in the Australian labour market via the wage arbitration system.[90] When this form of labour market regulation is factored in, what initially appears to have been a fairly extreme case of a liberal, means-tested social assistance system, takes on something more essentially 'social democratic' in its effects, at least insofar as male breadwinners and their households were concerned.[91]

Having reached a qualified characterisation of the Australian labour law system (i.e. one which was, and remains, strongly protective), it is now necessary to turn our attention to Australia's corporate law, the institutional domain which many scholars identify as 'complementary' to labour law, and to Australia's pattern of corporate ownership and control.

6. Shareholder Empowerment in Australia

The purpose of this section of the paper is to determine the position of shareholders of listed corporations in Australia in the context of the level of protection or empowerment they are afforded. As we have argued elsewhere, Australian corporate law has tended to track developments in the United Kingdom.[92] Australia's foundational legislative interventions in this area were closely modelled on British company law.[93] Some have suggested that the more recent flurry of activity since the mid-1990s represents an 'Americanisation' of corporate law.[94] In general terms there may be a convergence, yet there are still key areas where Australia tracks more closely a distinctly British model. The institutional role of the Takeovers Panel and its predecessor, the Corporations and Securities Panel, for example, represents a transplant of key elements of Britain's City Code on Takeovers, which also prohibits directors, in the absence of shareholder approval, from taking action that may frustrate a takeover offer or that denies shareholders the opportunity to decide whether to evaluate an offer on its merits,[95] whereas in many US jurisdictions directors of a target company still have the capacity to thwart hostile takeover bids. Similarly, whereas the US response to corporate scandals early in the 21st century was to shift towards a 'legislative rules-based approach to corporate governance, with a higher level of

[90] F. Castles and D. Mitchell, *Three Worlds of Welfare Capitalism or Four?* Discussion Paper 21, ANU , Canberra, 1993.
[91] Esping-Anderson, *Social Foundations of Post-Industrial Economies*, Oxford University Press, Oxford, 1999, p. 89.
[92] Mitchell et al
[93] McQueen, above n. 12, goes so far as to refer to 'Company Law as Imperialism', whereby a British model of company law was exported to the colonies despite there being little or no demand amongst business operators for the corporate form.
[94] P. von Nessen, 'The Americanization of Corporate Law' (1999) 26 *Syracuse Journal of International Law and Commerce* 239.
[95] A. Dignam, 'Transplanting UK Takeover Culture: The EU Takeovers Directive and the Australian Experience' (2007) 4 *International Journal of Disclosure* 148; E. Armson. 'Models for Takeover Dispute Resolution: Australia and the UK' (2005) 5 *Journal of Corporate Law Studies* 401.

mandatory standards',[96] Australia has adopted a more non-prescriptive approach, again mirroring that of the UK, whereby listed companies must comply with, or explain their divergence from, the principles set out in the ASX's corporate governance guidelines.[97] A final example is the divergence between recognition of shareholder interests through market-mechanisms (eg, disclosure requirements) and enhanced decision-making or participatory rights for shareholders. In more recent post-scandal regulatory reforms Australia and Britain have favoured the latter path, whilst the United States has tended toward the former.[98]

Bruner makes the point that it is an oversimplification to conflate the US and UK corporate governance systems — typically put forward as exemplars of 'liberal market' economies — as uniformly privileging shareholders and discounting other stakeholders.[99] He usefully draws up a list of six variables which indicate to him differences in the regulatory structures of corporate governance in the US and the UK and argues that there is a 'divergence in terms of shareholder power and orientation towards shareholder interests'.[100] Five of those variables are: the ability of shareholders of public companies to call special meetings; to remove directors without cause; to initiate amendments to the company charter; to compel the board to take action; and to approve takeover defences. The sixth variable identified by Bruner is the identity of the beneficiaries of the directors' efforts, specifically whether the directors efforts are designed to promote the interests of the shareholders, the corporation, or both the shareholders and the corporation. [101] Bruner determines that on all these measures shareholders in the UK have greater levels of protection than their counterparts in the US and that corporate governance is more shareholder centric in the UK, than it is in the US.[102]

Figure 1 is drawn from a figure contained in Bruner's article that summarises his evaluation of the position of shareholders in the US and the UK.[103] We have added the fourth column to illustrate the application of Bruner's variables to Australian corporate governance. An examination of Figure 1 indicates that shareholders of public companies in Australia have much in common with their counterparts in the UK and little in common with their counterparts in the US. Corporate governance in Australia shares five of the six variables with the UK and only one variable with the US.

[96] J. Hill, 'Regulatory Responses to Corporate Governance Scandals' (2005) 23 *Wisconsin International Law Journal* 367 at 382.
[97] ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best practice Recommendations*, 2003: these principles address board role and structure, integrity of financial reporting and disclosure of company information.
[98] J. Hill, *The Shifting Balance of Power Between Shareholders and the Board: News Corp's Exodus to Delaware and Other Antipodean Tales*, Sydney Law School Legal Studies Research Paper No. 08/20, 2008, and see n. 34 above. We also noted that this theme of shareholder participation underpinned Australian reforms in the area of executive remuneration: above n. 46.
[99] Bruner p. 593.
[100] Bruner p. 593.
[101] Bruner p. 593 – 611.
[102] Bruner p. 593 – 611.
[103] Bruner p 603.

Figure 1[104]

Shareholders' Default Powers and Directors' Duties in Public Corporations

	US (Delaware)	**UK**	**Australia**
Shareholders' power to call special meetings	No	Yes	Yes
Shareholders' power to remove directors without cause	No, if Board is classified	Yes	Yes
Shareholders' power to initiate charter amendments	No	Yes	Yes
Shareholders' power to compel board action	No	Yes	No
Shareholders' power to approve takeover defences	No	Yes	Yes
Beneficiaries of directors' efforts	Corporation and shareholders	Shareholders	Shareholders

One of the variables identified by Bruner is the power of shareholders to call special meetings.[105] Directors of Australian public companies are required to call and hold a general meeting of the members if requested to do so by members with at least five per cent of the vote or at least 100 members who are entitled to vote.[106] By contrast, shareholders of US public companies do not have the ability to call special meetings, unless that power is expressly granted to them by the company's charter, or constitution.[107]

Shareholders of Australian public companies can remove directors without cause by a simple majority.[108] By contrast, in practice the ability of shareholders to remove directors from the boards of US public companies is impeded by various factors.[109] Like the UK, shareholders of Australian public companies can propose amendments to the company constitution.[110] This contrasts with the situation in the US where Delaware law requires that changes to the company charter be proposed by the board before shareholders are given the chance to approve or disapprove of it.[111]

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[104] Apart from column four this figure replicates Figure One from Bruner p 603.
[105] Bruner p 595.
[106] *Corporations Act 2001* (Cth) s 249D.
[107] Bruner page 595 – he footnotes to Del. Code Ann. tit. 8, § 211(d) (2001).
[108] *Corporations Act 2001* (Cth) s 203D. While shareholders have the right to remove directors, the company may be liable for damages if there is a separate employment contract.
[109] Bruner p 595. (Bruner FN 121 - See Armour et al., Corporate Ownership Structure, supra note 8, at 1751-52; Gelter, supra note 1, at 188;see also supra note 87.)
[110] Amendments to the constitution of Australian public companies are required to be passed by special resolution which requires a seventy-five per cent majority. *Corporations Act 2001* (Cth) s 136(2). Bruner page 604. (Bruner FN 118 - The company's constitution includes its "articles," together with certain resolutions and agreements. Id. § 17. The articles set out "regulations for the company," though "model articles" prescribed by the Secretary of State apply by default. Id. §§ 18-20. Need to find art that states amendment rules).
[111] Bruner p 604. (no footnote in Bruner - find ref for US)

The next variable identified by Bruner is the ability of shareholders to direct the board. In the US, the UK and Australia the default rules state that the board is responsible for the management of the company's business and it is able to exercise all the powers of the company.[112] However, shareholders of UK public companies that adopt the model articles have the ability to pass a special resolution that orders the directors 'to take or refrain from taking specified action.'[113] This is not the case in the US or Australia. This is the only variable identified by Bruner where the position in Australia is the same as the position in the US, and different from the position in the UK.

Bruner contrasts the regulation of takeovers in the UK with that in the US and concludes that unlike the US, takeover regulation in the UK is shareholder centric. In the UK boards of target companies are 'effectively sidelined in a hostile takeover'[114]and the shareholders decide on the takeover bid. This position contrasts with the position in the US where boards are granted 'substantial discretion to employ defensive measures to impede tender offers.'[115] The position in Australia is similar to that in the UK in that strong protection is provided to shareholders of target companies.[116] Directors of Australian public companies subject to hostile takeovers have less freedom than their US counterparts and are subject to limitations on their ability to implement defensive tactics. An example of a defensive tactic that a board of a target company may consider adopting is the issuing of shares to someone who is friendly to the board. Australian Securities Exchange Listing Rule 7.9 limits a board's ability to employ this tactic by requiring the approval of existing shareholders before a listed company can issue or agree to issue shares for three months after the company is told in writing that a person is making, or proposes to make, a takeover.[117]

The identity of the beneficiary of the directors' efforts is the final variable identified by Bruner. Directors of Australian companies are under a fiduciary duty to act in good faith in the best interests of the company and are subject to an overlapping statutory duty 'to exercise their powers and discharge their duties: in good faith in the best interests of the corporation'[118] The 'best interests of the corporation' has been interpreted as the best interests of the existing shareholders[119] except for

[112] *Corporations Act 2001* (Cth) s 198A(1) states that 'The business of a company is to be managed by or under the direction of the directors.' *Corporations Act 2001* (Cth) s 198A(1) states that The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.' Similar provisions are contained in The Companies (Model Articles) Regulations, 2008, S.I. 2008/3229, art. 3, sched. 3 (U.K.) and find ref for US.
[113] The Companies (Model Articles) Regulations, 2008, S.I. 2008/3229, art. 3, sched. 3 (U.K.) art 4(1).
[114] Bruner 606.
[115] Bruner 606.
[116] Helen Anderson, Michelle Welsh, Ian Ramsay and Peter Gahan, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison.' (2012) 61 *International and Comparative Law Quarterly* 171, at 190-1.
[117] Australian Securities Exchange Listing Rule 7.9. Another differences between US and Australian regulation of takeovers is that In the US, directors of target companies have broad powers to commence litigation to thwart a hostile takeover. By contrast, in Australia, access to the courts is usually not permitted while a takeover is underway and disputes are referred to the Takeovers Panel, which generally decides matters in a matter of days. See I Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Publishing 2010), ch 1.
[118] *Corporations Act 2001* (Cth) s 181(1)(a)
[119] *Greenhalgh v Arderne Cinemas Ltd* [1915] Ch 286 at 291.

situations where the company is facing impending insolvency when the interests of the corporation has been interpreted to mean the interests of the corporation's creditors.[120] There is authority to support the view that in Australia the duty to act in the interests of the company as a whole does not require directors to act in the best interests of 'the company as a commercial entity, distinct from the corporators.'[121]

All this leaves no room for doubt that the Australian corporate governance regime should be classified as decidedly shareholder-centric. Other research has examined a wider range of variables and it confirms the view that the level of shareholder protection in the US is less than it is in both the UK and Australia.[122] This research includes work undertaken by Lele and Siems[123] where the authors adopted a 'leximetric' methodology[124] numerically to code 60 variables designed to measure the strength of shareholder protection. The authors applied the variables longitudinally to five countries, including the UK and the US, over the period 1970 to 2005.[125] Lele and Siems discovered that shareholder protection was higher in the US than in the UK for much of the period from 1970 to 1980. However the position was reversed from about 1980 onwards when the level of shareholder protection in the UK rose and exceeded the level in the US for the remainder of the period of the study. [126] In a later study by Anderson *et al. s*hareholder protection in Australia was coded using the 60 variables identified by Lele and Siems and the Australian results were compared with Lele and Siem's results for the US and the UK and three other countries.[127] The Anderson *et al* study discovered that compared with the UK and the US (as well as three other countries examined) the level of protection afforded to shareholders under Australian law was relatively high. While having more in common with the UK than the US since 1980, the level of shareholder protection in Australia was higher than both the UK and the US for the entire period of the study from 1970 to 2005.[128]

[120] Kinsela v Russell Kinsela Pty Ltd (in liq) (1986) 4 NSWLR 722.
[121] R P Austin and I M Ramsay 'Fords Principles of Corporate Law' (2010) 10th ed, [8.095] citing Greenhalgh v Arderne Cinemas Ltd [1915] Ch 286 at 291 and Ngurli Ltd v McCann (1953) 90 CLR 425 at 438; 27 ALJ 349.
[122] See P Lele and M Siems, "Shareholder Protection: A Leximetric Approach" (2007) 7 *Journal of Corporate Law Studies* 17 and Helen Anderson, Michelle Welsh, Ian Ramsay and Peter Gahan, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison.' (2012) 61(1) International and Comparative Law Quarterly 171 -207.
[123] P Lele and M Siems, "Shareholder Protection: A Leximetric Approach" (2007) 7 Journal of Corporate Law Studies 17.
[124] The leximetric methodology was adapted from the pioneering work of La Porta, Lopez-de-Silanes, Shleifer and Vishny. See R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, "Law and Finance" (1998) 106 *Journal of Political Economy* 1113. See also R La Porta, F Lopez-de-Silanes, A Shleifer, and R Vishny, "Legal Determinants of External Finance" (1997) 52 *Journal of Finance* 1131; R La Porta, F Lopez-de-Silanes and A Shleifer, "Corporate Ownership Around the World" (1999) 54 *Journal of Finance* 471.
[125] Lele and Siems, "Shareholder Protection: A Leximetric Approach".
[126] Ibid.
[127] Helen Anderson, Michelle Welsh, Ian Ramsay and Peter Gahan, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison.' (2012) 61(1) International and Comparative Law Quarterly 171 -207.
[128] *Ibid* at 184 – 5.

7. Australia: A Dispersed or Concentrated System of Corporate Control?

The Australian system of corporate governance and control has not featured prominently in international debates. Most international comparative studies rely on a stylised opposition between US and UK structures of ownership (dispersed) on the one hand and continental European patterns (concentrated) on the other. Some commentators have used the US and UK experience to assert the existence of an 'Anglo-Saxon' model of ownership and controls, into which Australia, along with Canada and New Zealand, is simply presumed to fall.[129] Others cluster Australia with the US and UK on the basis of its presumed pattern of corporate ownership.[130] A number of analyses point to Australia's market capitalization/GNP ratio, which is close to that of the US.[131] The OECD observed in 1998:

> As in other countries with an 'outsider' model, Australia has a relatively large market in publicly traded equities … Market capitalisation was almost 70 percent of GDP in 1994, near the United States level but far above the levels in most other countries, especially continental European countries. Australia has also experienced one of the largest increases in market capitalisation relative to GDP amongst OECD countries in the early 1990s.[132]

Weimar and Pape use similar data to group the US, UK and Australia as 'Anglo-Saxon' economies which in turn are said to be characterised by a 'low concentration of ownership' (although they don't provide empirical data as to ownership concentration).[133] Hall and Soskice, writing in the 'Varieties of Capitalism' tradition, have also clustered Australia with the US, UK and Canada as a 'liberal market economy' (and hence characterised by dispersed/outsider systems of corporate ownership and control) partly on the basis of its stock market capitalisation.[134] Finally, the categorisation of the Australian system as an 'outsider' one is also implicit in the 'Legal Origins' literature. As we saw, this literature asserts that countries with a common law as opposed to civil law legal system — as is the case in Australia — will tend to exhibit both strong minority shareholder protections in their corporate law and, correlating with this, a dispersed pattern of share ownership.[135]

On the other hand, some international commentators have expressed reservations about the categorisation of Australia as a dispersed or outsider system. For example, Mark Roe found it difficult

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[129] Eg, M Bradley et al., 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a crossroads' (1999) 62(3) *Law and Contemporary Problems* 9 at 51

[130] Gourevitch and Shinn, p 17; J Pontusson, *Inequality and Prosperity: Social Europe vs Liberal America*, Cornell University Press, Ithaca, 2005, p 22 — although to the extent that these authors rely on the data supplied in the La Porta et al. studies, this clustering may be flawed: see discussion below at nn.xxx and associated discussion..

[131] Cheffins, fn 47, citing La Porta, OECD etc

[132] OECD Economic Survey: Australia 1998, at p 96

[133] J Weimar and J Pape, 'A Taxonomy of Systems of Corporate Governance' (1999) 7 *Corporate Governance: An International Review* 152 at 154-6.

[134] Hall and Soskice, p 19 (Figure 1.1) — although the data presented by these authors actually show Australia in terms of stock market capitalisation sitting closer to the Netherlands and Japan than to the US, and closer to Denmark than to the UK.

[135]

to unequivocally place Australia,[136] whilst Nestor and Thompson pointed to a group of countries, including Australia, which inhabited a half-way house between the dispersed patterns evident in the US and UK and the concentration of ownership in continental European countries.[137] Bruner also acknowledges that countries such as Australia and Canada represent 'intermediate cases', with 'market oriented' corporate governance arrangements similar to US and UK but with ownership of corporations dominated by blockholders[138]

More recently, however, new empirical studies, and a reappraisal of existing empirical data, have led many to question more directly Australia's status as a dispersed/outsider system. Due to differing ways of measuring concentration and control, there are problems with the comparability of the data, both as between Australian studies undertaken at different points in time, and as between Australian and overseas studies.[139] So at best, such studies provide a series of snapshots taken at different times of different samples of Australian companies. Nevertheless, we'd suggest that such studies generally provide support for two insights. The first is that the ownership of Australian firms has been characterised by a notable degree of concentration, persisting across time, which calls into question any categorisation of the Australian system of corporate ownership and control as unequivocally a 'dispersed' system. However — and this is our second observation — such studies also suggest a significant concentration of ownership in the hands of institutional investors, again persistent or even increasing across time, which further complicates the categorisation of the Australian system of corporate ownership and control, a point we will discuss further, below.

One of the most telling points in favour of *not* treating Australia as exhibiting a dispersed pattern of share ownership relates to the proportion of companies that are listed on the stock exchange and which publicly trade shares. This is an important threshold question: it is not sufficient to draw conclusions about the dispersed or concentrated nature of holdings in publicly listed companies if such companies themselves represent a small proportion of corporate activity in an economy. Unlisted or private companies are generally going to exhibit a system of insider-oriented governance: a locked-in semi-closed class of shareholders, and a degree of insulation from the forms of marketised pressure for shareholder value, leading investors to find other, more direct forms of monitoring management. Australia pioneered the statutory recognition of private companies, which did not make public offerings and restricted transfer of their shares in return for being exempted from various compulsory

[136] Dignam and Galanis
[137] Stilpon Nestor and John K. Thompson, 'Corporate Governance Patterns In OECD Economies: Is Convergence Underway?'. They argue that the UK and US represent the classic 'outsider' systems whilst pointing to several continental European systems as 'insider', but go on to observe 'that there have always been a number of systems which stand somewhere between insider and outsider models. In particular, in the smaller English-speaking countries, such as Australia, Canada and New Zealand, the pattern of ownership is more concentrated than in the US or the UK with family-owned companies often predominating. However, the strong recognition of shareholder rights, institutional ownership of wealth, the tradition of strong legal regulation of securities markets and heavy insistence on transparency in accounting give these systems many points in common with the US and UK'.
[138] Bruner at nn 4 and 333
[139] As we shall see, there are problems with the data on corporate ownership concentration even in countries such as the United States where there has been a long history of research in this area.

disclosure and auditing requirements.[140] In the first decades of the twentieth century only a minority of companies sought a stock exchange listing. The capital market's prime activity before the 1890s had been trading in speculative mining stock and new issues for industrial stocks remained extremely modest until the 1920s and 1930s.[141] After World War II, more companies gained a stock exchange listing, but as late as the mid-1990s the stock exchange-listed corporate sector remained a relatively small part of the Australian economy: only about a third of Australia's largest companies were listed on its stock exchange compared with two thirds of the UK's largest companies and nearly all the largest US companies.[142]

Putting aside the important question of the proportion of corporate activity that takes place in the listed sector, one measure that has been be utilised to determine where a country is placed on the shareholder concentration/diversification continuum is the percentage of large companies that are controlled by block-holders. This was the approach used by Berle and Means in their classic study of US patterns of corporate control in the 1930s. In the absence of a controlling block-holder, and where shareholdings in a firm are widely dispersed with each shareholder having only very small holdings, such shareholders will both find it practically difficult and have little incentive to expend resources in formulating a coalition of shareholders able to effect change at a general meeting. In such firms, management would have a relatively free hand in furthering their own interests or the interests of stakeholders other than shareholders: such firms are effectively 'management controlled' in Berle and Means' terms. The critical question is identifying the point at which we can say that dispersal has proceeded so far that the firm is 'management controlled' rather than controlled by any single block-holder. Some studies define controlling block-holders as shareholders that own 20 per cent or more of a company's shares while other studies are based on a figure of 10 per cent and others on five per cent.[143] The appropriate cut-off no doubt depends on the dispersal of remaining shares,[144] but also on the propensity of shareholders generally to exercise their participation rights. In a corporate governance system where shareholder exercise of voting rights is low – as is the case in Australia — a block-holding as small as five percent may confer effective control.[145]

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[140] *Companies Act 1896* (Vic.)

[141] S. Ville and D. Merrett, 'The Development of Large Scale Enterprise in Australia, 1910-64' (2000) 42 *Business History* 13.

[142] G. Stapledon, 'Australian Sharemarket Ownership' in G. Walker, B. Fisse and I. Ramsay (eds) *Securities Regulation in Australia and New Zealand*, LBC Information Services, Sydney, 1998; Alan Dignam 'The Globalisation of General Principle 7: Transforming the Market for Corporate Control in Australia and Europe?' (2008) 28 *Legal Studies* 96 at 105. As at June 2009, public companies comprised only 1.2 per cent of total companies: RP Austin and IM Ramsay, *Ford's Principles of Corporations Law*, LexisNexis Butterworths, Sydney, 14th edn, 2010, p 157. Compare European countries: R. La Porta, F. Lopez-de-Silanes, A. Schleifer and R. Vishny, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113.:;

[143] See the discussion in J Scott, *Corporate Business and Capitalist Classes*, Oxford University Press, Oxford, 1997 at pp 43-44. Also, some studies include institutional investors in the definition of 'block-holders' and others exclude them.

[144] Scott, ibid, p 43. Scott favours a 10 percent threshold as 'appropriate for the Anglo-American economies in the post-war period': p 44.

[145] Dignam and Galanis, 2004, p 629. Note 'substantial shareholder' define in s 708 of Corps act

The earliest study that measured shareholder dispersal in Australia in this way was conducted by Wheelwright in 1953.[146] He examined shareholder lists from the Annual Returns of 102 of the largest incorporated Australian companies. The study defined companies as 'management controlled' where ownership of shares was so dispersed that no single shareholder accounted for more than 5 per cent of voting shares. Wheelwright found that only one third of the 102 companies in his study were management controlled. Founding families were in the position to control the position of the majority of those companies through their board positions and their shareholdings. A follow-up study of Australia's 299 largest listed and unlisted manufacturing firms found that 'management control' was limited to 11 percent of firms in the sample.[147] This contrasted markedly with Berle and Means finding that by the 1930s, just over 40 per cent of US 200 largest firms were without a dominant controlling interest and effectively management controlled.

Wheelwright's findings for Australia were usefully updated in Stapledon's study of share ownership in 1996.[148] He also defined a 'block-holder' (or 'substantial shareholder') as one who had not less than five percent of the company's voting shares, and included institutional investors as 'block-holders'. The study found that 97 percent of companies on Australia's ASX All Ordinaries Index had a substantial shareholder, and approximately 45 per cent of all companies had a shareholder, other than an institutional investor, that owned 20 per cent or more of the shares.

By way of comparison, Cheffins cites the work of Florence and Hannah to suggest that Britain by the 1950s had reached a similarly dispersed ownership structure as that measured by Berle and Means in the United States.[149] As regards Stapledon's figures, Cheffins also cites a British study published in 2000 which utilised the same definition of 'block-holder' that indicated just over 20 per cent of companies listed in the UK were under block-holder control.[150] The situation in the United States across the twentieth century is less clear. As noted, early studies such as that by Berle and Means established the US as having a particularly dispersed ownership structure, but more recent reappraisals have called this into question. Holderness has suggested that the Berle and Means' understanding of American corporate ownership prevailed for several decades because no empirical surveys of US share ownership in the 1950s, 60s and 70s were undertaken to upset the dominant view.[151] In fact, Cheffins and Bank identify seven surveys that confirmed Berle and Means' conclusions across this period, and

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[146] E Wheelwright, *Ownership and Control of Australian Companies*, Law Book Co, Sydney 1957. Note that if there exists a shareholding exceeding 5 percent of the equity, but that shareholding is held by one or more of the directors, then the company is also classified as 'management controlled'.

[147] E. L. Wheelwright and J. Miskelly, *Anatomy of Australian Manufacturing Industry*, Law Book Company, Sydney, 1967, pp 5-6. In terms of the total assets of the companies within the sample, however, managerial control accounted for around a quarter, suggesting management control was more prevalent amongst the larger companies.

[148] G Stapledon, 'Shareownership and Control in Australian Listed Companies' (1999) 2 *Corporate Governance International* 17.

[149] Does Law Matter at p 467. But he also notes a study by Scott that found nearly one out of two UK firms in 1976 had a shareholder owning more than 10 percent of the equity: at 468

[150] B Cheffins, 'Comparative Corporate Governance and the Australian Experience' in Ian Ramsay (ed) *Key Developments in Corporate Law and Trusts Law*, LexisNexis Butterworths, 2001, at p 18 referring to M Faccio L P H Lang, 'The Separation of Ownership and Control: An Analysis of Ultimate Ownership in Western European Corporations' (2000), Unpublished working paper, Table no 2... Stapledon and Holderness both included institutional investors in their definition of 'block-holders'.

[151] Clifford G Holderness, 'The Myth of Diffuse Ownership in the United States' (2000) 22 *Rev. Fin. Stud*. 1377

an equal number of empirical surveys that refuted it.[152] The studies that concluded, *contra* Berle and Means, that block-holdings persisted in United States companies into the 1970s tended to use a control benchmark of five percent, lower than that used by Berle and Means and that used by subsequent studies which confirmed the Berle and Means thesis regarding dispersed ownership. If a higher benchmark had been used, arguably managerial control would have been found to be more prevalent than not.[153] However, given that the five percent benchmark was favoured by Australian analysts, it is perhaps those US studies utilising a similar benchmark which offer the most appropriate comparison.[154] Most recently Holderness used a data set containing a representative sample of 375 Compustat and CRSP listed US firms. Defining block-holders as shareholders owning 5 per cent or more of a firms common stock, he found that 95 percent of the firms in his sample had block-holders who owned more than 5 per cent of the firm's common stock, a figure comparable to Stapledon's findings for Australia.[155]

One further indication of the comparative extent of block-holding in Australian companies is provided by the 1999 study published by La Porta et al. Defining block-holders as shareholders that owned 10 per cent or more of a corporation's equity, the study found only 11 out of the 20 largest listed corporations in Australia in 1999 could be defined as a widely held by that measure. In the US and the UK the figures were 16 out of 20 and 18 out of 20 respectively.[156]

Another measure of the degree of share ownership concentration utilised by Australian and overseas empirical studies is that of the percentage of shares held by the 'top twenty' shareholders.[157] Unlike studies that try to identify a block-holder who can exercise minority *control*, the 'top twenty' measure tells us only about *concentration* of shareholdings. Yet a sufficient degree of concentration amongst a

[152] B Cheffins and S Bank, 'Is Berle and Means Really a Myth?' (2009) 83 *Business History Review* 443.
[153] Ibid
[154] So, for example, in contrast to Larner's mid-1960's study which used a 10 per cent cut-off and which identified 85 per cent of US companies to be management controlled, Chevalier's 1965 study of manufacturing companies using a five per cent benchmark found only 40 per cent were management controlled; whilst Pedersen and Tabb's 1970 study, again using the five per cent benchmark, found only 15 per cent of companies were management controlled, whereas a block-holder could be found in 64 per cent: see Cheffins and Banks, above n., Appendix 3.
[155] C. G. Holderness, 'The Myth of Diffuse Ownership in the United States' (2000) 22 *Rev. Fin. Stud*. 1377. (Stapledon and Holderness both included institutional investors in their definition of 'block-holders').
[156] La Porta et al, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471 at 492-3. Note, however, that compared with the studies by Wheelwright and Stapledon, the sample for the La Porta study was small, comprising only 10 or 20 of the largest corporations in the countries studied. This is problematic because ownership concentration decreases with firm size so if only the largest firms are studied, then the results will not be representative of what is happening more widely: see the critique by Holderness, op. cit., at 1378. If one were to use La Porta et al.'s data to draw up a 'league table' of countries with dispersed ownership, Australia would indeed rank number three, after the United Kingdom and the United States. However, the gap between the US and Australia is significant, and placed on a continuum, the incidence of block-holding in Australia is closer to that of Switzerland, Japan, South Korea and the Netherlands than to the UK.
[157] See P H Davies, 'Equity Finance and the Ownership of Shares' in Australian Financial System Inquiry, *Commissioned Studies and Selected Papers Part 3: Business Taxation and The Financing of Industry*, AGPS, Canberra, 1983 at 3.2.6. Some early US studies in this vein measured the proportion of shares held by the top five percent, but it was Florence in the late 1940s who suggested the 'top twenty' as the appropriate focus: P S Florence, 'The Statistical Analysis of Joint Stock Company Control' (1947) *Statistical Journal* 1. Some Australian studies using the 'top twenty' approach — such as those by Wheelwright and by Lawriwsky — aggregate what may appear as separate registered holdings but which are controlled by a single interest group into a single holding. Thus Lawrinsky's 'top twenty' in some cases contains 30 – 50 holdings. In contrast the 'top twenty' lists provided by Australian companies to the Stock Exchange are lists of the strictly top twenty holdings: see Davies, at 3.2.2.

small group shareholders may produce a situation where the concept of 'management control' — associated with more or less complete dispersal of share ownership — cannot be applied.[158] That is, as Scott explains, in some cases there will be a 'constellation of interests' whereby the largest shareholders may

> collectively hold a block of shares that would be large enough to give minority, or even majority, control to a united group, yet they lack the basis for collective organisation that would enable them to act as a cohesive controlling group…The co-operation of these competing institutions is limited to their very broad shared interests in the activities of the companies in which they invest.[159]

Wheelwright's 1957 study of the 100 largest Australian companies found that the 20 largest shareholders in a firm held, on average, 37 percent of the issued shares.[160] A study of Australian manufacturing firms in the period 1962-64 indicated that the top twenty shareholders held around 43 percent of shares in the sample.[161] In a further study undertaken in the first half of the 1970s, this figure had risen to nearly 52 per cent.[162] A study in the late 1970s, albeit using a smaller sample, found this last figure more or less unchanged.[163] In short, data across nearly two decades shows 'a tendency towards concentration of large holdings in the larger listed companies as shown in the rising proportion of shares held by the top twenty shareholders'.[164] There is nothing in more recent studies to indicate this overall tendency has been reversed. For example, using a similar focus on shareholder concentration for the period 1990-91, Blair and Ramsay found the five largest shareholders of the 100 companies in their sample held, on average, 54 per cent of the issued shares. The 10 largest shareholders held 64 per cent and the 20 largest shareholders held 72 per cent.[165]

To sum up, the bulk of the empirical data on corporate ownership patterns in Australia shows relatively concentrated ownership which has persisted over time, although it is difficult to draw strong conclusions given the limitations in the available data. However, blockholders can be of various types, and in Australia — and this is the second main insight supported by the data — the tendency toward concentration of share ownership has gone hand-in-hand with an increase in the proportion of the

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[158] Scott, op cit, pp 50-51, drawing on Florence, op cit.
[159] Scott, op cit, pp 48-9.
[160] Wheelwright, op cit.
[161] Wheelwright and Miskelly, above n
[162] M. Lawriwsky, *Ownership and Control of Australian Corporations*, Occasional Paper No. 1, Transnational Corporations Research Project, University of Sydney, 1978
[163]GJ Crough, 'Financial Institutions and the Ownership of Australian Corporations', University of Sydney (1981), pp 3-4.
[164] Davies, at 5.4.
[165] I Ramsay and M Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153 at 168. The only more up-to-date figures on ownership concentration come from La Porta et al.'s use of a much smaller sample whereby they examined the average and median ownership stakes of the three largest shareholders in the 10 largest publicly traded companies in a number of countries. The median stake across the 45 countries studied was 45 percent, with the Australian median at 28 percent, whilst the US and UK sit at 12 and 15 percent respectively. They conclude 'Dispersed ownership in large public companies is simply a myth…presumably, if we looked at smaller companies the numbers we would get for ownership concentration would be even larger': 'Law and Finance' (1998) 106 *Journal of Political Economy* 113 at 1146.

Australian equity market that was held beneficially by institutions and a decrease in direct ownership. The concentration of shareholdings which Davies identified in his review of the data from the mid-1950s through to 1980 appeared largely to be driven by the institutionalisation of the share market. Ownership was becoming increasingly concentrated in the hands of large life offices, banks and bank nominees and during the same period there had been a decrease in ownership by individual holders.[166] Davies considered whether the same phenomena was occurring in middle and small size companies and found that while the institutions were unquestioningly involved in larger and more marketable equities they were also quite strongly represented as shareholders of the middle size companies.[167] A later study by Marshman and Davies indicates that from 1955 until at least 1986 institutions were net purchasers and individuals were net sellers of shares in Australia.[168] In 1995 Stapledon published a study which contained comparative data for Australia and the UK for 1991 and 1992. In 1992 the percentage of the UK listed equity market owned by institutional investors was 60.4 per cent and the percentage owned directly by individual investors was 21.3 per cent. In 1981 those figures had been 57.6 per cent and 28.2 per cent respectively. By comparison, in 1991 the percentage of the Australian listed equity market held by institutional investors was 36 per cent and 28 percent was owned by individuals. While individuals held a larger proportion of local equities in Australia than they did in Britain (28 per cent in Australia compared to 21.3 per cent in Britain) according to Stapledon the proportion held by individuals in Australia had declined in Australia in the previous decades.[169] By 1997 Australian institutional investors owned around 35 per cent of the Australian listed share market, and overseas institutional investors a further 10-15 per cent, but these institutional ownership patterns are smaller than those prevailing in the US and UK.[170]

Does this matter? One view is that institutional investors will play a less intrusive role in corporate management than will private blockholders and are largely driven by financial metrics and, as Davies has pointed out in the context of the rise of institutional investment in Britain, from the point of view of the fund manager, exit is the less costly choice than the exercise of voice in many cases.[171] In this sense, the presence of institutional investors is still consistent with the emergence of a management-controlled model of corporate governance. That is, management will be more independent in companies that have a higher percentage of institutional investors than managers in those companies that have a higher percentage of non-institutional blockholders. On this basis, Australian share ownership arguably could be described as a dispersed model (or at least as moving towards such an 'outsider' model), even whilst block-holdings persist, as long as institutions rather than individuals or

[166] P H Davies, 'Equity Finance and the Ownership of Shares' in Australian Financial System Inquiry, *Commissioned Studies and Selected Papers Part 3: Business Taxation and The Financing of Industry* (AGPS, Canberra, 1983) at 3.3.6
[167] P H Davies, 'Equity Finance and the Ownership of Shares' at 3.5.3
[168] P Marshman and P Davies 'The Role of the Stock Exchange and the Financial Characteristics of Australian Companies' in Bruce R et al (eds) *Handbook of Australian Corporate Finance* (4th ed, 1991) 78 at 93.
[169] Stapledon 1995, at 253-4.
[170] Stapledon 1998.
[171] Paul Davies, 'Shareholder Value, Company Law And Securities Markets Law: A British View'.

families are increasingly the block-holders. However, recent studies suggest that while many institutional investors are indeed passive, institutions are becoming increasingly influential.[172]

The presence of institutional blockholders might then indicate a model of 'insider' ownership and control whereby a coalition of relatively few institutional shareholders or of fund managers acting on their behalf may be able to exercise effective control in any given company. Furthermore, the size of their holdings in any one company can make them illiquid, as the sale of large holdings tends to depress the price of the very shares a fund might wish to sell, creating an incentive to retain holdings. Indexed funds, by definition, are limited in their capacity to sell share holdings as they are required to keep their portfolios weighted in accordance with the market.[173] Thus, the rise of institutional shareholdings suggests the emergence of shareholdings with both an enhanced capacity and an increased incentive to intervene in the management of listed companies.[174]

8. Discussion and Conclusion

What does this discussion of the Australian case tell us about national configurations of key areas of social policy in contemporary societies? Is it the case that there are two major distinguishable 'styles' of capitalist system, one of which, the liberal-market model, includes Australia and is characterised by, among other things, relatively weak labour laws and social security provisions, and by relatively strong shareholder protection laws? And is it the case that countries of a common law legal origin (including Australia) have inherited a 'regulatory style' which prefers relatively weak labour market protections and relatively strong shareholder protections (as compared with civil law origin countries where the position is reversed)? Finally, what do we make of the evident positive correlation[175] between the relatively high levels of *both* worker/stakeholder protection and shareholder protection in contemporary Australian law?

In order to address these, and other, issues it has been necessary for us to assemble and present a considerable amount of evidence in this paper. Two principal issues are dealt with. First, we have had to arrive at some conclusions as to how empirically to characterise Australia in respect of three core sets of social phenomena: the degree of protectiveness of its labour and social security laws; the degree

[172] S Marshall, K Anderson and I Ramsay, 'Are Superannuation Funds and Other Institutional Investors Acting Like "Universal Investors"?' (2009) 51 *Journal of Industrial Relations* 439.
[173] John W Cioffi, 'Governing Globalization? The State, Law and Structural Change in Corporate Governance' (2000) 27 *Journal of Law and Society* 572 at 584. Coffee refers to the trade off between liquidity and control, whereby the reduced liquidity of large holdings raises the incentive for governance activism as the preferred strategy for improving companies' financial performance: John C Coffee, 'Liquidity Versus Control: The Institutional Investor as Corporate Monitor' (1991) 91 *Columbia Law Review* 1277.
[174] On the scope for the rise of institutional investors to transform corporate governance in the UK, see S Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11; on Australia, see the discussion in S Marshall, K Anderson and I Ramsay, 'Are Superannuation Funds and Other Institutional Investors Acting Like "Universal Investors"?' (2009) 51 *Journal of Industrial Relations* 439.
[175] Anderson et. Al. Comment in Sydney Law Review

of protectiveness of its shareholder protection laws; and the degree to which its corporate ownership is concentrated or dispersed amongst the owners of capital.

In this, for reasons we have explained throughout, we have been confronted by considerable disagreement and uncertainty in the literature which has made characterisation problematical. In the case of labour law, there are longstanding uncertainties associated with the unusual nature of Australia's traditional compulsory arbitration system, and there are also widely varying views about the trajectory of the Australian system over the past two decades, and what that has meant for worker protection. Similarly, Australia's pattern of corporate ownership is also in contention for a variety of reasons, including the impact of a trend towards share concentrations in institutional investors rather than other traditional block-holders. The one area in which there seems to be little disagreement concerns shareholder protection – the evidence points, fairly uncontroversially, to the conclusion that Australia has relatively strong laws in this domain. However, and this point is a relevant factor in the shifts in shareholder concentration, and the strength of labour law, timing may be important in accounting for particular institutional configurations, and it is necessary to bear in mind the fact that shareholder protection laws of the sort that would identify the Australian corporate law system as strongly 'shareholder-centric' (as we have proposed), occurred at a time when shareholder patterns have been relatively concentrated.

The position we have reached in respect of these matters is as follows: (i) we have concluded on the weight of the evidence that Australia can be characterised as having a relatively strong labour law/stakeholder protection system; (ii) we have concluded that Australia can be characterised as having a very strong shareholder protection system; and (iii) we have concluded that Australia can be characterised as having an insider system of corporate control by virtue of a relatively concentrated pattern of share ownership. As noted, our findings in respect of points (i) and (iii) are more tentative than they are for point (ii).

Our second core question is to ask how these outcomes map onto the different theoretical models of capitalist economy addressed earlier in the paper. What we are asking here is whether we can understand Australia's labour laws as part of a socio-political arrangement in which they complement certain other areas of social policy (in the present inquiry, shareholder protection laws and corporate governance) in the economic system generally.

We begin with the varieties of capitalism and legal origins configurations, treating them as fundamentally similar in approach (i.e. the varieties of capitalisms 'liberal market' economies being closely associated with the legal origins 'common law' group of countries, and the varieties of capitalism 'co-ordinated market economies being closely associated with the legal origins 'civil law' group of countries. The starting point is to note that Australia would, by convention, usually be grouped within the 'liberal market'/'common law' set of legal/economic systems.

From the perspective of labour law, there are arguments to be made both ways on this point. For example, we might say that Australia does fit this categorisation: its labour law offers little institutional say in corporate governance, its labour laws (arguably) have been liberalised away from the traditionally strong protections offered historically, it matches the UK in important respects (on social security for example), and so on. On the other hand, there are arguments to say that Australia's labour law position does *not* fit either the legal origins or the varieties of capitalism model. Such arguments would draw on the fact that Australian labour law, in terms of its workplace coverage, its strong inclusion of trade unions, its social welfare net and its extensive regulation of employment rights is closer to the 'co-ordinated market'/'civil law' models than to the alternative models. This argument would also point to the available evidence showing that this traditional model has remained largely intact notwithstanding important labour law changes in recent years.

It is difficult to know what conclusion to draw from this, but the difficulty lies as much in the varieties of capitalism and legal origins categorisations as it does in where to situate the Australian case. If we use the research outcomes in the labour protection index as a guide, Australia does fit, along with the US and the UK in the common law group of countries, and not in the civil law group if one chooses to draw a line between the countries at the high end (in terms of degree of worker protection) of the common law group (which would include Australia, and incidentally, India) and at the low end of the civil law group. But at the same time, the protective strength of Australia's labour law appears in this index to be approximately as close to that of Germany (civil law) as it is to the US (common law). In other words, Australia matches up as a relatively weak system of labour law among a group of 'co-ordinated market' countries (who in this case include only France and Germany and are civil law in origin) or as a relatively strong labour law system among a group of 'liberal market' economies (who are, like Australia, common law in origin. The same, incidentally, might also be said for the UK , which, at times, and based on this data, has featured a labour law system which is as far away from the US model as it is from some of those in the other group. The obvious question is this; is there any more point to grouping the UK (and Australia) together with the US, than there is to grouping them with Germany? By these yardsticks the US, UK and Australia do not appear to be a variety of economy with 'regulatory style' exhibiting weak labour laws, than does Australia, the UK and Germany appear to be a variety of economy featuring relatively strong labour laws. Nor, self-evidently, do legal origins explain the calibre of labour law protection.

Perhaps the position would be less tenuous were the other components of the puzzle more consistent with the model, but again, in the case of Australia they are not. Both the legal origins and varieties of capitalism configurations match up with the strong shareholder protection laws which characterise Australian corporate law, but these laws do not appear to have been a pre-cursor to the diffusion of share ownership in Australia, nor has a diffusion of share ownership been a pre-cursor to the introduction of these strong shareholder protection laws. Both the varieties of capitalism and legal origins arguments suggest that the 'liberal market' economies are characterised by strong, deeply diversified capital markets based on dispersed share ownership. But the conclusion we have reached in

this paper, as noted, is that Australia remains characterised by relatively concentrated patterns of share ownership, the very antithesis of the legal origins and varieties of capitalism positions. Again, there are differences between the UK and the US in relations to these corporate law indicators, which calls further into question the whole varieties of capitalism model.

Turning next to Roe's right/left political dichotomy, our characterisation of Australian labour law as 'strongly protective' would tend to fit Roe's configuration on the assumption that we would position Australia as a 'social democracy' similar to the UK. Roe's account of social democratic governments is that they typically favour labour and stakeholder interests over shareholder interests. Again, however, the configuration does not hold up if we factor in the corporate governance dimensions. Here, in relation to Australia, Roe's account is open to the same criticisms made of it by Cheffins in relation to the UK.[176] In the UK, as we have seen, the dispersal in shareholder ownership occurred contemporaneously with the development of strong social democratic policies and a welfare state, rather than with the development of strong shareholder protection laws, which did not occur until some time later. In the Australian case whereas there are strong shareholder protection policies, these exist alongside strong labour protection policies (if we are correct in so characterising Australian labour laws), thus defying the supposed left wing/right wing configuration suggested by Roe, and, at least in theory, pointing to the possibility of an analytical typology based on a 'transparency' coalition of owners and workers as suggested by Gourevitch and Shinn.[177] This is a point which remains open to further investigation.

Drawing all of these arguments together, we can observe that while Australia is often grouped with the so-called 'liberal market' economies, the evidence and analysis presented here suggests that both its labour law and its patterns of corporate ownership more closely resemble(d) those of the 'co-ordinated market' economies than otherwise. Further, Australia appears as an exception to the generalisations of the varieties of capitalism and legal origins arguments, as well as to the political theories such as those advanced by Roe, all of which posit that strong protection of labour and stakeholders exist alongside relatively weak protections for shareholders, or vice versa. Australia, by contrast, exhibits both strong worker *and* shareholder protections.

Bruner's arguments are potentially more important for the Australian case because they do envisage the possibility of an economic system in which strong labour, and strong shareholder, protections exist side by side, and thus his model differs considerably from the others discussed above. However, Bruner's argument attempts to explain a style of corporate governance, and its relation to labour law and stakeholder protection, in the context of an existing pattern of dispersed ownership. Our analysis suggests that Australia remains an economy with a relatively concentrated pattern of concentrated ownership and control. Further, his argument concerns not merely the correlation of strong labour protection and strong shareholder protection, but the timing of these relationships: for Bruner, strong

[176] Note discussion above.
[177] Note discussion above.

shareholder protection laws in dispersed ownership systems are the result of a political trade-off against existing or contemporaneously developing labour protection laws. On the face of it, the Australian position does not match this analysis. Over the past four decades, whereas there have been some discernible increases and decreases in the levels of worker protection, associated with the politically contested nature of labour law reform, shareholder protection has continued only to strengthen over the same period, and the periods of most significant increase (1992, 1998 and 2003) do not appear to be positively associated with any increases in worker protection. It follows, then, that in the Australian case the configuration of strong labour laws, strong shareholder protection laws, and a concentrated pattern of corporate ownership calls into question the accuracy of Bruner's model as much as it does the other models discussed here. If Bruner's argument is correct, the emergence of a strong labour law model and social democratic state in Australia, in the context of a concentrated ownership and insider governed and controlled corporate sector should mean that Australia would be grouped as a model similar to the co-ordinated economies of Europe.[178] But here, too, it is at odds with the model, being characterised by very strong shareholder protection laws which such co-ordinated market systems purportedly lack.

None of this necessarily detracts from the utility of constructing stylised models of political economy as a guide to analysis, but as we have argued in other discussions of the Australian position, it does point to the need for greater nuance and careful distinction between, and even within, typologies.[179] Australian labour law does not, on our view of the evidence, owe its character to any political arrangement in which labour's interests and shareholders' interests are weighted against each other and adjusted for the purposes of policy development. Rather, as is widely acknowledged, the character of Australia's labour laws was set in place as a result of a political arrangement between capital and labour at a much earlier time, and of quite a different sort: strong labour protections were offered in exchange for protections to for Australian businesses against foreign competition. These laws were complemented by the evolution of social-welfare-type policies in the post-World War Two period, and, as we have argued, they have continued to retain much of their strong protective character, notwithstanding periodic attempts to weaken them over the past two decades. The more recent evolution of Australia's strong shareholder protection laws appears to have occurred independently of labour policy, and requires separate explanation.

[178] Refer to Bruner'sFigure
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